



UNIVERSITÀ
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Università degli studi di Palermo
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Universitat de Girona
Programa de doctorado en
“Derecho, Economía y empresa”
Facultat de Dret

**LEGAL EXCLUSIONISM:
LEGAL PERSONHOOD BETWEEN
THE ERASURE AND THE RULE OF LAW**

IL DOTTORE

MATIJA ŽGUR

IL COORDINATORE

Chiar.ma Prof.ssa ISABEL TRUJILLO

IL TUTOR

Chiar.mo Prof. BRUNO CELANO

IL CO-TUTOR

Chiar.mo Prof. JORDI FERRER BELTRÁN

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TABLE OF CONTENTS

PROLOGUE. THE MANY FACES OF THE ERASURE	4
“People don’t understand that citizenship is something different from permanent residence”	4
“12 Years an Erased”	6
A citizen in name only	8
CHAPTER 1. LEGAL EXCLUSIONISM: A NEW WAY OF LOOKING AT OLD PROBLEMS	11
PART I. LEGAL STATUS & LEGAL PERSONHOOD	19
INTRODUCTION	19
CHAPTER 2. LEGAL STATUS	21
2.1. Status as a “special condition of the ab-normals”	25
2.2. “From status to contract”	28
2.3. Status as a matter of capacities and incapacities	32
2.4. Status as a matter of “commodious exposition”	34
2.5. Status as an intermediary legal term	36
2.6. Status as a sensible set of rights and duties	39
CHAPTER 3. LEGAL PERSONHOOD	45
3.1. The person as an intermediary legal concept? A proposal	46
3.1.1. Specifically on legal capacity	50
3.2. Who is law for?	56
3.2.1. A formalist approach to personhood	60
<i>The (mis)fortunes of the formalist approach</i>	64
3.2.2. Substantive approaches to personhood	67
<i>The Rationalists</i>	68
<i>The Religionists</i>	72
<i>The Naturalists</i>	77
3.3. New conceptualizations in the personhood debate	81
<i>Juridical Humanism & its insufficiencies</i>	82
<i>The necessity of conceptual refinements: the introduction of non-personal subjects of law</i>	85
CONCLUSION	90

PART II. LEGAL PERSONHOOD & THE ERASURE	93
INTRODUCTION	93
CHAPTER 4. A RECONSTRUCTION OF THE LEGAL FRAMEWORK	98
4.1. Citizenship & permanent residence in the former SFRY	99
4.2. The transition: legal foundations for the independent state	102
4.3. The “Independence legislation”	106
<i>The Citizenship Act</i>	106
<i>Subsequent amendments to the Citizenship Act: “The Exclusion Clauses”</i>	110
<i>The Aliens Act</i>	111
CHAPTER 5. THE LEGAL MECHANISMS OF THE ERASURE	115
5.1. Disenfranchisement as a precursor to the Erasure	116
5.2. The Erasure in the narrow sense (deprivation of residency status)	127
<i>Preparations and the first instructions</i>	128
<i>Instructions authorizing the Erasure</i>	130
5.3. The unlawfulness of the Erasure	132
<i>The first “systemic” decision: the unlawfulness of the Aliens Act</i>	136
<i>The second “systemic” decision: an attempt at remedying the inadequacies of the Legal Status Act</i>	140
<i>The final resolution: Kurić and others v. Slovenia</i>	143
CHAPTER 6. THE CONSEQUENCES OF THE ERASURE & LEGAL PERSONHOOD	148
6.1. Precariousness of legal personhood	149
6.2. Consequences for the status of a person	157
6.3. The interconnection of legal statuses: an inverted pyramid or a web?	167
CONCLUSION	171
PART III. THE ERASURE & THE RULE OF LAW	175
INTRODUCTION	175
CHAPTER 7. THE RULE OF LAW	180
7.1. Introduction	180
7.2. The requirements of the Rule of Law	188
7.2.1. Generality	188
7.2.2. Publicity	191
7.2.3. Prospectivity	195
7.2.4. Intelligibility	197

7.2.5. Consistency	200
7.2.6. Practicability	202
7.2.7. Constancy	203
7.3. Congruence	204
CHAPTER 8. ERASURE AS AN AFFRONT TO THE RULE OF LAW	214
8.1. Introduction	214
8.2. Erasure & the Rule of Law requirements	214
8.2.1. Generality	214
8.2.2. Publicity	216
8.2.3. Prospectivity	219
8.2.4. Intelligibility	221
8.2.5. Consistency	223
8.2.6. Practicability	224
8.2.7. Constancy	225
8.3. Congruence	226
CONCLUSION. THE PERSON IN LIMBO: LEGAL EXCLUSIONISM, ERASURE & THE RULE OF LAW	231
REFERENCES	243
ABSTRACTS	257
Abstract	257
Riassunto	259
Resumen	261
ACKNOWLEDGMENTS	263

PROLOGUE.

THE MANY FACES OF THE ERASURE

“People don’t understand that citizenship is something different from permanent residence”¹

Ana (that is not her real name), was born in Velika Kladuša (now Bosnia and Herzegovina) in 1958. There she completed her elementary education and vocational training. In 1978 she moved to Ljubljana (Slovenia) where she was able to find a job. After only three months, her employer asked her to register a permanent residence in Ljubljana because they were going to offer her a permanent contract.

Soon after establishing residence in Slovenia, Ana met her future husband and they had three children together. After her husband got a civilian job with the military they were able to move into a military-owned apartment. In 1990, at the beginning of Slovenian independence process, Ana filed for divorce (she said she and her husband just weren’t meant to be because they saw the world too differently) and she was given both custody over her children as well as the apartment.

In 1991, when she was supposed to apply for citizenship, Ana decided not to, for she was told that it was not obligatory. She thought to herself:

I’ve lived here for so many years, I had permanent residence registered in Ljubljana, my children were citizens and Slovenes through their father, and I was part of that family, the mother of three children and I had a regular job. ... I couldn’t know that I was going to lose my rights if I didn’t take citizenship.

Indeed, Ana had no way of knowing that her residency status will be invalidated without any prior notification. Here is how she recalls the moment she found out she had been erased:

In 1993 I went to Mačkova Street to get a certificate concerning a shared household which I had to submit to the center for social work. The clerk asked me for my personal document. When I gave her my ID card, she took it, punched it and instructed me to go to the office for foreigners. When I wanted to get the certificate and didn’t get it, I knew that something was seriously wrong ... I couldn’t understand what had happened that I was suddenly left without permanent residence. Until then, I had obtained and extended all my documents in Ljubljana, but when the country became independent this stopped. My passport and driver’s license, both

¹ The case presented here is taken from Kogovšek Šalamon et al. 2010: 251–255.

issued in Ljubljana, had already expired by that time. Only then did I begin to understand that I no longer had legal status in this country.

Although she was able to keep the apartment after her divorce, Ana nevertheless was unable to purchase it because she had been erased and did not have Slovenian citizenship. After realizing that her condition indeed presented a problem, in the summer of 1992 she finally applied for citizenship. Ana, however, still could not purchase the apartment – not even on behalf of her children who were Slovenian citizens. First of all, she didn't have any valid documents, so she couldn't obtain a bank loan even though at that time she still had a permanent job. The other reason was that the Ministry of Defence, the new owner of the apartment, sued her for unpaid rent. The court procedure lasted for seven years, during which time the Ministry attempted to evict her. In the end, the Ministry lost the case since the debt was accumulated when her ex-husband was the official tenant.

Ana was deeply aware how lucky she was in retaining her job – and a permanent one at that – despite having been erased. The Erasure was nevertheless also felt in this segment of her life:

The awkward thing was, that without a personal document, I couldn't withdraw my wages which were paid to my bank account. Until 1995 I didn't have problems because I withdrew money from ATMs. The problem emerged when the bank card had to be replaced, and, naturally, I had to submit a personal document. I gave my old ID card, but they didn't consider it a valid document. How could I get my wages?

Agreeing with her employer to be paid “cash-in-hand”, Ana was able to overcome this problem as well. But what of it if her salary was so low that it didn't even allow her to provide for her children and herself?

The pressure under which she had lived was eventually felt by her three children as well. The hardship had had an especially profound effect on her older daughter. She

was really hurting because of this; she quarrelled with everyone, she was angry with the teachers, she went totally berserk. Her marks were bad, she barely managed to complete elementary education, and she couldn't enroll anywhere after that. It was difficult for her; she wanted to be like her friends, her schoolmates but she couldn't. When she was in the eighth grade she reproached me, saying that I wasn't able to take care of her, that she didn't need me, and that it was my fault that she couldn't enroll anywhere.

Although her children were Slovenian citizens through their father and received child benefits, Ana herself, even though a single parent, could not obtain any kind of social assistance on the account of her “status-less” condition.

Ana eventually fell ill due to the psychological pressure of living on the edge and without valid documents. She was advised by her doctor to take a few months of sick leave, but was

rejected by her employer. Unable to keep up with the pressures of the work, Ana eventually lost her job. She recalls how terrible her situation was at that time: *“the entire right side of my body was blocked, my leg, my hand, half of my face – everything was so stiff that I didn’t feel anything”*. Her condition persisted for several years.

Throughout all this, many of her friends and family were unaware of her problems and those who knew did not provide her with much support. Her brother, for instance told her:

‘But how come you don’t have a passport? It’s your fault, you could have arranged it. They offered citizenship but you didn’t take it!’

In 2000, after it was announced that *“people without documents and permanent residence who had been living here at least from the plebiscite on should go to the Office for Foreigners”*, Ana finally applied for permanent residence. After more than a year, she finally received it and was then able to apply for a Bosnian passport. In 2002 she also got her foreigners ID card: *“I still have it at home. I was so glad, as if I had been born again, so happy and relieve I was,”* she says. In 2003, after thirteen years, she finally obtained Slovenian citizenship.

“12 Years an Erased”²

Srečka³ was born in Croatia and lived there until her thirteenth birthday when she moved to Belgrade (Serbia). Unable to find a stable job there, towards the end of the 1980s she came to Slovenia where prospects seemed better. Luckily, her sister was able to get her a job with a renowned pharmaceutical company. Srečka registered her permanent residency in Slovenia and rented an apartment, one in which she lived for the next 18 years. She considers those to have been the best years of her life.

Things, however, soon turned for the worse. When her company went bankrupt, Srečka lost her job. She registered with the Employment Service, but since there were no jobs for her, she had to find other ways to survive.

² The case presented here is taken from Kogovšek Šalamon et al. 2010: 145–150. The title alludes to Solomon Northup's book *12 Years a Slave* (1853)

³ Srečka is a female name that sounds much like, and alludes to the notion of being lucky (*sreča* in Slov.). In any case, this name is neither the person's real name.

I began to sew, and I was lucky again that a lady who owned a boutique noticed me in a shop. ... Two years later my son was born. I worked for that boutique right up till he was born and later. I worked all day to be able to save money for the one year of maternity leave. Since I was registered with the Employment Service, I was insured, so I was entitled to a three-month minimal maternity benefit.

When the six-month deadline was established for applying for citizenship, Srečka did not hesitate. At the local administrative office, however, they requested that she presents a stamped birth certificate as part of her application. Being unable to provide the exact requested document, she was put in an unpredictable situation. She found out that she and her son had been erased when one day she went to the social services office to sign some papers for his kindergarten enrolment.

Even though she had been erased, she was again lucky: on one occasion, a friend of hers who was employed at that same administrative office warned her not to go there again, for they would destroy her documents. Because of this warning, Srečka was at least able to use her existing documents for some time and so resolve various bureaucratic matters with them. But in 1993 the documents had to be replaced.

With the employment situation getting worse and resources diminishing, Srečka and her son eventually lost their apartment. One day, after again being late with rent, she found that the owner had changed the locks so she and her son were literally left on the street. She moved around various apartments, never able to pay rent regularly. On one occasion “a friend” took her in and Srečka paid for the lodging by cooking, washing and cleaning. But this individual mistreated Srečka and did not allow her to use much if any electricity and heating. It was during that time that Srečka fell seriously ill.

I weighed only 52 kilos; I had a high fever and couldn't get up. That situation lasted one month or so. I treated it myself, using echinacea, aspirin, syrups, tablets, herbs and the like.

Back on her feet, Srečka was able to start a business of her own – though it did not produce any profit – and was thereafter able to obtain a Croatian passport. Though unable to do the same for her son, who was born in Slovenia, and unable to use it in order to obtain Slovenian citizenship, Srečka nevertheless felt relieved that she finally had some legal status.

Around 2000 things started looking up again for Srečka. She went to Croatia where she obtained a certificate of nationality and a birth certificate. Then she arranged a permanent

residence permit for herself. She could not, however, arrange for her son's status – only his father could do so.

One of Srečka's biggest problems, even after she had regularized her status, was that although she had worked her whole adult life, because of the Erasure, for much of those years she had worked illegally and so did not pay her pension contributions. Luckily, she says, she likes working and will continue to do so as long as she is able to.

Srečka concludes:

This story describes only the tip of the iceberg. How much uncertainty there was, how many nights without sleep, tears, and suffering because of the lack of money, when I and my son ate only spaghetti, alone in this world, without a roof over our heads, without money, without insurance and without dignity. For 12 years.

A citizen in name only⁴

Rifet moved to Slovenia in 1984 and in 1992 he applied for Slovenian citizenship. He received no official reply. An employee at the social care centre where he lived convinced him that he would not be granted Slovenian citizenship and should therefore rather obtain a Bosnian passport and a temporary residence permit.

In 1999, when his Bosnian passport expired, he decided to deal with the unresolved matter of his Slovenian citizenship.

When I phoned the office at Beethovenova street, the sector for naturalization, I insisted that the clerk check the computer files and find out what my status was. She found me and sent an invitation to an interview. The official assured me that I would be granted Slovenian citizenship one hundred percent sure and that there was no point in extending the Bosnian passport since I was going to get a Slovenian passport.

One week later, on 14 September 1999, he was informed that his citizenship certificate was ready and that it will be sent to him by mail. The very next day Rifet went to see a doctor and then met his friend to whom he revealed the happy news. They had a drink and then went their separate ways.

⁴ The case presented here is taken from Zorn 2003: 125–128.

That afternoon I was stopped by two police officers and asked to show my documents. I gave them my residence permit and told them that on the previous day I had become a Slovenian citizen. I also showed them my Bosnian passport, which indeed had expired. The police officer said I had committed an offense. I asked him to call the Ministry of Internal Affairs and check my status. It was a working day, Wednesday, half past one, but he did not do it. The officer insisted that I had committed a serious offense and that I had to come with him.

Being in the vicinity of the bar where only minutes before they met, Rifet was able to summon his friend back. Even though the latter tried to explain Rifet's situation to the police officers, they did not listen to him. One of them was particularly hostile towards Rifet because of his Muslim name. The police officers escorted him to the police station, where he waited for more than half an hour before being taken to the police magistrate.

Here is how the subsequent events unfolded.

The officer who took the matter in hand first went to the police magistrate alone. The other, silent policeman, guarded me outside in the meanwhile. In about ten minutes I was asked to come in, and there was a payment order on the table. I cheered up because I thought I was only going to pay a fine – although I did not know what for – and that they would let me go. ... We went out, the police officers were walking close to me, one at each side, but I did not know why. When we stepped into the street, my friend asked them: "What are you doing? Why don't you let him go?" The one who hated me and carried all my papers said: "He doesn't know anything. He was ordered to leave the country under police escort." The magistrate had not told me this, I was told about it by the police officer when we were outside in the street.

Shocked and in panic, Rifet escaped from the police officers and ran to the nearby pub where he grabbed a beer glass and knocked himself with it over the head. Subduing Rifet, the officers almost choked him in the process. He was, as it is, covered in blood due to his self-inflicted wound. After that, he was brought to the police station where he was beaten, hit in the head and had his legs tied. Eventually, he was taken to the hospital for emergency surgery, but even there the doctors treated him like some drug addict or a common criminal. As soon as they were finished, without being given any pain killers or other further treatment, he was taken back to the police station.

Meanwhile, his friend ran away and was able to inform the care centre employee about what had just happened. She immediately called both the police and the interior ministry to enquire about Rifet's situation.

Back at the police station, Rifet was put back into a prison cell. He recalls being scared and fearing for his life. Finally, some higher ranking officers entered. "*I was glad*", he says, "*because I thought that I could finally tell them it was a misunderstanding and that somebody would realize my situation. None of them wanted to listen to me. They said they were going to take me away*".

Instead of being released, however, he was taken to the centre for asylum seekers. He recalls it as a terrible “black-and-white place” where people slept on the floor. The next morning, however, out of nowhere, a guard came to him, handed him his passport and told him he was free to go.

Rifet recalls:

One day after the event I received my citizenship certificate and went to the psychiatric hospital. I was completely beside myself. I needed half a year to calm down.

CHAPTER 1.

LEGAL EXCLUSIONISM: A NEW WAY OF LOOKING AT OLD PROBLEMS

“The law giveth and the law taketh away”.

(Dayan 2011: 42)

While it may be that we are born and die naked,⁵ we go about our lives wearing innumerable clothes, many of them of the legal kind. We dress ourselves as citizens of this or that State; as owners of houses, automobiles and company shares; as parents, guardians, spouses or infants; as university professors and students; as claimants in courts of law, inmates or protected witnesses. Legal vestiges are indeed in great supply. This dissertation is about such legal vestiges: it is about what they are, who gets to wear them and why, and about their effects for those carrying them; but it is especially about the way law can take them away and about the consequences this has on those left without them.

The particular thing about legal vestiges is that despite being fictitious, they have an incredible capacity to radically transform men: “It is as if whenever ‘legal’ is used, it erodes not just the customary and normal but the very facts of existence” says one author (Dayan 2011: 150). By vesting individuals with different outfits, the law often distorts reality: it tends to exaggerate certain features of individuals and overlook others, thus creating particular legal chimeras. As the same author continues, “[t]his transforming power gives law a reality that flies in the face of logic, and the most fantastic fictions are put forth as the most natural, the most reasonable thing in the world” (Dayan 2011: 150f).

On the side of law’s creative transformational power, one very important piece of legal clothing is what we usually refer to as *legal personhood* (also legal subjectivity, legal personality etc.). Legal personhood is a particular type of clothing, a kind of second skin that transforms real-life human beings into subjects of law – being vested with legal personhood makes them into entities that are able to partake in legal relations, acquire rights and duties (contractually or otherwise), be held liable for their legal actions etc. Legal personhood is the principal legal cover as it is the condition of anyone’s acting in the law. We have seen that

⁵ The epigraph is a paraphrase of Job 1:21, where it is said: “And said, Naked came I out of my mother’s womb, and naked shall I return thither: the Lord gave, and the Lord hath taken away; blessed be the name of the Lord”.

besides this one, law gives out numerous other kinds of legal vestiges; while some of them will be referred to and discussed in this thesis, given its purported overarching importance, legal personhood will be the focus of this dissertation.

Law's transformative power, however, doesn't manifest itself only as the power to create but as the power to destroy or take away as well. We see this capacity at work everywhere: when citizens are turned into aliens, foreign soldiers into "unlawful enemy combatants", asylum seekers into illegal immigrants and so on. Whether law can also transform persons into non-persons – and if so, how – will be a key question of this thesis.

Due to its second-skin-like nature, legal personhood is often taken for granted and presupposed in human beings. Unlike with citizenship, or some other such status which can be acquired or lost at any moment, it appears today firmly accepted that immediately upon their birth, human beings are provided with legal personhood which then attaches to them throughout their lives. In this manner, legal personhood is depicted as a (quasi)natural quality that pertains to all human beings by virtue of their birth. Historically speaking, however, things have not always been this way. Indeed, for much of history, slavery – the legal institution sanctioning ownership of men by other men – had been an important part of human relations and social organization. In Medieval times, and until not too long ago, it was possible to deprive an individual convicted of certain crimes of all his civil rights, making him for all effect and purposes dead in the eyes of the law. History is replete with cases of human beings being legally considered as non-persons.

While today slavery and civil death may no longer exist in their original forms as they are thought to be contrary to the fundamental principles of civilized nations and universal human rights, their transformative-exclusionary spirit lives on, incorporated into new institutes and practices that provide for similar results. In the USA alone there are currently more than six million individuals deprived of the right to vote under felony disenfranchisement laws on the account of having been previously convicted of a crime or for currently serving a prison sentence; as of 2017, more than forty men are still being held indefinitely at the Guantanamo Bay facility without having been charged of any crime or ever brought to trial – as so-called "enemy combatants" their situation has often been described as being in a legal black hole; finally, thousands of migrants that are fleeing the impoverished and war-torn countries of Africa and the Middle East enter the European Union illegally only to be put in so-called CIE (Identification and Expulsion Centres). There they await identification and possible expulsion,

living in prison-like conditions, with severe limitations of personal freedoms and other basic rights.

Considering the above said, what can we make of legal personhood? On the one hand we have the dogma of legal personhood's ubiquity and inalienability; on the other hand are examples of its relativization, limitation and even deprivation. Which is the real face of legal personhood? It is believed that after the atrocities of World War II, the Universal Declaration of Human Rights (UDHR) ushered in the so-called Age of Rights (see Bobbio 2005): a radically different political and legal perception of human beings and their legal selves, together with a changed perception of the power of States in their confront. In this age of human rights triumph, each human being is perceived as uniquely valuable in herself and as such endowed with inalienable rights, such as the rights to life, liberty and personal integrity. Enslavement, torture, massive deportations, summary justice and the likes are supposed to be relicts of a barbarous past. Yet, in light of the above examples (and numerous others could be furnished), it is my belief that even today law's exclusionary power can be harvested in order to deprive individuals, fully or partially, of their legal personhood thus producing different kind of legal chimeras and even human non-persons. The basic presuppositions of this new model, particularly the idea that all human beings unconditionally and inalienably possess legal personhood, should therefore be reconsidered.

Suppose we accept (and there is no reason why we shouldn't) that legal personhood is the condition of one's acting in the law: of entering into contracts, committing crimes and being held responsible for them, seeking judicial protection of one's property rights against unauthorized invasions etc. Suppose also that an individual can, in some way and to some degree or even fully, have it taken away (this is a somewhat more problematic claim). What would that mean for her? If legal personhood makes one a subject, a someone who can actively participate in legal relations, being stripped of it should make one unable to perform any act-in-the-law. Does this mean that being left without one's legal skin results in being made a kind of *homo sacer* (Agamben 1995) – a bare, worthless and dispensable life? Can we go so far as to say that someone without legal personhood is relegated to the condition of a non-person, thus a thing?

These are some of the doubts and uncertainties that have sparked my interest in the topic and more or less explicitly guide this investigation. These perplexities arose when in my investigations, I had come in contact with a series of different material, both academic and

lay: a novel telling the story of one teenager from the former Yugoslav republic of Slovenia who, due to a series of accidents, was swept into a whirlwind of tragic political events that left him excluded from the only community he ever considered his home and consequently pushed him into one of the bloodiest wars in modern history (Bauk 2015); the monumental *On Totalitarianism*, where Hannah Arendt so efficiently depicts the plight of stateless individuals after World War I and reveals how the loss of a community where one belongs and is valued had resulted for these people in a condition that can only be described as one of utter rightlessness; the incredible journey of Solomon Northup – as told by the protagonist himself in the novel *12 Years a Slave* (2014) made famous by a recent homonymous movie –, a freeborn black man in the antebellum US, who one day was tricked by a couple of slave dealers, kidnapped and sold into slavery. Having spent twelve years as a slave in Southern plantations, treated not as a person but as an object and saleable piece of property, Solomon was in the end nevertheless fortunate enough to regain his freedom; finally, Primo Levi's (2007 & 2014) first-person testimonies from the Nazi death camps in *Se questo è un uomo* (2014) and *I sommersi e i salvati* (2007), where every newcomer, who even upon arrival possessed little of the distinctive features that make a man what he is, was stripped of even those last human characteristics that he still had. The final product of a prolonged process of exclusion which began with the infamous Nuremberg Race Law and ended there in the lagers, was a figure never before seen: the *Muselmänner*, says Levi, were “non-men”, figures whose “divine spark” was dead within them. “One hesitates to call them living,” says the witness, “one hesitates to call their death death, in the face of which they have no fear, as they are too tired to understand”.

These harrowing stories of the “Erasure”, slavery, post-World War I statelessness and the extermination of the Jews in the Second World War, even though they occurred far apart in time and space and differ in numerous important respects, nevertheless seemed to me to be fundamentally related, as if manifestations of the same phenomenon. They all spoke of a condition human beings can find themselves by the will of some malicious men in power; a condition marked by radical losses of fundamental rights and (above all) the ability to obtain anew these rights; a condition in which, so it seems, one loses a part or everything of what usually defines one as a person. I propose that this overarching phenomenon, the common denominator joining all these cases, should be called “legal exclusionism”. The term should be understood roughly as including those legal practices whereby legal instruments, such as laws, sub-statutory acts, judicial decisions etc., are employed in order to limit, disfigure,

hollow out or take away the legal personhood of an individual. This definition is, of course, highly undetermined, but for now it should provide a sufficient idea of what I am talking about.

Can such legal practices as the above ones be described in terms of legal exclusionism? If there is some plausibility to this – what are the consequences for our way of thinking about law in general? Can we envision measures to eradicate such practices from happening? Or are we left with the realization that no matter what we do, how we design our law, there will always be the possibility of law being used for exclusionary purposes? This dissertation is essentially an attempt of articulating these underlying intuitions and finding some answers to the presented perplexities.

This dissertation, however, is only one part of the larger project on legal exclusionism which I am considering and focuses on just one such proposed example of legal exclusionism. The Erasure, as the case has come to be known, regards the administrative “handling” of the permanent residency status of some twenty-five thousand individuals, who after the dissolution of a former common state, found themselves illegal aliens on the territory of a newly-established state, where they were trapped in a kind of legal limbo – an unpredictable, highly precarious legal situation which for many of them meant a kind of legal death. While the specifics of the case will be discussed extensively later on (in Parts II and III of the thesis), I should here only add that while the example may not be what I would consider a paradigmatic case of legal exclusionism, such as the three cases mentioned earlier, it is nevertheless a highly valuable case study for it manifests several pathologies relevant for understanding legal exclusionism.

As will be shown on the example of the Erasure, deprivation, limitation or disfigurement of legal personhood can be achieved by various means and to different effect. In this analysis, I propose to focus on seeing how legal exclusionism functions if it is perceived as representing deviations (violations) from the requirements of formal legality (formal Rule of Law).

Why formal legality as the means of analysing exclusionist practices? Why not, as it might intuitively seem to make more sense, square off these cases against the requirements set by international human rights norms? The reasons for my choice of method will be explained in due time (see Part III), but let me us quickly mention some of them here: for one, the ideal of formal legality regards only the manner in which laws are created and the way they are implemented and does not address the question of the content of laws. In this way, focused

only on the necessary formal qualities of law, it presents itself both as politically neutral as well as indifferent with respect to the historical time and place of the scrutinized cases. This quality makes it ideal as an instrument with which we can analyse the cases we have in mind. Moreover, as we will later on see, in most cases of legal exclusion, the legal acts behind it are seldom directly exclusionary in their content. Rarely will we find such provisions as the one, for example, in Art. 1 of the Italian Civil Code, which stated that limitations of the general legal capacity due to one's race are to be determined by special laws (the provision has since been abrogated). It is much more common that exclusionary practices are based on ambiguous and lacunose legislation that leaves ample space to administrative bodies charged with its interpretation and implementation to do so in an unchecked and arbitrary fashion. The chosen analytical tools should enable us to detect precisely these exclusionary methods.

I should conclude this introductory chapter by admitting to some limitations of this work as well as pointing to what I believe might be some of its merits.

Foremost, many of the concepts and theories mentioned or applied in this thesis are not rigorously defined or extensively discussed therein; rather, they often remain superficially described and unexamined. Similarly, throughout the text, I refer to and make use of the work of numerous authors without either extensively presenting their work on the particular issue or fully adopting their views. Moreover, regardless the fact that my focus is limited to the analysis of the Erasure case only, even within this more limited context several questions and different perspectives are raised and not all of them are followed through and examined to the end. In general, both temporal and spatial limitations prevented me from being able to sufficiently dedicate myself to analysing all the hugely complex issues raised in this dissertation. This thesis is therefore but a first, and in many aspects sketchy, attempt at a particular type of analysis. Given the embryonic stage of the project, numerous lacunae can be identified along the way.

Despite these (and perhaps other) shortcomings, I believe that the aims this project is pursuing outweigh its deficiencies. While each of the cases that I mentioned above and which form the central reference points of the project (namely, slavery, Jewish extermination and the status of refugees) have been examined individually time and again by legal scholars, political scientists, sociologists and students of almost every other social science, this project attempts for the first time – at least to my knowledge – to bring all of these, and potentially numerous other examples, together on the same plane in order to consider them as manifestations of the

same broader phenomenon and analyse them using the same set of tools. This thesis and its analysis of the case of the Erasure are intended as a first attempt in this direction. While the cases themselves and the tools used to analyse them are not in any way new or inventive, the manner of looking at them that I proposes – as instances of legal exclusionism from the status of legal personhood – are, however, in my opinion, novel. Legal exclusionism is (just) a new way of looking at old (and new) problems.

Hopefully the results of this analysis will provoke further positive implications: above all, they may stimulate a critical re-evaluation of some basic presuppositions about the way our legal institutions function, starting with human rights; the way law is created and implement, especially by the increasingly expanding administrative State apparatus; the way fundamental legal statuses are interconnected and mutually dependent, above all the way legal personhood is (in)dependent of other statuses and so forth.

*

This dissertation has three Parts. In Part I (Legal Status & Legal Personhood), I discuss two fundamental legal notions that form the conceptual backbone of the thesis, namely “legal status” and “legal personhood”. The Part has two Chapters: in Chapter 2, I analyse different conceptions of “legal status”, whereas in Chapter 3, I deal with legal personhood. After presenting a possible model for understanding legal personhood as a particular type of legal status, I go on to discuss different theories of personhood. Finally, I address a novel proposal for expanding the tight ontological dichotomy of persons and things that informs our way of thinking about entities both in law and in the world at large.

In Part II (The Erasure & Legal Personhood), I deal with the Erasure and its consequences, especially for the status of a person. In Chapter 4, I provide a reconstruction of the legal framework that determined the Erasure – I look at both the relevant legal sources prior to Slovenia’s secession from SFRY as well as the laws adopted by the newly formed State relevant to the matter. Next, in Chapter 5, I examine the mechanisms of the Erasure: the legal tools used in achieving the deprivation of citizenship and residency status of more than twenty thousand individuals. Finally, in Chapter 6, I analyse the consequences this deprivation of had on the underlying personhood status of the affected individuals. The conclusions regarding the precariousness of legal personhood due to its (inter)dependence on such derivative statuses leads me to propose (albeit extremely briefly and very sketchily) a somewhat altered manner of viewing at and regularizing legal personhood.

Finally, in Part III (The Erasure and the Rule of Law), I discuss the Erasure from the perspective of the conditions of formal legality (Rule of Law). In Chapter 7, I first analyse the requirements of the formal Rule of Law, with particular emphasis given on the last condition, namely the congruence between the “law on the books” and the actions of legal officials implementing it or rather the “law in action”. In Chapter 8, I confront these requirements with the legal sources and actions of authorities in the case of the Erasure.

In the Conclusion of the thesis I summarize the main findings and attempt to bring together the key notions of the investigation.

PART I.

LEGAL STATUS & LEGAL PERSONHOOD

INTRODUCTION

This first Part of the thesis is dedicated to a discussion and definition of two key notions of this thesis, namely the notion of legal status and the notion of a person in law. This Part, then, serves primarily as a necessary theoretical basis for our further discussion of legal exclusionism, in particular the Erasure as one example this larger phenomenon in law.

Hereinafter, I will defend the claim that “the person”, in law, is a particular kind of “legal status”. Both are indeterminate and ambiguous words and the claim generally lacks sufficient context. I will attempt to resolve these problems as I progress.

In Chapter 2, I will provide a broader perspective on the notion “legal status”. In the respective sections of the chapter (2.1. – 2.6.), I will present several conceptions of legal status which differ in many aspects, but one in particular: one of the presented conceptions (see 2.1.) views legal status as a condition of an individual, based either on some inherent or acquired feature of hers – a condition that significantly characterizes the individual and fundamentally determines her legal life. Her status determines what that individual “is”: a married woman, an infant, a lunatic etc. On the other hand are conceptions (2.3.–2.5.) that explain the notion of status as a formal legal instrument – as an expedient for representing a connection between a set of conditioning facts and a set of normative consequences following from these facts. In this sense, a legal status is an intermediary legal term, “a vehicle of information” or a logical connector. It is a version of this conception of status that I will opt for in my thesis (2.6.). In between (2.2.), I discuss Henry Sumner Maine’s famous thesis of the development of “progressive societies” from “status to contract”.

Chapter 3 is dedicated to the discussion of the notion of person in law. In the first section (3.1.), I propose to view the concept of the person in the formal sense of the term. In laying out this view, I stipulate that the content of the status (the normative consequences attached to it) can best be described as the set of legal capacities. These capacities importantly determine which kinds of entities may reasonably be ascribed the status of a person in law. In order to

acquire a better understanding of which entities have traditionally been judged proper candidates for legal personhood, and for what reasons, in the next section (3.2.), I examine several theories of legal personhood. Here, two large groups of theories are distinguished: on the one hand (3.2.1.), there are formalist theories of personhood (also called “the legalist” theories) which view the person as merely an instrument that serves to achieve some instrumental purpose within the legal system. On this view, the criteria for personhood are determined exclusively within (by) the law itself in relation to the immediate need – there are no inherent, *a priori*, extra-legal limits that would determine the extension of the status. On the other hand (3.2.2.), there are substantive (also “realist”) theories of personhood that rather see the person in law as an expression of an independently and *a priori* existing real entity which is only given its due recognition by the legal system. The latter theories differ amongst each other with regard to the exact personhood-determining characteristic, i.e. a physical or some other trait that makes an entity deserving of special recognition.

Finally, in the last section of the chapter (3.3.), I present one possible solution to the problem that the standard persons-things dichotomy in law is facing in that it is increasingly unable to fit different categories of (new) entities within the rigid confines of the two conceptual categories. The proposed expansion of the conceptual universe in respect shows that even though the categories of persons and things have been around for millennia, they needn’t be seen as immutable and timeless.

CHAPTER 2.

LEGAL STATUS

Talking about “the legal status (of)” is common for lawyers. Nevertheless, the meaning of the term is far from being unambiguous, as it is used in different contexts in order to refer to sometimes radically different things. Austin even declared that determining what exactly a status is to be “the most difficult problem in the whole science of jurisprudence” (Austin 2002: 190). What are some of the typical uses of the term “legal status” that can be encountered in legal discussions? Let us look at some examples.

Sometimes we come across talk of legal status of particular legal institutes or even entire areas of law. For instance, we talk about “the constitutional status of tort law” or “the constitutional status of the President of the republic”; some even discuss the “status of law” as such in a given society. In such cases, what we are usually referring to is actually the effective legal regulation of a particular area of law or legal institute: the current legal arrangement of tort law in the UK and its relation to other branches of UK law; the constitutionally determined powers and limits thereof of the President in Italy; or, law’s relation to politics, science and economy in the contemporary globalized society and the changes it has underwent in the last century. Or something of the sorts.

Historically, the “legal status of” infants, married women, inmates, mentally handicapped, slaves and the likes, has been a matter of vivid discussion. When invoked in such cases, it is used to refer to specific, oftentimes minority and vulnerable groups of subjects and their legal condition. In this context, having a status is a mark of its holders’ legal abnormality, with normality being determined by the legal position of a *sui iuris* adult man of sound mind. Usually two types of questions are discussed in this regard: on the one hand, the criteria prescribed for the ascription of a particular status (i.e. who is or can be, legally, an infant, a married woman, an inmate, a lunatic etc.; and, on the other hand, the normative consequences attached to the status, i.e. the particular rights and obligations, powers, immunities, privileges, capacities or incapacities stemming from a given status (in short: rights and duties).

Finally, the term “legal status” is sometimes used to refer to practically any individual legal position of an individual (i.e. a claim, a right, a no-right, an obligation, an (in)capacity etc.),⁶

⁶ “Legal position” is here understood in the Hohfeldian sense. See Hohfeld 1923.

or a cluster thereof. We thus say, for instance, that the status of parents in modern society in respect to their children has changed greatly, with the State imposing ever greater duties upon the parents to provide for their children's well-being; or that obtaining residency status in an EU country is becoming increasingly difficult due to the migration crisis; or that chimpanzees have the right to personal freedom and, as a consequence, should have the status of (non-human) persons in law. In this broad sense, the list of legal statuses is potentially limitless.

These examples should give us an idea of the extent and the diversity of the linguistic field in which the expression "legal status" is in play. As far as this thesis is concerned, the first proposed use – in the sense of "the state of affairs" regarding a given legal institute or area of law – is of no interest. The latter two uses, however, appear more informative. They reveal important differences in the use of "legal status" in different historical, doctrinal and jurisdictional contexts: for instance, in the first case (the legal status of the ab-normals), status appears as something rigid, a permanent or, at least, a long-term *condition*; in the second case, status is used to refer to even very transient, short-termed legal *positions*.⁷ Moreover, in the first case, it appears to regard only specific classes of individuals that in some way escape the "normal" condition – the weak or the vulnerable ones; in the second case, rather, "legal status" is used quite indiscriminately to denote a legal position which any individual may find herself in.

Provided this very general framework of reference – and before I turn to discussing different theoretical conceptions of legal status –, I will only briefly remark on the historical (Roman law) origins of the use of the term legal status and then present several different uses of the notion in jurisprudential discourse.

Roman law knew two different, albeit very similar terms for what would today be commonly referred to as legal status.

On the one hand, with regard to an individual, the term was used either to refer to the individual's official rank or his specific *legal position* (Berger 1953): with regard to the community of free men (*status libertatis*); with regard to the community of citizens (*status civitatis*); and, finally, with regard to the family (*status familiae*).⁸ An individual could possess each status in various combinations with the others: a person that was simultaneously free, a Roman citizen and a *pater familias* (or in any case not subject to a *potesta*) had what

⁷ More on this distinction in Ricciardi 2008: 53 ff.

⁸ Cfr. Marrone 2006: 189.

today would be called full legal *capacity* or full *citizenship* (*civitas optimo iure*).⁹ On the other hand, any change (*mutatio*) of the three statuses could either improve one's legal condition (e.g. when a slave became a free man (*manumissio*)) or deteriorate it – the loss of any of these elements was termed *capitis deminutio*. Given the three statuses, three *capitis deminutio* were possible: i) *capitis deminutio minima* regarded the loss of *status familiae* (either due to entry into another family or by becoming head of a new family); ii) *capitis deminutio media*, which meant the loss of *status civitatis* (i.e. loss of citizenship without the loss of freedom, but including the loss of membership in family) and iii) *capitis deminutio maxima*, which marked the loss of *status libertatis* (when an individual became a slave) and included both of the lesser losses.¹⁰

In its most general sense, the conception Romans had of status – although without calling it that way – as the way of being (existing) of a person in front of the legal order (see Crifò 1960: 129) carried over to our times. Status, even today, regardless its specific meaning, is always a *relational* notion: one holds a particular status only in relation to something or someone else.

More recently, John Salmond in his *Jurisprudence* (1913) argued that we may distinguish four different senses in which the term “status” is used.

First, as to mean the “legal condition of any kind, whether personal or proprietary”. In this comprehensive use, an individual's status “includes his whole position in the law – *the sum total* of his legal rights, duties, liabilities, or other legal relations, whether proprietary or personal, or any particular group of them separately considered” (Salmond 1913: 210; emphasis mine). Examples of such uses of status include that of a landowner, a trustee, a solicitor and so forth.

In this most general sense of the term, having a status of any kind indicates that the individual stands in a certain relationship with the law (hence, it is a relational concept). It is due to this relationship that the individual is considered a person in law. This, in turn, means that the individual is both a (potential) duty-bearer as well as a (potential) rights-holder.¹¹ The

⁹ Cfr. Mindus 2014: 103; Bovero 2002: 17. This situation of full-fledged membership is also termed *caput*. See Berger 1953 and Crifò 1960: 129.

¹⁰ Cfr. Berger 1953; see also Marrone 2006: 249–250.

¹¹ Allen claims that this understanding is also reflected in the High Court of Justice's case *Niboyet v. Niboyet* (1879), where status is defined as is “[t]he legal position of the individual in or with regard to the rest of the community”. In this, we recognize the general understanding of status in Roman law (see above).

problem with this conception, however, is that it is too vague. According to Savigny, for example, the term used in this sense lacks technical, juridical significance and is, instead, the sense in which it is used in common language (see Allen 1930: 279). Both Salmond (1913: 210) and Allen were also opposed to identifying the term with this usage on practical grounds. Allen argued that while it might be that case that the term is “sometimes loosely employed to denote the general attribute of being a true and lawful man within the jurisdiction of a particular community” (Allen 1930: 279), in the greater part of its use the term “has a more restricted and a more technical meaning (Ibid.).¹²

Secondly, status has been used to denote a “personal legal condition”. In this sense (that Salmond himself seems to adopt), status is “a man’s legal condition, only as far as his personal rights and burdens are concerned, to the exclusion of his proprietary relations” (Ibid.). Thus, in this sense, we speak of the status of an infant or a father or a public official, but not of a landowner.

Thirdly, it can be used to refer to “personal capacities and incapacities”. Understood in this sense, the “law of status” includes the different capacities different classes of people (infants, married women, lunatics etc.) possess and which enable them to acquire rights and enter into legal relations (Salmond 1913: 211). As such, law of status is considered a special branch of law. Nevertheless, Salmond finds “little justification for confining the term status to this particular branch of personal condition” (Ibid.). As we will shortly see, C.K. Allen essentially adopts this conception of status (2.3.)

Finally, the term can be used to denote a “compulsory as opposed to conventional personal condition”. In this sense, status is used to indicate those conditions that are imposed on an individual, such as slavery, as opposed to those that an individual acquires of his own free will – such as virtually any contractually based status.

In what follows, I will look at several different conceptions of legal status. In the next section (2.1.), I discuss Graveson’s conception, which is aligned with perhaps the most widespread understanding of status in our history. It is a particular, “substantive” conception that conceives of status as a condition of specific types of people due to which they are unable to perform certain acts-in-the-law or participate actively in legal commerce in some other way.

¹² Allen also indirectly furnishes a conceptual objection against this use of the term, for he himself adopts a different conception of status as “a condition which qualifies a person for the exercise of rights” (Allen 1930: 279).

After that, in 2.2. I present H.S. Maine's treatment of status. Maine's discussion of status is not interesting because of some particularly original conception thereof, but rather because of his highly impactful thesis on the historical development of our modern societies "from status to contract". Moreover, discussing Maine's thesis also enables me to introduce C.K. Allen's views on status in the next section (2.3.). This and all further sections (2.4.–2.6.) deal with conceptions that fall within what I have called "formal" conceptions of status. The prevailing characteristic of these conceptions is that "status" serves primarily as a formal, technical device in presenting legal materials.

The presentation of these conceptions does not necessarily respect the temporal order in which they were first proposed; the presentation is not a historical (diachronic) one. Rather, I attempt to provide a particular conceptual development of the notion by way of which certain fundamental ideas about the notion of status will gradually emerge. On this way, the conception of legal status that I adopt in this thesis will emerge in the end (2.6.).¹³

2.1. Status as a "special condition of the ab-normals"

In his extensive study *Status in the Common Law* (1953), Ronald Graveson argues that wherever there is law, *human personality* is two-fold. One is a purely biological, a "natural personality": it is a set of "powers and incapacities which determine what that person in fact can or cannot do" (Graveson 1953: 111). The other is the "legal personality". The latter can either be "the legal condition of the normal member of a society"¹⁴ or it can be a *status*, i.e. "the condition of those persons whom a particular society regards as legally abnormal" (Ibid.). Specifically, for Graveson status is

a special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by the law and not purely by the act of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern. (Graveson 1953: 2)

¹³ In this relatively short presentation I was forced to omit discussion of certain other, even well-known and influential conceptions of status. Perhaps the most prominent among these is Jellinek's theory of statuses. For more on this theory, see Jellinek 1912 & 1949 and Alexy 2010.

¹⁴ Graveson defines the "normal person" in a narrow legal sense, as "one of full age and capacity who is neither married nor subject to any other legally imposed enabling or disabling condition, such as would arise, for example, from his being a peer, a bankrupt or a convicted felon" (Graveson 1953: 2).

In both cases, “legal personality” it represents who the person is in the legal sphere, “and carries with it capacities for the performance of legal acts as well as incapacities, rights and duties, powers and disabilities of a legal nature” (Graveson 1953: 112). In other terms, the attribution of legal personality is, in general, a recognition of one’s legal existence and of her ability (capacity) to participate in the legal sphere.

While the above characteristics are shared by both the legal condition of the normal person, as well as by status-holders, Graveson nominates a list of features that are exclusive to *status*, that is, to the legal condition of the abnormal members of society.¹⁵

i) Status, says Graveson, “is a personality conferred by the State through the application of general principles of law” (Graveson 1953: 112). This conferral (concession) is, as already indicated, the “recognition by the State through its legal system of the existence of the individual as a legal as well as a natural person” (Ibid.). As something that is conceded by the State it is not an inherent feature of human beings – although in contemporary (mature) legal systems legal personality is practically a universal attribute of their citizens (members), almost “an inborn quality” (Graveson 1953: 112f.).

ii) Graveson notes that “status is essentially a conception of law, not a question of fact” (Graveson 1953: 114) – even though the reason or basis for its ascription can be found in some natural circumstance, such as being of a certain age (i.e. an infant). But not only is the idea of status as such a matter of law, the same also holds for “the factors which determine what shall constitute a status and entitle a person to claim that status” (Ibid.).

iii) The ascription of status to an individual is not a matter of that individual’s interest. Rather, it is a matter of a public or a social interest (or both) (Graveson 1953: 114). For example, the status of a convict is imposed upon an individual in the interest of public safety; on the other hand, the status of an infant is, it is true, ascribed to her primarily for her own protection against the world, but there exists also a more general social interest in the welfare and safety of these vulnerable members of society (see Graveson 1953: 115).

iv) Status – if properly acquired (i.e. in accordance with domestic law) on the prescribed basis –¹⁶ is, on Graveson’s view, entitled to “universal recognition” (see Graveson 1953: 119). The key point here is that since legal statuses are ascribed by national law, it is most probable

¹⁵ Besides providing a list of their characteristics, Graveson also furnishes a classification of status based on their nature or the basis of their acquisition. See Graveson 1953: 134–136.

¹⁶ See characteristic n. 4. Graveson 1953: 116–119.

that different States will not only design different statuses, but that even the statuses that they have in common (e.g. citizenship), will likely have different attribution-conditions and that their contents (normative consequences or entitlements) will likewise differ. Thus, in order to avoid possible conflicts that might arise, universal recognition of a status is something that may “rightly be expected from all countries in which the rule of law operates” (Graveson 1953: 119). Such recognition, however, may extend “only to the existence of the status, and not necessarily to its contents” (Graveson 1953: 120).

v) As far as the entities to which status can be ascribed concerns, Graveson argues that generally speaking status is ascribed only to “objects which have a basis of living personality” (Graveson 1953: 120), whether they be natural or legal persons. However, it is also the case that “there is theoretically no need so to limit the conception” (Ibid.). Legal personality can also be attributed to inanimate (material) objects, such as corporation or foundations if there is an interest in making them potential holders of rights and duties.¹⁷ Nevertheless, certain limitations do arise from the fact that the concept of status rests upon “the idea of an entity capable of supporting capacities and incapacities and, in particular, of instituting or defending judicial proceedings, directly or through some other person” (Graveson 1953: 122). Thus, the entity to which a status is ascribed should, in principle, have certain characteristics that make it possible for her to make use of (to exercise) the rights and duties stemming from the ascribed status.

vi) Status cannot exist *in abstracto*, that is, separated from the object, or entity, to which it is attached. Status is a person’s legal personality, and as such only makes sense as long as there is a person to whom it can be attached. To describe this close relationship, Graveson uses a metaphor. He says: “Status is the legal shadow of a human personality: remove either that personality or the light of law which creates it, and the shadow vanishes” (Graveson 1953: 124).

vii) “One of the functions of status in a legal system,” argues Graveson, “is the legal classification of society” (Graveson 1953: 124f). Ascription of status with particular rights and duties creates, within a society, particular groups – an operation which distinguishes the members of these groups between each other as well as each group in relation to the legal position of the normal citizens (Graveson 1953: 125). Such treatment of individuals by groups greatly facilitates the legal organization and management of a society. Graveson, following

¹⁷ On the legal personhood of corporations, see Dewey 1926.

Austin (see below), also holds that these groups (or classes) of people should not be so extensive as to comprise all, or almost all, of society's members – that would make little sense seeing how “a status implies a special legal position, and if the whole community is in such a position, that condition ceases to be special” (Ibid.). Nevertheless, these groups are, and must be, generally large in size. This means that status-groups cannot be based on any minor legal detail that distinguishes some individuals from the legal position of the normal citizen. Rather, “the classification of persons ... will generally have to depend upon variations from the legal position of the normal citizen which are extensive both in importance and quality” (Graveson 1953: 126).

viii) Finally, statuses are of an institutional and permanent nature. They are often based on certain natural disabilities of individuals and relate to some of the most basic relationships and institutions in a society (see Graveson 1953: 129). Contrasted with *ad hoc* powers (rights), statuses thus have more general effects upon the status-holder and are of long(er) duration. Moreover, given the particular social interest in them, the content of a given status is fixed by law and individuals have little influence on them (Graveson 1953: 132). For the same reasons, the status as such and its relative rights and duties cannot be transferred to another (Graveson 1953: 133).

Although Graveson's conception of status is limited to the specific legal condition of individuals that in some important way differ from the legal condition of the “normal” individual, I believe that the characteristics of a status as presented by the author can, nevertheless be generalized. As we will see, the above characteristics are almost fully integrated (explicitly or implicitly) into the conception of status that I eventually adopt.

2.2. “From status to contract”

In Chapter V (entitled *Primitive Society and Ancient Law*) of his famous *Ancient Law* (1861), Henry Sumner Maine traces the development of law and its institutions, from the oldest legal systems to the law of his days. His focus is on the institutions of family law, for it is in this field that the most profound differences between “ancient law” and modern law are to be

found. Indeed, as Maine argued: “the [basic] *unit* of an ancient society was the Family, of a modern society the Individual” (Maine 1906: 121).

It should be noted that Maine does not furnish a distinct conception of status. Rather, he provides a historical analysis of the role status played in history and provides a thesis regarding its fading influence, being gradually substituted by contract as the primary means of establishing the legal condition of an individual in a given community.

His investigation of familial relations, particularly in Roman law, such as those between the husband and his wife, the father and his children, the master and his slaves etc. shows that in ancient times all of individual’s legal relations depended upon his or her position within the family unit – more specifically, in relation to the eldest male individual as the head of the family (in Roman law *pater familias* holding *patria potestas*).

In the earlier times this dependency was complete in all respects: “The eldest male parent – the eldest ascendant – is absolutely supreme in his household. His dominion extends to life and death, and is as unqualified over his children and their houses as over his slaves” (Maine 1906: 119). Progressively, however, this “family dependency” diminished with “individual obligation” taking its place (Maine 1906: 163). Indeed, with the increased attention placed by law on the individual, there comes also the change in the source determining one’s legal condition. Maine argues,

[It is not] difficult to see what is the tie between man and man which replaced by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. In Western Europe the progress achieved in this direction has been considerable. Thus the status of the Slave has disappeared – it has been superseded by the contractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract. So too the status of the Son under Power has no true place in the law of modern European societies. If any civil obligation binds together the Parent and the child of full age, it is one to which only contract gives its legal validity (Ibid.).

Despite what Maine sees as a clear shrinking of the role of status in Western law in light of the increasing importance of contractual relations, certain residues of the ancient statuses have remained in modern times. Hence the examples of infants, orphans and lunatics (see Maine 1906: 164). The legal position of such individuals is (more or less) not dependent on legal actions taken of their own free will but regulated by “the Law of Persons”. This is so, argues

Maine, because such individuals “do not possess the faculty of forming a judgment of their own interests; in other words, that they are wanting in the first essential of an engagement by Contract” (Ibid.).

It is clear from this that on Maine’s view status (what is left of it) is a matter of disabilities. “In this view”, says Allen (1930: 284), “every man, in normal circumstances, is free to determine, according to his own will, his rights and duties towards his fellow-citizens”. If, however, “he has not sufficient will to determine this for himself, the law imposes on him certain defined capacities and incapacities which constitute his status” (Ibid.). Thus, if the notion of status is applied only to the cases Maine examines (in Chapter V); if, in other words, we “avoid applying the term to such conditions as are the immediate or remote result of agreement”, then “we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract” (Maine 1906: 165).¹⁸

This Maine’s thesis has been “one of the most famous legal aphorisms in the English language” (Allen 1930: 285) and it has been “generalized and understood as a universal principle of legal evolution” (Rehbinder 1971: 942). Yet, despite its overall fortunes, the thesis has nevertheless been subject to numerous criticisms.

Pollock, for one, argues that Maine’s thesis should be “understood as limited to the law of Property”: that is, “inclusive of whatever has a value measurable in exchange” (Pollock in: Maine 1906: 422). So limited, the argument is still valid, argues Pollock. Indeed, by pointing to the still changing legal position of married women, he claims that the movement has not yet been completed. Apart from that, however, Pollock does not believe “that a movement from Status to Contract can be asserted with any generality” (Pollock in: Maine 1906: 423). He shows how certain legal institutions (or legal positions of individuals) may have been increasingly de-regularized, but certain features of these positions have nevertheless remained a matter of status. Maine’s test in regard – i.e. whether the individual in question is capable of forming a judgment on her own interests – fails in such cases. This is because in cases as these, the law is interested in more than just that individual’s own interests. “Paramount considerations of the stability of society, or the general convenience of the third persons, override the freedom usually left to parties in their own affairs” (Ibid.). Thus, while it is true

¹⁸ “The meaning of the statement is clear: that the rights and duties, capacities and incapacities of the individual are no longer being fixed by law as a consequence of his membership of a class; but those former incidents of status are coming more and more to depend for their nature and existence upon the will of the parties affected by them: and the remedy for breach of those incidents is becoming increasingly contractual in nature” (Graveson 1953: 34).

that the law of persons has been “cut short”, it is also the case that “so long as we recognise any differences at all among persons, we cannot allow their existence and nature to be treated merely as a matter of bargain” (Ibid.). Finally, Pollock notes that Maine himself limited to an important degree the extent of his claim, excluding from it, above all, the institute of marriage. If status is understood in this more limited sense, an important objection against Maine falls, but, says Pollock, it also drastically reduces its scope (and importance).

For his part, Graveson also notes that “a movement away from status does not necessarily connote a movement in the direction of contract” (Graveson 1953: 34). Indeed, in Roman law the idea of a contract was largely undeveloped and promises were enforced in other manners. The theory of autonomy and free will, lying at the basis of the theory of contract, came much later, with Kant and Bentham (see Graveson 1953: 35). As far as English Common Law is concerned, where status does not originate only in familiar relations but is chiefly based in “estates and tenures of land” (Ibid.), Graveson shows that the movement was, quite the opposite, “from contract to status” (Graveson 1953: 38). It was

[b]y virtue of the possession of a certain status in the social order [that] a person would be entitled to claim a certain estate in land. The grant of such estate would be based on express undertakings of service and protection or implied acceptance of the generally understood terms of the grant. ... The status of the grantee would be vitally material in determining what set of rights and duties ... would govern the relationship to arise from the grant. Once the grant was made, those rights and duties, public and private, would attach inalienably to the grantee during his life, and thereby become part of his status (Graveson 1953: 38).

Like Pollock, Graveson is similarly critical of the narrowness of Maine’s claim. While he sees as perfectly reasonable the fact that Maine himself limited the validity of his claims to his own time – and thus did not wish to predict future developments – he is nevertheless critical of the fact that Maine excluded from the scope of his thesis “those personal conditions which resulted, immediately or remotely, from agreement” (Graveson 1953: 36) – i.e., statuses resulting from marriage and also most of the Common law that is the result of the feudal agreement between lord and man (Ibid.). Taking this in consideration, Graveson asks himself what is even left of the maxim. His answer: “So far as the Common Law is concerned, very little remains if one subtracts from our law of status those personal conditions resulting on the one hand from feudal land tenure and on the other indirectly from private agreement” (Ibid.).

Allen (1930) also moves certain objections against Maine. Applying Maine’s test for attribution of status to several historical statuses (e.g. sex, minority, coverture, celibacy, mental defect, slavery, civil death etc.), he comes to conclude that while most of them would

pass it, i.e. they do regard “aspects of a man’s personality over which he himself has no control over” (Allen 1930: 284), others do not arise involuntarily but by some action of the individual herself. Thus, he argues that Maine’s central assumption is in need of modification. He argues that while it is true that most historic statuses have originated in circumstances beyond an individual’s control, they may nevertheless also originate in her own “voluntary act” (Allen 1930: 286).

Moreover, Allen argues that in modern law status “does not necessarily depend on *defect of judgment*” (Allen 1930: 286). There are numerous statuses, such as professional rank, illegitimacy, nationality etc. that are based on different policy grounds. Thus, says Allen, while natural incapacity may be the main cause for ascribing a status, “the law *may* attach that quality to a particular class on any ground of policy which social exigencies dictate” (Ibid.). From this consideration follows Allen’s conclusion that status is not only a matter of incapacity, but of capacity as well.

2.3. Status as a matter of capacities and incapacities

C.K. Allen, whom I have already invoked above, also provided his own definition of status. On his view, status is “the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities or both” (Allen 1930: 288).¹⁹

Several elements of this definition can be individualized. For one, status is a condition of an individual. As such it is permanent or at least long-term in nature; it is static and therefore cannot be exercised (unlike capacities as we will soon see) (Allen 1930: 292). Moreover, and more importantly, status is not a cluster of (substantive) rights and duties – rather, it is the “condition of membership of a group” (Ibid.). Such a group (or a class) of persons, in relation to a status, is determined by “an established rule of law”²⁰ in virtue of which “legal consequences result to its members from the mere fact of belonging to it” (Allen 1930: 289).

¹⁹ He constructs his own view of status on the critique of Salmond’s, Austin’s and Maine’s treatment of status. See Allen 1930: 277–288.

²⁰ Status, therefore, is something that is ascribed by law upon an individual. Status may originate either from an individual’s voluntary act or from “circumstances which lie beyond the control and choice of the individual” (Allen 1930: 286).

When speaking of legal consequences stemming from membership in a given class of persons (i.e. from being ascribed a status), Allen points out that we should distinguish between rights and duties, on the one hand, and the capacities and incapacities, on the other hand. As said, on Allen's view status is not determined by the rights and duties attached to a particular legal condition. While individuals may hold certain rights and duties in relation to a particular (kind of) thing, this fact alone does not affect their capacity in any way. Status, on the other hand, is "a condition affecting capacity generally" (Allen 1930: 290). Thus, for instance, in the case of infancy, the consequences of that status are in the contractual domain seen in the infant's general incapacity to contract – and not in some particular right an individual young child may or may not hold in virtue of a specific relationship. Unlike Graveson and Maine, Allen believes that status is a matter not only of incapacities, but of capacities as well.

The notion of capacities (and incapacities) is central in Allen's account. On his view, capacities are of two kinds: *passive* and *active*. While the former is the "capacity for enjoyment of rights", the latter is "the capacity for exercise of rights" (Allen 1930: 290). Allen swiftly dismisses the first, arguing that "[t]o say that a person has capacity for enjoying rights is merely to say that he is a person" (Allen 1930: 291). Though theoretically possible, he rejects the practical possibility of there being, in modern law, individuals without the general capacity for enjoying rights.

Allen, thus, focuses his attention on the active legal capacity, i.e. "the ability to exercise (which of course presupposes the ability to acquire) specific rights" (Allen 1930: 291).²¹ Certain characteristics of active legal capacity are emphasized by Allen. For one, it should be clearly distinguished from rights – which are exercised on the basis of a given capacity. Capacity is "a condition precedent to the exercise of rights" – as such it is "*latent and potential* in the individual" (Allen 1930: 291). Moreover, capacity is also a power: given its dormant character it can be said to be *static*. But it is also *dynamic* for it "affects rights and duties as soon as it is exercised" (Allen 1930: 292).

To conclude: Allen shows us that we must clearly distinguish between three important concepts: status, capacity and rights, respectively. While *status* is a condition "which gives rise to certain capacities or incapacities or both", *capacity* is "the power to acquire and exercise rights" (Allen 1930: 292).

²¹ This ability, he adds, can either be total or partial. See Allen 1930: 291.

2.4. Status as a matter of “commodious exposition”

John Austin dealt with the question of status in Lectures XL–XLIII of his *Lectures on Jurisprudence*. There, with reference to the purposes of law, he distinguishes Law of Persons and Law of Things. He describes the distinction between the two as follows:

There are certain *rights* and *duties*, with certain *capacities* and *incapacities* to take rights and incur duties, by which *persons*, as subjects of law, are variously determined to certain *classes*.

The rights, duties, capacities, or incapacities, which determine a given person to any of these classes, constitute a *condition* or *status* which the person occupies, or with which the person is invested. (Austin 2002: 706)

Persons, then, are holders of statuses, i.e. sets of rights and duties (with capacities and incapacities) – potentially a great many of them (Ibid.). Such statuses include, but are not limited to, being a son, a husband, a father, an advocate, a trader and so forth. While both the Law of Things and the Law of Persons deal with persons and their rights and duties, these are regarded in the Law of Things in a more general or abstract manner. On the other hand, rights and duties that affect particular classes of individuals are grouped together under the Law of Persons – or, what amounts to the same, Law of Status. The line between these two bodies of law is thus determined by the notion of status: “The Law of Things is *the* law; the *corpus juris*, minus the law of *status* or conditions. The Law of Persons is the law of *status* or conditions, detached for the sake of convenience from the body of the entire legal system” (Austin 2002: 709).

While representing a line of demarcation between the two departments of law, status seems to have very few other particular characteristics. Indeed, when inquiring into the nature of status, Austin admits that even after thorough investigation, he can “find no mark by which a *status* or condition can be distinguished from any other collection of rights and duties” (Austin 2002: 710). There is, in other words, “no common generic character which determines what a *status* or condition is” (Ibid.). In the end, the only reasons, as far as Austin is concerned, for detaching particular sets of rights and duties – termed status – from the rest of the law is purely “for the sake of commodious expositions” (Ibid.).

Nevertheless, Austin does find that the rights and duties (with capacities and incapacities) that constitute status do have, generally speaking, certain (common) characteristics:

First of all, Austin holds that a status “resides” in an individual “not as being that very individual person” but rather “as being a member of a *class* of persons” (Austin 2002: 710). The idea of a class (of persons) is central in Austin’s understanding of status: “It does not matter, on Austin’s view, what the class is ... but a class of some kind, with rights and duties peculiar to itself” (Allen 1930: 282). What is relevant here is, first, that status is not related to singular rights ascribed to individuals as such (e.g. privileges) and, second, that “the class itself must not be such that it may comprise any, or nearly any, person whatsoever” (i.e. an universal class of all persons). Indeed, “[c]lasses possessing a *status* or condition are classes which *can only* comprise a part of the community” (Austin 2002: 713).

Classes of people – in virtue of being ascribed a given status – are distinguished from other classes precisely because of the particular set of rights and duties that are attached to them. This is a further characteristic Austin recognizes in regard. Or, as he puts it: “the rights and duties capacities and incapacities constituting *status* or conditions, regard specially the class of persons by whom the status or condition is borne” (Austin 2002: 711). Rights, such as those that stem from various contracts regard no particular class of persons; rights of infants, on the other hand, regard specifically that group of people. Of course, such rights needn’t regard these individuals exclusively, says Austin – it suffices that they “*specially* regard such persons” (Ibid.).

Finally, a further characteristic of the rights and duties that determine a status is that they are “commonly considerable in number and various in kind” (Austin 2002: 710). Indeed, they are potentially so many as to affect the individual in many, if not most, of his social relations (Ibid.). Although Austin does admit that this is not really a distinguishing mark of statuses.

In Lecture XLI Austin dismisses several definitions of status that he sees as erroneous – arguing, for example, against Bentham’s view that status is an inherent quality of a given person generating rights and duties,²² and against the idea that status is a (set of) capacity.²³ In Lecture XLII he ultimately furnishes a definition of status based on the elements previously pointed out. What, then, is a status? This is Austin’s definition:

²² See more in Austin 2002: 720–725; cfr. also Allen 1930: 281.

²³ See Austin 2002: 738–740; cfr. Allen 1930: 281f.

Where a set of rights and duties capacities and incapacities, specifically affecting a narrow class of persons, is detached from the bulk of the legal system, and placed under a separate head for the convenience of exposition, that set of rights and duties capacities and incapacities, is called a *status* (Austin 2002: 746f).

Status, then, is merely a methodological instrument for organizing law (legal systematization). The only difference between a status and any other set of rights and duties is that a status only applies to “a narrow class of persons” and not to any and all persons.

2.5. Status as an intermediary legal term

While very little can be said about the specificity of “status” on Austin’s account, one and perhaps the only relevant feature that he emphasizes is that it facilitates the systematization (exposition) of law. For Austin, status is but an instrument for organizing law.

This idea of status is heavily present in Alf Ross’s famous paper *Tû-Tû* (1957). Ross begins his seminal work by telling us about a tribe Noît-cif from the Noîsulli Islands in the South Pacific which applies certain rules by relying on the notion of *tû-tû*. In this tribe, the following statements hold true:

- (1) If a person x has encountered their mother in law, x is *tû-tû*.
- (2) If a person x has killed a totem animal, x is *tû-tû*.
- (3) If a person x has eaten the food prepared for the chief, x is *tû-tû*.
- (4) If a person x is *tû-tû*, x is subject to the ceremony of purification.

Ross is quick to dispense with any kind of “magic”: “It is obvious”, he argues, “that the Noît-cif tribe dwells in a state of darkest superstition. ‘*Tû-tû*’ is of course nothing at all, a word devoid of any meaning whatever” (1957: 812). To prove this, Ross shows how meaningful statements could easily be constructed without employed this term. For instance, the following statement does not make use of the term: “(5) If a person x has killed a totem animal, x is subject to the ceremony of purification.” This, on Ross’s account, goes to show that *tû-tû* has no “semantic reference” of its own: it refers to nothing in the real world. The tribe’s system could very well function without the use of *tû-tû*. The relevant statements would then look like this:

- (6) If a person *x* has encountered their mother in law, *x* is subject to the ceremony of purification.
- (7) If a person *x* has killed a totem animal, *x* is subject to the ceremony of purification.
- (8) If a person *x* has eaten the food prepared for the chief, *x* is subject to the ceremony of purification.

These rules appear quite common and unproblematic. Yet, imagine that the following statements are also valid in the same tribe:

- (9) If a person *x* is *tû-tû*, *x* is unfit for combat.
- (10) If a person *x* is *tû-tû*, *x* is unfit for hunting.²⁴

This simple addition of two further (correct) uses of the term *tû-tû* would, if we were to abandon it, render the system at hand much more complex, augmenting the number of valid norms considerably.

Legal rules in our contemporary legal systems often function in the exact same way, says Ross. We, too, “express ourselves as though something had come into being between the conditioning fact (juristic fact) and the conditioned legal consequence, namely, a claim, a right, which like an intervening vehicle or causal connecting link promotes an effect or provides the basis for a legal consequence” (Ross 1957: 818). Our legal systems are full of such notions: among them are right, duty, claim, ownership, marriage, citizenship, contract, validity, negligence etc. They all function exactly as *tû-tû*:²⁵ they are “inserted” between the (legally relevant) conditioning facts on the one side and the conditioned (normative) consequences on the other side. In this way they greatly facilitate the presentation (i.e. reduce the number) of legally valid statements (rules) in a given legal system. They serve, in other words, as “a tool of presentation” (Ross 1957: 820).

As it is highly relevant for my discussion, I should add that Ross notes that the intermediary link will not always be a single right (a single legal position), but that it can also be “a complex legal condition of rights and duties” (Ross 1957: 821). Such is the example of (the legal effects of) marriage or (the legal effects of) citizenship. In such cases we speak of “a status” (Ibid.).

While Ross’s ideas with regard have been highly influential, numerous refinements and critiques have been offered. I shall mention just some of the briefly.

²⁴ See Brożek 2015.

²⁵ See Ross’s scheme on p. 820.

Brožek (2015), for instance, offers two important criticisms of Ross's treatment of *tû-tû*: first, he argues that Ross's argument regarding the "semantic voidness" of *tû-tû* is flawed in that any predicate can be used in place of *tû-tû*. This is possible by accepting Ross's strategy in which he accepts two claims, namely i) "a (partial) meaning postulate, such as 'If a person x has eaten the food prepared for the chief, x is a *tû-tû*'" and ii) "a norm in which the term under consideration in the description of a state of affairs that triggers the application of the norm, as in 'If a person x is *tû-tû*, x is subject to the ceremony of purification'" (Brožek 2015: 18). "Assuming", says Brožek, "that one can always identify a (partial) meaning postulate for any term, the possibility of carrying out Ross's argument to the effect that the term has no semantic reference hangs together with there being a norm which the terms appears in the description of a state of affairs that triggers the application of the norm" (Ibid.). For example, if for the term "food" a partial meaning postulate is, let says, "If x is a mango, then x is food", it suffices that there is a social norm, such as, "If x is food, then x should be shared among the members of the community" in order to prove that "food" has no semantic reference (Ibid.).

Secondly, Brožek also shows that Ross is mistaken in claiming that intermediate legal terms function (are of benefit) only as efficient tools for the presentation of legal rules. According to Brožek intermediary legal terms are indispensable for a functional legal system because, one, they increase coherence in the legal system (Brožek 2015: 20) and, two, they "may help increase the completeness of a legal system" (Brožek 2015: 21). As they are not fundamental for the current project, I shall not pursue these objections further.

Finally, Lars Lindahl (2004), who provides a thorough theoretical analysis of intermediary legal terms and of their role in legal inferences, also argues that legal middle terms are not only vehicles of inference (see Lindahl 2004: 189). Instead, Lindahl argues, "[l]egal institutions such as contract, ownership, citizenship and matrimony are instruments for satisfying the needs and interests of individuals" (2004: 198). Thus, they have a particular instrumental function in legal systems. What Lindahl emphasizes in relation to the specific group of legal institutions that correspond to "complex legal positions of individuals" (2004: 199), such as ownership, citizenship or matrimony, is that the normative consequences stemming from these positions have "a strong interrelationship": they "are considered to constitute a bundle, the value of which depends on incorporating components that go together. That the components 'go together' can be expressed by saying that having them jointly in a bundle accomplishes a synergetic effect" (Ibid.). It is this synergy that is the reason for ascribing the whole bundle to a single legal middle term, such as "citizenship" (Ibid.).

Lindahl further emphasizes the importance of formulating (reconstructing) pre-legal inference schemes in relation to instrumental ideas regarding such middle terms. He argues that these inference schemes, be they philosophical, anthropological or economic, are not tied to particular legal systems, but are rather more universal in nature. They are, nevertheless, relevant for the rules of particular legal systems. “By clarifying the ‘rationale’ of different legal institutions, such reconstructions indicate the reasons for composing particular bundles of rights, powers, obligations, etc., to be attached to the appropriate sets of grounds” (Lindahl 2004: 200). The idea here is that not only are the normative consequences attached to a given status not a random set of rights and duties – being rather a sensible, interrelated bundle of such – but that the attribution of these rights and duties (the status itself) also has an underlying rationale.

2.6. Status as a sensible set of rights and duties

The arguments in the previous section showed that status can be understood both as a legal middle term whose function it is to provide for a more “commodious exposition” of rules valid in a given legal system as well as a particular set of interrelated rights and duties that serves an underlying interest or need. In this section, I will continue to develop this line of reasoning by engaging with the works of Jeremy Waldron and Patricia Mindus, respectively.

Waldron defines status in law as “a particular package of rights, powers, disabilities, duties, privileges, immunities, and liabilities accruing to a person by virtue of the condition or situation they are in” (Waldron 2015: 134). Waldron’s conception of status is broad, inclusive of all sorts of subjective legal conditions and situations. The examples of status that he furnishes, e.g. bankruptcy, infancy, being an alien, a prisoner, a member of the armed forces, being married etc., attest to the inclusiveness of his conception, which does not refer only to “abnormal” individuals or only to some permanent life conditions.²⁶

Waldron accepts the view that statuses operate as kinds of “abbreviations”, or, what amounts to the same, as legal middle terms (Ibid.). His argument for this is substantially the same as we have seen above (2.5.). Each proposition that holds in relation to an individual in a

²⁶ Waldron explicitly object to this characteristic of status provided by Graveson. See Waldron 2012: 57–60.

particular legal situation could be spelled out individually: i.e. for someone (X) who is considered to be an infant, it could be said that (i) if X is under eighteen, then X has the right to support from X's parents and that (ii) if X is under eighteen, then X does not have the power to enter into certain contracts. Instead, be it for "expository convenience" or some other reason, we "summarize all this information by saying that in law X is an infant" (Ibid.). By understanding the technical (legal) meaning of the term infant (or any other status-term), which "carries with it knowledge of the details of the legal position that people with this status are in" (Ibid), statements regarding "infants" are rendered meaningful.

However, Waldron thinks that this is not the only quality of status-words. Indeed, he says that "it is also worth insisting that the list is not arbitrary" (Waldron 2015: 135). Here, "the list" he refers to is intended as any set of rights and duties (rights, powers, abilities and disabilities, duties, privileges, liabilities etc.) that the status-word is an abbreviation for. The rights and duties of a given status are not just any random set thereof; rather, the list "*makes sense* relative to some *underlying idea* that informs the status in question" (Ibid.). Here we recognize the same ideas as were already proposed by Lindahl above. However, the latter offered no further arguments or examples in regard.

Waldron argues that, as far as infancy *qua* legal status is concerned, propositions such as, for example, "If X is under eighteen, then X has the right to support from X's parents" and "If X is under eighteen, then X does not have the power to enter into certain contracts" are not just any random or arbitrary legal propositions (Waldron 2015:134). Rather, "[e]ach of them makes sense in terms of the underlying idea that human children are much less capable of looking after themselves and much more vulnerable to depredation or exploitation by others than adults are" (Waldron 2015: 135). But not only individually – these rights and duties (to be short) also "make sense" jointly, as a package (Ibid.). It is, therefore, not enough that each particular element (a right, an obligation, a privilege, a capacity etc.) responds to some circumstance of the overall condition – rather, "[i]t is a matter of their having a common rationale which explains how the various rights, duties, and so on hang together, i.e. the underlying coherence of the package" (Ibid.).²⁷

In some of her recent works, Patricia Mindus has been developing a "functionalist" theory of citizenship (see Mindus 2014 & 2017). Her theoretical approach to citizenship is particularly

²⁷ "Hanging together" amounts, I would argue, to more or less the same as Lindahl's "going together". See above, 2.6.

interesting for this investigation for she not only treats citizenship as a status *qua* a legal middle term, but she also provides a particular theory as to how the internal connection between the conditions for status acquisition (“access criteria”) and the normative consequences (“entitlements”) stemming from the status could be understood.

Mindus, following her Scandinavian predecessors and contemporaries (i.e. Ross, Lindahl etc.), claims that citizenship, just as many other legal terms like ownership, contract, validity, negligence etc., does not, in fact, correspond to anything in the real world. Citizenship, she says, is not an empirical concept and, hence, has no semantic reference (Mindus 2014: 264). This alone, however, does not make the concept useless, a mere “ideological construct”, or even inexistent. To the contrary: such legal concepts are useful, if not indispensable, since they serve as “vehicles of inference” or “techniques of presentation” in legal discourse (Mindus 2014: 265). As we have already seen, statuses, in this role, are a fundamental element of today’s complex legal systems (see above, 2.5.).

But Mindus, similarly as Waldron, doesn’t believe this citizenship (legal statuses) is only about expressive economy.²⁸ According to her, a general theory of citizenship (like hers) “needs to describe the relationship between entitlements and access criteria” (Mindus 2017: 51). The former (the entitlements) “are about *what* citizenship consists in” and constitute the concept’s intension; the latter (the access criteria), on the other hand, “determine to *whom* the status is conferred” – in other words, they constitute the concept’s extension (Ibid). And while it is true, she adds, that these two components of the status are not fixed and differ among legal orders (as well as with time, I should add), they do not do so indefinitely: consequently, “[t]heir variation is intelligible and can be studied” (Ibid.).

The connection between the “access criteria” (the conditioning state of affairs) and the entitlements (the normative consequences) is not neutral, random or arbitrary. You will remember that both Lindahl and Waldron argued that the entitlements appertaining to a given status are not a random or arbitrary set of rights and duties – rather, they depend on the underlying idea of the status in question. Their accounts, however, reveal little as to the nature of the connection between the entitlements and the access criteria of a status. Mindus, to the opposite, provides a specific theory regarding precisely this point. The relationship between

²⁸ Note that Mindus develops her theory for citizenship only. The extension of the theory – of some of its key ideas, is my own proposal.

these two components is, on Mindus's view, a functional one.²⁹ More to the point, Mindus argues that "access to *status civitatis* [i.e. citizenship] is not neutral, but can be conceived as a variable of the content of the status". This, in a nutshell, is the point of the "correlation thesis" which is one of the two theses that Mindus develops within her functionalist account of citizenship.³⁰ What Mindus means when she says that the correlation between the two components of status is a functional one is that the "criteria giving access to the status and the type of entitlements it entails have to be aligned so that access criteria fit the particular type of entitlements connected to the status" (Mindus 2017: 52).³¹ In other terms, "extension will follow intension", or "to *who[m]* citizenship is granted must depend on *what* citizenship consists in" (Mindus 2017: 53).

But how exactly is this fit determined? How, in other words, do we get from the intention to the extension; from the entitlements to access criteria "correctly"? For Mindus, the answer lies in a mathematical formula: the functional connection is intended in the mathematical sense of the word. In this context, Mindus proposes to refer to the extension of the status as "codomain" (C) and to its intension as "domain" (D): "The domain is the set of the arguments for which the function is defined", whereas "the codomain is the target set" (Mindus 2017: 52). The correlation thesis argues, you will remember, that the "criteria for acquisition and loss of the status constitute a function of the entitlements it consists in" (Mindus 2017: 53). Symbolically, this is represented as $f: D \rightarrow C$. In other terms, f is a "surjective function from D to C" because "every point in the codomain is the value of $f(d)$ for at least one point d in the domain" (Ibid.).

Mindus argues that if this characterization is correct, "we obtain a *standard* for evaluating the appropriateness of criteria for acquisition and loss" of citizenship or any other status (Ibid.). In this way, "the internal consistency" of a given (citizenship) policy can be analysed. This standard serves as a test for judging the justifiability of a given status-attribution policy (Mindus 2017: 53).

²⁹ Talk of functions of statuses inevitably invokes associations to Searle's social ontology. While this is not the place to enter into the specifics of Searle's "construction of social reality", it should be noted that according to Searle, a *status* is assigned to some phenomenon by collective intentionality when the accompanying *function* of that status "cannot be performed solely in virtue of the intrinsic physical features of the phenomenon in question" (Searle 1995: 46). More on Searle's theory of constitutive rules, statuses and status functions, see Searle 1995: especially 40ff.

³⁰ The other is the "constitutional-sensitivity thesis" which I will not be discussing here. See Mindus 2017: 51-52.

³¹ "If they are not aligned by functional correlation", continues Mindus, "citizenship becomes an arbitrary instrument of social closure: as if we were to distinguish insiders from outsiders randomly" (Mindus 2017: 52).

This shows that on the functionalist view, the connection between the entitlements and access criteria cannot be of just any kind: the criteria for status acquisition cannot be arbitrarily selected, without regard to the rights and duties the status gives access to. Rather, the law-maker has to choose (determine) which pre-legal (natural or institutional) facts are *relevant* for the status in question, i.e. for the ability to exercise the rights and duties attached to the status.³² This decision (judgement) is not purely evaluative nor is it completely descriptive (see Mindus 2014: 267). It is, rather, a *reason-based* judgement. Not every personal characteristic (potential condition for access) will be relevant for the particular status in question. The same characteristic may or may not be held relevant for status-attribution, relative to the status to be ascribed – relative to the rights and duties attached the status. The relevancy of a particular (personal) characteristic for a given status thus depends on the congruence between that characteristic and the particular entitlement (or a set thereof) in question (see Mindus 2014: 269). In the final instance, whether there is congruence between the two is a matter of reason-giving or (proper, convincing) justification (cfr. Mindus 2014: 290).

Mindus's argumentation needn't be fully adopted here. For the present purpose there is no need to assume that the connection between the access criteria and the entitlements is a precise mathematical function from the set of entitlements towards the access criteria. As we will later see (see below, 3.1.), other plausible explanations of the way in which access criteria are (to be) determined may be offered. But we may suspend the judgment on Mindus's functional theory of citizenship and still benefit from some of her insights.

First of all, I believe that, *mutatis mutandis*, her characterization of the status of citizenship can be transplanted to any, or almost any, other legal status. Moreover, Mindus convincingly shows that there is a strong connection between the access criteria and the entitlements pertaining to a status, a connection that does not allow for extensive and rapid manipulations of the access criteria or the set of entitlements or both. The two, though they may change in time and space, are in such a relation that any change in any of the two sets will require a sufficient justification for doing so as well as (potentially) require a modification in the other set. Otherwise the "internal consistency" of the status can be undermined and any such modification deemed illegitimate.

³² "Lo standard che propongo invece ci fornisce un metodo per scegliere una regolazione dell'accesso alla cittadinanza che sia *funzionale* (o *adeguata*) al ruolo svolto dalla cittadinanza all'interno dell'ordine costituzionale" (Mindus 2015: 541).

*

Having reviewed several conceptions of legal status, I am now in a position to settle upon one that I will be using from now on. The conception that I am espousing is basically the one presented in section 2.6. I basically follow Waldron's work, but accept elements presented by other authors as well – as far as they compatible with the former view. Thus, I accept the claim that a legal status is in any case a legal invention and not some natural attribute of the individual; that it is, as such, a legal middle term that serves, in part, as a means of compressing large bulks of legal information; that, moreover, statuses are always attributed by law, regardless of whether the acquisition criteria may be based on some inherent quality of an entity; that any attribution of a legal status upon an entity is, indirectly, also a recognition of that entity's capacity for being a holder of rights and duties and thus, of being if not necessarily a person in law, at least of not being an object; that any given legal status has, at its basis, some underlying reason (an interest) for its existence and for being ascribed to particular entities and that, related to this, the content of a status is a sensible set of rights and duties that are attached to the status-word in the light of the status's underlying rationale. Finally, I also agree that the relation between the entitlements and the access criteria is not random or arbitrary, but rather that the two are strongly interrelated.

CHAPTER 3.

LEGAL PERSONHOOD

The person is one of the fundamental notions of law and legal science. The person as the subject of law is at the centre of every legal transaction, statutory, constitutional or any other legal norm; indeed, the person is at the core of any and all legal systems as such. All this is not controversial. What is, however, much disputed, is who or what can be deemed a person in law; and related to this, how the person as a legal institute should best be conceptualized.

In the previous chapter, I examined the notion of legal status, or better, several conceptions thereof. One fundamental distinction between the presented conceptions was between a more “substantive” approach which saw a legal status as a special long-term condition of “abnormal” individuals (e.g. married women, infants, lunatics etc.) and more “formal” approaches which conceive of status as a technical instrument for compressing information. At the end of this examination, I espoused one such conception, which sees a legal status not only as an instrument of expressive economy but also accepts that any legal status has an underlying rationale to it which partially informs its content (the normative consequences or entitlements attached to it). On this understanding of status, moreover, the content of a status at least partially co-determines the access criteria of that same status.

In this chapter, I take this idea of legal status and use it to claim that the notion of person in law is a legal status that can be represented in more or less the same manner as just described. Thus, in the first section (3.1.), I sketch out a proposal for such an understanding of the notion of a person in law. I stipulate that the content of the status of person (the normative consequences or entitlements) is to be sought a series of legal capacities (3.1.1.). On this basis, in the next section (3.2.), I look at a series of competing theories of legal personhood, i.e. theories giving different responses as to who or what may count as a person in law. These theories can be distinguished into formalist ones (3.2.1.) and substantive ones (3.2.2.). While these theories provide greatly diverging views of the person in law, they nevertheless share the ontological supposition that, in law, all entities can either be classified as persons or as things: *tertium non datur*. This view, however entrenched it may be, has recently come under criticism for it is proving inadequate for explaining the nature of an ever increasing set of entities that can neither be described as persons nor as things. Hence, in the last section (3.3.), I discuss one recent proposal for expanding the ontological universe in this ambit.

3.1. The person as an intermediary legal concept? A proposal

In this section, I sketch out a proposal for understanding the person in law as a legal status conformant to the conception developed above (see 2.6.).

First of all, following our conceptualization, we have to demonstrate that “person” can function as an intermediary legal term. For this purpose, the term should be able to pass the test proposed by Brožek (above, 2.5.). Accordingly, we should be able to identify a (partial) meaning postulate regarding the term person. As we will later see (3.2.), according to certain substantive theories of personhood, being a natural-born human being is the prerequisite (often the only one) for being deemed a person in law. Thus, we can form a (partial) meaning postulate such as “If x is a natural-born human being, then x is a person (in law)”. Furthermore, there should also be identifiable a norm in which the term person, used in the description of a state of affairs triggers the norm’s application. Being a person in law entails a series of normative consequences: for instance, it is often presumed that something like the following statement obtains: “If x is a person (in law), then x has the capacity to obtain rights and duties (in law)”. These two statements can easily be modified so that the word person is omitted from both of them without any loss of meaning. Thus, we can merge two the statements into a new statement “If x is a natural-born human being, then x has the capacity to obtain rights and duties (in law)”. In this simple way, it is proven, or so I believe, that “person (in law)” does indeed function an intermediary legal term – a *tû-tû*.

However, as with other legal statuses that we have dealt with (e.g. infancy, citizenship), the person, too, should not be seen only as an intermediary legal term. There is more to the notion of person than just being an intermediate concept connecting access criteria and entitlements. Following the above presented authors (see 2.5. & 2.6.), I have argued that there is some “rationale” for the existence of a given status; or that there exists some “underlying idea” as to why we have a particular status. The same should then be the case with the status of a person as well. So what is that underlying rationale when it comes to the status of person?

A comprehensive answer to this question would require (at least) an extensive sociological, anthropological and psychological investigation of its own.³³ But such an inquiry is beyond the scope of this thesis. I shall therefore limit myself to giving a very approximate, sketchy answer.

Often legal scholars like to compare law to some game, like chess or baseball or some other, because they share many fundamental characteristics.³⁴ Such games are, first of all, rule-constituted. These rules prescribe, among other things, how (by way of which permitted actions) one can achieve the ultimate goal of the game, that is, to win the game. The rules of the game also prescribe which actions are prohibited in the course of the game and, presumably, also determine the sanctions for breaking these rules. However, and more importantly for our discussion, the rules of a given game also have to determine (i) *who gets to play* the game and (ii) *who (or what) gets to be played with*. In other terms, determining the *active participants* (the subjects) of the game and the *passive objects* of their play is one of the constitutive requirements for the establishment and playing of any game whatsoever.

The same, *mutatis mutandis*, applies to law. The law, in general, is made of rules that determine what is required in order to obtain a certain (desired) normative consequence. For instance, if we wish to purchase a real estate, the law will spell out the conditions we need to meet in order to perform the transaction (e.g. be legally adults, citizens, have the contract of sales authenticated by a notary etc.). The law also contains a series of rules that prohibit, in general and for specific areas of law, certain actions in pursuit of the desired aims. For example, in selling a real estate, it is not permitted to withhold vital information regarding the property to the buyer. Finally, it also prescribes sanctions for the specific violations which vary from pecuniary sanctions to sanctions regarding the formal validity of certain acts (e.g. nullity) and to more severe criminal law sanctions (e.g. incarceration).

But as in games, so in the legal game as well, we also need to first and foremost establish who gets to participate in it. Which entities will be deemed players of the legal game (i.e. subjects of law or persons) and which the objects of that game, will depend, clearly, on the decision of the game-creator, in this case the law-maker (the legislator). Whatever that decision may be, one thing is certain: upon being deemed either persons or things, the real-world empirical

³³ Cfr. Carrithers, Collins & Lukes (Eds.) 1985.

³⁴ Cfr. Marmor 2006.

entities³⁵ are immediately transformed into artificial entities of the legal game i.e. they become subjects of law. Only as such may they actively participate in the game or, alternatively, be its passive participants.

The above said tells us something very important about the status of a person in law, namely that legal personhood is a *primary* or *original* and a *fundamental* legal status. This means that legal personhood precedes and is a precondition of any other legal status an individual may come to hold. One cannot obtain the status of, let say, an infant, a debtor or a university professor, if she is not legally a person already. At the same time, legal personhood – at least its passive part (see below, 3.1.1.), is also a *threshold* legal status in that it marks the most basic qualitative distinction between entities in law: the one between *subjects* and *objects* of law (or, between *persons* and *things*).

Another key characteristic of games is that they have a particular purpose or a function. Besides the apparent immediate purpose of any given game, i.e. to be somehow finished (won) by one or more players, games also usually have other, more profound purposes. In reference to one particular game, Marmor (2009: 40) argues that it “can only be understood on the background of understanding a whole range of social needs and various aspects of human nature, such as our need to play games, to win, to be intellectually challenged, to be able to understand a distinction between real-life concerns and ‘artificial’ or ‘detached’ structures of interaction, and so forth.” Thus, games are designed to satisfy some important human needs. By extension, the same can be said of the function of the roles players of the game assume.

While the analogous answer as to the underlying function (or functions) of law would be much more complex – law surely serves numerous different and sometimes conflicting functions and satisfies more complex interests than games do –, an attempt to answer the question regarding the function of the status of the person in law can nevertheless be made. Actually, the answer has already been provided, albeit indirectly. We have said that some rules of legal system – and here I should add that they needn’t necessarily be explicit rules – must determine who or what can participate in the legal game as an active participant (a subject) of the legal game. This being so, the status of a person in law is an instrument through which specific players of the legal game are created – and distinguished from the

³⁵ Here I am ignoring the non-empirical, purely institutional persons whose creation process is somewhat different as well as the objects of law.

objects of the legal game. As natural entities as such cannot act in law, the role or the function of the status of person of establishing players (subjects) of the legal game is fundamental in making the legal game possible at all.

Following our model of status, this underlying and most often implicit “legal-game-enabling” function of the status ought to be, in some way, reflected in the status itself that is in its content. What does the idea informing the status of person – its underlying function – tell us about what content of the status is (ought to be)? In other words, what does it mean that an entity is able to participate in the legal game? What does this ability consist of?

Let us take up the example of the game of baseball. Although I am no expert on the game, I am nevertheless certain that its constitutive rules distinguish between those who are active participants of the game (the players) and those who are the passive objects of the game. Whether or not there is a precise rule with regard I am unsure, but that matters little because other rules of the game surely explicitly distinguish between different types of players, such as the pitcher, the batter, the shortstop etc., and ascribe to each of these types of players certain powers to make certain actions within the game with the respective objects of the game. They also preclude these players from performing certain actions by virtue of the role that they occupy and provide sanctions for their violations. Likewise, the rules also distinguish between different types of objects in the game, like the base-ball, the bat, the bases etc.

The reason why I said that it is irrelevant whether or not there is an explicit game rule that distinguishes between players and objects of the game is that the rule of the game by explicitly constituting the different types of players also simultaneously determine that all these players are, as such, capable of playing the game itself. Thus, the players’ general capacity to play the game is implied by the fact that the rules of the game consider them either pitchers, batters etc. The same holds for the legal game: legal rules that ascribe different statuses to individuals or provide for their capacity to obtain a given legal status or an individual right implicitly presuppose (and re-affirm) that the individual has the general capacity to have legal rights and duties; that she is, in other terms, a person. An explanation that would run counter to this general idea would seem to me quite senseless: how could some entity that is not generally recognized as a person in law and thus capable of holding the generality of legal rights and duties be also capable of being or be), let say, a university

professor or a prisoner? Such an arrangement, though not unknown in our history, strikes me as utterly illogical.

On the basis of the above said, I stipulate that the content of the status of a person in law (that is, the normative consequences or the entitlements attached to the status) is a general *legal capacity* to hold legal rights and bear legal duties. In other words, the capacity to play the legal game. It is only in further instances that legal subjects are distinguished on the basis of different types of capacities and incapacities to perform specific legal acts or to hold specific rights and duties.

The concept of legal capacity is crucial for this investigation and I will soon have more to say about it (below, 3.1.1.). But I should finish this general presentation of the idea of the status of person as a (intermediary) legal status by saying something more on the connection between the content of the status and the access criteria. We have come to argue that there exists a strong interrelation between the two elements of the status. While we needn't go so far as to argue that there exists a functional connection between them (from the entitlements to the access criteria), we must nevertheless admit that the access criteria do, at least in part, depend on the function (rationale) of the status – and thus indirectly on its content. When it comes to the status of a person, a status with particular fundamental importance in law, we may furthermore claim that the access criteria depend on more than just the internal, purely instrumental function of the status itself. It can be said that the access to legal personhood, being a particular threshold status, is, in part, determined also by the deeper social convictions about who (or what) ought to be recognized as a person in law. This issue will be further touched upon below (see 3.2. and 3.3.).

3.1.1. Specifically on legal capacity

“Legal capacity”, as the purported content of legal personhood, is both an ambiguous and a vague notion and as such of little use for our further analysis. It should, therefore, be adequately specified.

The term “capacity” alludes to someone’s ability to do something, to perform a certain action. If, for instance, I have the capacity to break the world sprinting record, this means that I have the adequate physical abilities to run faster than anyone else in the world. Clearly not all

(types of) human beings have the same natural capacities: young children, for instance, are not able to perform most of the actions that adults can. It would therefore be senseless to argue that all human beings, as such, have the same capacities. Yet, in law, the notion “legal capacity” is widely understood as meaning the general and equal characteristic of all (natural) persons for being the (potential) subject of the generality of legal relations of a particular legal order (Cuniberti 2006: 476). Often it is even understood as an intrinsic quality of the person that, as such, cannot be taken away from anyone (Alpa & Ansaldo 2013: 73, 232).

However, just as in real life, in law as well it makes little sense to speak of one, general and equal legal capacity. As young children are both physically and intellectually more limited than adults, it should follow that they should not have the same legal capacity as adults. Depending on their age, they are more or less incapable of understanding the long-term effects of many, if not all, of their actions and hence cannot assume responsibility for them. This, in consequence, is (should be) reflected in law as their inability or limited ability for entering into legal (contractual) relations on their own. Law then, does in fact distinguish between different types of capacities in law.

Neil MacCormick (1988 & 2007) proposes to distinguish between (i) passive capacity and (ii) active capacity; he then proceeds to further distinguish (i.i.) pure passive capacity and (i.ii) passive transactional capacity, on the one side, and (ii.i.) capacity responsibility and (ii.ii) transactional capacity, on the other side.

(i.i) As for the *pure passive capacity*, MacCormick argues that it is “an entity's capability in law to be the beneficiary of some legal provision or provisions, in the sense that these provisions are interpreted as aiming at protecting such an entity from some harm or at advancing some interest or another of that entity” (MacCormick 2007: 86). In other words, it is “the condition of being eligible to receive the protection of the law *for one's own sake* rather than as a means to some other end for its own sake” (MacCormick 2007: 94).

It follows from the above definition that whether something will be perceived as having pure passive capacity – and in this very limited sense be considered a person, will ultimately depend on our interpretation of the “justifying grounds” of a particular law or legal provision. For example: a law criminalizing an assault on another individual will normally be interpreted as safeguarding the bodily integrity of human beings. Hence, it can be argued that the presumed aim of that provision is aimed directly at protecting a given interest of human beings. On the other hand, MacCormick gives an example of a law prohibiting demolition of

historic buildings and argues that the interest protected in this case is presumably not that of the physical identity of the buildings but rather the advancement of cultural interests of human beings. Here, then, the protected good is only a means for the advancement of someone else's interests). Finally, MacCormick argues that the case of animal protection laws is in this regard a controversial example with some interpreting them as protecting certain human interests and others as directly protecting animal bodily integrity (see MacCormick 2007: 86).

(i.ii) *Passive transactional capacity* is defined as the “[c]apacity to take the benefit or the burden created through a certain transaction” (MacCormick 2007: 87). It is, adds MacCormick, “the capacity to be acted upon with legal effect through some form of legal transaction or act-in-the-law, whether the effect be beneficial or detrimental” (Ibid.). This capacity, then, is relative to legal transactions or other (unilateral) legal acts. In the case of a legal transaction, say a contract, it is of course necessary that at least one of the parties possesses adequate active capacities in order for the transaction to be legally valid. The active party must perform her act(s) “toward or for the behoof of some other, or effecting the imposition of some legal burden on another” (MacCormick 1988: 382). Of course, the passive party (the recipient of the benefit or of the burden) must also be itself capable of obtaining the intended benefit or burden. For instance, in the provided examples of this capacity, which include being the beneficiary of a promise although incapable of making a binding promise or becoming the owner of a property by gift even if incapable of managing it (Ibid.), a human infant (and in certain cases even an unborn human being) can undoubtedly be the recipient of such acts-in-the-law, whereas a body of water, such as a river, cannot. Animals are again a disputed case.³⁶

According to MacCormick, passive capacity is the threshold that distinguishes persons from non-persons: “possession of some at least minimal legal capacity or capacities is of the essence of personatness in law” (MacCormick 2007: 94). There is no need that, in order to recognize it as a person in law, an entity be empowered with a full set of legal capacities. Rather, “passive capacity is fully conceivable as inhering in some being or entity wholly lacking in any active capacity. Possession in some measure of some range of passive capacity should be considered the minimum element of legal personatness” (MacCormick 2007:

³⁶ Cfr. Kurki 2017: 150–157.

88).³⁷ It is precisely for situations in which particular entities lack active capacities to carry out legal transactions (to “enforce, secure, uphold or vindicate” their own rights), “that various devices of *representation* have been evolved or developed by law. These ensure that some person having active capacity in law is made responsible to act for the interest of the person endowed with purely passive capacity (MacCormick 2007: 88; emphasis mine). A typical example of such representation is the obligation of parents to care for and administer their under-aged child’s property.

When determining to whom legal personhood can and ought to be ascribed, what matters in the final instance is whether “some state of affairs is conceived of sufficient value to merit some legal protection for its own sake” (MacCormick 2007: 88). What this is so, continues the author, “it may even be the case that conferment of some minimal personate status *even on inanimate objects* can be considered a useful device” (Ibid.; emphasis mine). The attribution of such a “thin” legal personhood does not even require that the recipient entity be endowed with certain “natural human or at least animal capabilities” (Ibid.). This goes to show that virtually any type of entity can be attributed with this kind of legal personhood, regardless of its natural capacities. What matters, is that “the law” perceives that there is sufficient value in some state of affairs and decides to protect it “for its own sake”.

Passive capacities, however, are only one part of the system. The whole purpose of law and legal personhood is, as I have come to claim, to enable different entities to actively participate in the legal game, to engage in legal transactions. As MacCormick reminds us, if law is to be seen as (function as) an action guiding mechanism, the idea of active capacities – and of actively capable agents – must necessarily, albeit implicitly, be present in a legal system (see MacCormick 1988: 385f & 2007: 90). In general, “the (active) legal capacities a person has are the conditions in law of his or her being able to act with full legal effect either in the way of committing some wrongful act or exercising some liberty of action, or in the way of effecting some legal transaction” (MacCormick 2007: 89-90). Thus, the paradigmatic examples of a person in law cannot be a purely passive person, such as a child. It is, rather, a person that possesses “a full range of passive and active capacities” (MacCormick 2007: 95). Paradigmatic examples of such persons are adult human beings of sound mind.

³⁷ This seems to be in accordance with Allen’s view, for he claims that the passive capacity (to enjoy rights) is “an absolutely essential characteristic of personality and can never be divorced from it” and that “[t]o say that a person has capacity for enjoying rights is merely to say that he is a person.” See Allen 1930: 291.

This distinction between fully legally capable adults and only passively capable children goes to show that active capacities are “by law made dependent on enduring (though not necessarily permanent) features of a person” (MacCormick 2007: 90). These features are, of course, legally determined and can either be non-institutional, such as age, gender, mental competence etc. or institutional, such as citizenship, matrimonial status, solvency and so forth (Ibid.). In our example, the justifying ground for limiting the active capacities of children is their limited cognitive capacities which prevent them from being able to fully comprehend the complexities involved in legal transactions, especially the possible consequences of assumed burdens. MacCormick distinguishes between *capacity-responsibility* (ii.i) and *transactional capacity* (ii.ii), respectively.

(ii.i) *Capacity responsibility* regards the question “whether or not one can be subjected to criminal or civil liability to sanctions for one’s acts” (MacCormick 2007: 91). This capacity, MacCormick emphasizes, should be distinguished from “capacity-for-liability”, i.e. the capacity to be held liable, which is a form of passive transactional capacity. Most often the two will go hand in hand, but they needn’t. Very young children, for example, cannot, according to (modern) law, form a criminal intent – they do not have the capacity to act and thus cannot commit a crime (i.e. cannot be liable to be held legally guilty of crimes). On the other hand, for some special reason like in the case of diplomatic immunity, individuals are not deemed incapable of acting (thus have the capacity to act), but they are incapable of being held liable for their actions. Here we should also mention the special case of (US antebellum) slaves who though they were not considered persons in law, were nevertheless held criminally liable for their acts.³⁸

As law is, in general, a system for governing the actions of rational agents, capacity responsibility is its fundamental feature. “It is this ability which is essential to either being judged a wrongdoer or being deemed one who does no wrong in respect of some given act or omission” (MacCormick 1997: 92-3). Capacity for responsibility necessarily complements other active capacities such as the capacity to enter into contracts. That is because, as Kurki notes, if individuals were “merely able to perform legal acts but could not be held criminally and/or civilly responsible, their practical ability to contract would be severely diminished because any potential contractees would have limited legal recourse in the case of non-fulfilment” (Kurki 2017: 157).

³⁸ See more on that in Fede 1992: especially Ch.8.

(ii.ii) Finally, MacCormick defines *transactional capacity* as the “ability to exercise legal power, that is, to perform some act which is deemed to bring about some valid legal effect” (MacCormick 2007: 93). This effect can be seen, for example, in limiting a particular liberty (e.g. giving a valid promise – non-performance becomes a wrong towards the promisee) or, alternatively, in making permissible something that would otherwise be prohibited (e.g. by giving one’s consent for a surgical intervention, one allows that his bodily integrity be violated) (see MacCormick 2007: 93). Capacities for transactions are actually numerous and certain types of transactions often require additional conditions to be met. Surely the most typical example of transaction capacity is the contractual capacity.

MacCormick emphasizes that the significance of the exercise of a legal power and in the consequent creation of a “valid legal effect” is in the “judicial enforceability of sanctions for legal wrongs” and in the consequent “judicial duty to give effect by enforcement to all validly established legal relations and arrangements” (MacCormick 2007: 93). The key notion in this is then the creation of “valid legal effect” through acts-in-the-law.

Power-conferring provisions, however, are subject to a condition “which determines which kinds of persons having what characteristics can bring about this result by a relevant act (MacCormick 2007: 93-4). Thus, just as capacity responsibility, transactional capacity is likewise subject to qualification. Normally, only entities possessing certain personal characteristics (e.g. a certain age, being of sound mind etc.) may exercise certain powers (such as making a contract, transferring property etc.). The most classic case of such a restriction is the limitation of the contractual capacity of children due to their age (and, as a consequence, their limited intellectual capacities). However, as they mature, children are gradually acknowledged more and more competences to engage in legal transactions on their own. Hence, sometimes between transactional incompetence and full transactional competence intermediate categories of limited competences are also constructed.

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The person in law is not, as it has emerged from the above presentation, a static and a uniform status; depending on which types of legal capacities an individual entity possesses, its legal personhood can either be thicker or thinner. The thinnest persons in law possess only the passive capacity for being beneficiaries of some benefit provided by the law; seen from a different perspective, it suffices for some entity to be recognized as a person in law that a

single right-claim be ascribed to it. On this side of things hardly any limit exists as to what kind of an entity may be treated as a person.

On the other side of this personhood spectrum, the thickest persons possess all four types of capacities to the fullest degree. These persons are, at least in principle, fully capable of performing any act-in-the-law on their own and for their account. Of course, in order for an entity to be endowed with such personhood, it ought to possess certain physical (cognitive) capacities, particularly it should be sufficiently intellectually developed in order to express its own will freely and be able to comprehend the consequences of its actions. Adult human beings of sound mind are paradigmatic examples of this thick kind of persons in law.

While in this section I focused on the “entitlements” part of the legal personhood status construction, I will now proceed with examining different theories that regard the “access criteria” part of the same status.

3.2. Who is law for?

It is typical for legal scholars to ponder the nature of the law as such and the reasons for having law. In so doing they are addressing questions like “*what is law*” and “*what is law for*”. Countless highly divergent and conflicting answers have been provided regarding these questions.

This thesis, however, is not interested in discussing these questions (at least not directly). As has by now become clear, my interest rather lies in understanding who or what can be *a person in* or *a subject of* law. The question that I am pursuing here is therefore something like “*who is law for*” (Naffine 2009: 1). I shall explore what this question entails as I proceed.

The questions concerning the “nature” of the person in law are manifold and the literature on them too vast to be analysed thoroughly. This is why in the present section I do not pretend to be either exhaustive or particularly detailed in my examination of the existing theories of legal

personhood.³⁹ Rather, I will only provide a basic overview of the most distinct scholarly positions on the matter.

I imagine that for many lawyers the question “*who is law for*” might appear trivial, if not senseless. Most would tell you that law is, of course, for people, human beings.⁴⁰ Law exists to guide *human* behaviour, to protect *individuals’* interests, resolve *inter-personal* conflicts, and so forth. The law is made *by* humans, *for* humans. All other (living) entities feature in law merely as the objects of man’s actions and relations.

Upon further consideration, however, these lawyers would probably tell you that, as a matter of fact, law considers as its subjects not only human beings (who in law are called *natural persons*) but also certain non-human entities, the so-called *juridical persons*. A typical example of such a juridical person is the corporation.⁴¹ While these entities are not human – indeed they are not even physical entities, but rather institutional ones⁴² – the law nevertheless ascribes legal personhood to them as well as imputes them with rights and duties as if they were their own.⁴³ But even though the rights and duties ascribed to a juridical person are legally its own – and not of those human individuals who own or operate it –, the underlying reason for constructing and maintaining this legal fiction⁴⁴ is ultimately the satisfaction of certain interests and needs of human individuals that might otherwise not be protected or satisfied.

It follows from the above said that although the terms person and human being (man, individual etc.) are strongly connected, they should not be equated.⁴⁵ In law, the notion of person has always had a very technical meaning, different from the meaning it is attributed in ordinary, everyday language. It is highly likely that any trained lawyer, regardless of her

³⁹ Neither does it pretend to be historically detailed. For the conceptualization of the person in Roman law, from where the notion originates, see for instance Marrone 2006: 186-274; for a concise historical overview of the legal status of the person, see Orestano 1978: Part III; Tarello 1976 & 1978; Viola 1999; Zarka 1999; Davies & Naffine 2001: 57ff;

⁴⁰ Hohfeld, for example, is categorical about this. He argues that “since the purpose of law is *to regulate the conduct of human beings*, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings.” (Hohfeld 1923: 75; italics are mine).

⁴¹ Kelsen, for example, defines the corporation as “a group of individuals treated by the law as a unity, namely as a person having rights and duties distinct from those of the individuals composing it” (Kelsen 2006: 96). For a classical examination of the corporate legal personhood, see Dewey 1926.

⁴² On institutional facts see more in Searle 1995.

⁴³ According to Kelsen, “[a] corporation is regarded as a person because there the legal order stipulates certain legal rights and duties which *concern the interests of the members of the corporation* but which do not seem to be rights and duties of the members and are, therefore, interpreted as rights and duties of the corporation itself” See Kelsen 2006: 96 (italics are mine).

⁴⁴ On legal fictions in general, see Fuller 1967.

⁴⁵ Cfr. McHugh 1992.

philosophical or religious background, will tell you that the proper meaning of the notion of person *in law* is something like “the holder, or potential holder, of rights and duties” or “a rights-and-duties-bearing unit” and that as such it is primarily a formal legal construct which is not to be mistaken for the natural human being (cfr. Naffine 2009: 1).⁴⁶

This, however, does not mean that law does not also establish a necessary connection between the two notions: in numerous legal orders you find provisions establishing, for instance, that legal capacity is acquired at birth. It can be argued that in this way law implicitly presupposes that legal capacity, as the (supposed) content of legal personhood, can be acquired by, and only by, human beings.⁴⁷ While today it may be an established normative principle that all human beings are to be considered persons in law, this, however, is neither historically true nor conceptually necessary. Historically speaking, we need only to look back some 150 years to see that certain human beings were not, just because of the colour of their skin, considered persons in law, but rather treated as objects of law, mere property.⁴⁸ As we will see later on, this problem has even today not entirely disappeared (see below, Part II: 6.1.). On the conceptual side of things, we see that the logic behind the *technical-legal sense* of the notion may lead to the conclusion that the person in law could be “anyone or thing that the law is willing to endow with the capacity to bear rights and duties” (Naffine 2009: 7). Indeed, if legal personhood is understood technical sense of the word, “[t]here are no logical or formal limits to who or even what might be considered a suitable subject for the bearing of rights and duties” (Naffine 2009: 7).

Many, however, would probably object to such an “empty” formalistic and extensive understanding of legal personhood. The most radical opponents of such an approach would argue, I imagine, that the law(-giver) should not be artificially “inventing” its subject, devaluing in this way the central and very special place human beings have in our world. Instead, law should but “discover” its subject. On this perspective, “law is always confronted with prior natural subjects of rights (real persons before the law in both a temporal and spatial sense) to which personifying legal rights and duties must be fitted in a manner which honours their nature” (Naffine 2009: 2). Thus, the law’s subject should be merely a reflection of an *a*

⁴⁶ The “legal-person-as-right-holder” position is the paradigmatic and the predominant view of the person in legal scholarship. However, recently it has been challenged by Kurki (2017). I will briefly mention his challenge in the next section (3.3.).

⁴⁷ See, for instance, Art.1 of the Italian Civil Code or Article 8 of the Polish Civil Code.

⁴⁸ On the question of slavery, see for instance: Dayan 2011; Fede 1992; Fehrenbacher 1981; Haney López 2006; Harris 1993; Patterson 1982. In general, on the issue of the creation of “equal” legal subjectivity, see Tarello 1976 & 1978.

priori existing moral person – however this latter may be defined. While lawyers subscribing to this view of legal personhood might disagree about what it is that makes human beings special (be it their rational nature, being made in God’ image, or something else) and in this way also disagree as to the proper extension of legal personhood, they would nevertheless agree that “the legal person is an expression of some important defining attribute of human nature” (Naffine 2009: 22). Hence, on this view, the criteria for attributing legal personhood are always *pre-* or *extra-*legal.

The above said leads us to think that in the contemporary discussion on legal personhood we are presented with a clear-cut choice: we either accept that the person in law is an artificial creation whose extension depends exclusively on criteria determined by the law(-giver) itself (the *formalist* approach) or, alternatively, we acknowledge that the law’s person is only a reflection of a law-independent, *a priori* existing moral person (the *Metaphysical Realist* approach).⁴⁹ *Tertium non datur.*

Whether or not these two positions are actually the only way we can think about the person in law remains to be seen. Undoubtedly they have been the predominant views on personhood for much of our history. However, regardless of the answer to this problem, one thing appears to be clear in all this: whichever the philosophical perspective they espouse, scholars agree that the concept of the person in law is in some way special or fundamental and stands at the very centre of law. This importance of the notion of person for law – and beyond – is well expressed by Naffine:

Through its concept of the person, law helps to define who matters. The scope and nature of legal personification are both barometers of social and moral thought and the means of practically enforcing those ideas: of giving them the force of law. Law thus absorbs, reflects and expresses ideas in the broader culture about what and who is of value and why (2009: 11).

What this quote reveals, is that the legal conception of the person is fundamentally related to social (moral) ideas about who matters. The judgment as to whom (a particular kind of) legal personhood will be ascribed is, at least in part, a reflection of some more basic social agreement – with “agreement” understood in a very loose sense – as to which entities (beings) deserve respect for their own sake and which, alternatively, are seen as only instrumental for the good of the former.

⁴⁹ Cfr. Brožek (2017: 7) who, differently, claims that the 20th century debate on the notion of personhood has developed along two positions: the descriptive conception which defines the person according to certain empirical criteria, such as the ability to feel, self-awareness, autonomy etc. and the axiological conception which sees the person as “a bearer of values and hence a moral agent, responsible for her actions”.

Any such underlying social agreement does not, in my opinion, necessarily repudiate the formalist approach to personhood. This is so, because, as Fagundes notes, the law does more than just express or reflect social ideas: it also “shapes behavior by creating social norms that people use to measure the morality and worth of their actions” (2001: 1760). If the law changes peoples’ *actions*, we speak about its “the behavioral effect”, whereas if it changes their *beliefs*, we speak of its *hermeneutic effect*. Fagundes argues that in reference to the law of persons, the hermeneutic aspect of law’s expressive function is especially relevant:

When the law manipulates status distinctions through the use of the metaphor ‘person,’ it necessarily expresses a conception of the relative worth of the objects included and excluded by the scope of that metaphor. These expressions then affect general understandings of personhood and regard for the objects of the law, as the law’s values influence society’s value (Fagundes 2001: 1760).

This is corroborated by Naffine, who argues that by distinguishing who counts as a person and who does not, the law “powerfully assists in the determination of the normal and the abnormal, the intrinsically valuable and that which is mainly for use” (Naffine 2009: 11). Thus, while the underlying social views on the issue are streamed into law, they needn’t be the exclusive source that informs the law’s person. The law may (semi)autonomously develop its own conception of the person, providing its own criteria for status-attribution. By doing so, the law also feeds this “new” notion of the person into society, in this way – at least partly – modifying the society’s views on the matter.

Two types of theories on legal personhood have been identified in this somewhat longer introduction, namely “formalist” and “substantive” ones. In Naffine’s terminology they are called Legalists and Metaphysical Realists, respectively.⁵⁰ In the first subsection (3.2.1.), I present the “formalist” conception of personhood in general and Hans Kelsen’s in particular. Thereafter (3.2.2.), I discuss several different substantive or “realist” theories of personhood.

3.2.1. A formalist approach to personhood

Those who subscribe to the formalist account of personhood, “represent the orthodox, technical approach to law’s person” (Naffine 2009: 21). On their view, the notion of the person is constructed exclusively within the confines of the law itself: “the concept of the

⁵⁰ The distinction can also be put, very roughly speaking, in more familiar terms as one between legal positivists and natural lawyers. See Davies & Naffine 2001: 52.

person is internal to law and essentially a matter of formal legal definition” (Naffine 2009: 22).

Formalists believe that law(yers) should not engage in extra-legal, ontological determinations. That doesn't mean that they reject the possibility that there exists some “real” person beyond the law, in the natural world – neither do they affirm it. Rather, they are silent on the matter and believe that it is unnecessary and undesirable to seek for law's person outside of the realm of law – be it in philosophy, biology, psychology, religion etc. (see Naffine 2009: 22). For them, legal personhood is not the law's recognition of some special nature of certain entities, for instance, of the human beings' cognitive superiority over all other beings. On their view, there is “no necessary relation between any given set of human characteristics (say, the ability to reason and reflect) and legal personality” (Davies & Naffine 2001: 54). Instead, they see legal personhood as merely an instrument, “a formal and neutral device for enabling a being or entity to act in law, to acquire what is known as a ‘legal personality’: the ability to bear rights and duties” (Naffine 2009: 21).

Considerations regarding the attribution of legal personhood are therefore primarily instrumental according to this view. For example, a foetus may be ascribed legal personhood for the purpose of inheritance law, but denied the status when it comes to the issue of abortion (see Thomas 2011: 633). For the formalists, the ascription of personhood is not dependent upon ideological consideration that advocates, for example, that all human life is sacred and should thus be protected by law from conception onwards. Rather, the ascription of personhood “depends on, and is formed from, specifically legal purposes” (Naffine 2009: 21).

Followed to its logical conclusion, this argument holds that the extension of legal personhood, i.e. the set of entities to which legal personhood can be ascribed, is not *a priori* delimited. If there is no underlying ideology (philosophy) determining who or what can be a person and if the law-giver is free in this respect to follow her instrumental considerations, then it seems the case that (more or less) “anything goes, anything or anyone can be endowed with rights and so become a legal person” – “as long as it is compatible with the purpose of any particular law” (Ibid).⁵¹

⁵¹ Cfr. Lawson (1957: 915): “All that is necessary for the existence of a person is that the *lawmaker* ... should decide to treat it as a subject of rights and other legal relations. /.../ Once this point is reached, a vista of unrestricted liberty opens up before the jurist, unrestricted, that is, by any need to make a person resemble a man or a collection of men” (emphasis mine).

Hans Kelsen can be considered a typical representative of the formalist position on the question of legal personhood. Let us briefly examine his position.

In his treatment of the person, Kelsen is true to his Pure Theory which fervorously distinguishes between the world of facts and the world of norms (see Kelsen 2002 & 2005). The two worlds are to be neatly distinguished and “[n]obody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa” (Kelsen 2005: 6). Concepts belonging to one sphere should therefore not be mixed with those belonging to the other. It is therefore understandable that Kelsen was critical of the traditional definitions of the person which held that the person is “the human being as a subject of rights and obligations” (Kelsen 2005: 171; 2006: 94).

First of all, on Kelsen’s view, the above statement is incorrect, because an individual cannot be a subject of a right or a duty; she cannot “have” rights and duties. What this statement is actually to mean is that “a certain behavior of this individual is the content of a legally established obligation [or right]” (Kelsen 2005: 169). Legal cognition, therefore, is not interested in and does not deal with the individual as such, with the human being *tout court*, but only with her conduct insofar as it is the content of legal norms. Most of one’s actions lie outside of law’s domain so that only a part of her actions, those that are the content of legal norms, are of law’s interest. For instance, it is usually of no concern to the legislator whether citizens drink their tea with milk or not; the legislator, however, usually is concerned with whether or not citizens pay their taxes. Only such actions, then, are relevant for the concept of the legal person. If the individual human being cannot “have” rights and duties, it is therefore only the person that has them. “The person”, says Kelsen, “exists only insofar as he ‘has’ duties and rights; apart from them the person has no existence whatsoever” (Kelsen 2006: 94).

This leads us to a conclusion I emphasized in the introduction to this section: namely, that the the human being is not the physical (natural) person. The two concepts belong to two completely different worlds: the human is a concept of the natural sciences (the world of facts), while the person is a jurisprudential concept (the world of norms).⁵² The traditional definition of the person should therefore be rejected.

However, according to Kelsen, it is also not correct to say – as I just did – that it is the person that “has” rights and duties. That is because, on his view, “the physical (natural) person is the

⁵² See more on that in Paulson 1997: 225ff.

personification of a set of legal norms which by constituting duties and rights containing the conduct of one and the same human being regulate the conduct of this being” (Kelsen 2006: 94f). It would be redundant and incorrect to say that the person has rights and duties: the person is no real entity that can have anything. It is but a legal construct and as such its only existence is as a personification of a specific set of legal norms. Its connection with an individual human being is in the fact that the personified set of norms refers to the actions of one and the same human being (Kelsen 2006: 95). Thus, although the person is an artificial, purely legal construct, the rights and duties that form the person can only have as their content the behaviour of human beings (Kelsen 2006: 95f). What is, then, correct to say, is that the person “is” those rights and duties. As we will later see, this argument represents a huge difficulty for Kelsen as it seems to move him away from his formalist background.

Kelsen of course acknowledged that other entities too can be recognized as persons in law: traditionally, there have been other subjects of rights and duties that were not human beings – such subjects or persons are normally called “juristic persons”. We have already seen (above, 3.2. fn. 41) that for Kelsen a corporation, as the typical juristic person, is “a group of individuals treated by the law as a unity, namely as a person having rights and duties distinct from those of the individuals composing it” (Kelsen 2006: 96). Here the same logic as before applies: just as it is not really the human being that is the subject of rights and duties, but rather that these rights and duties “belong to” or “are” the (natural) person, so too the juristic person is not real the subject of rights and duties ascribed to this fictitious entity. The juristic person does not itself act according to its rights and duties. In the end, all rights and duties of the juristic person refer to the behaviour of human beings, even if only indirectly. It follows that the relation to a human being cannot be the *differentia specifica* of the natural person. Hence, on Kelsen’s view, the “natural” person – being a legal construct and not a real-life entity – is also, in this sense, a “juristic” person. If this is the case, then another important conclusion follows: “If the so-called physical (natural) person is a juristic person, there can be no essential difference between the physical (natural) person and what is usually exclusively considered as a ‘juristic’ person” (Kelsen 2006: 96).⁵³ Hence, instead of with two concepts of person, Kelsen only operates with one.

We should add, however, that Kelsen was wary about using the notion of legal or juristic person – for either type of entities. His reason for doing so was double: first, because he saw

⁵³ More on Kelsen’s conception of the juristic person in Kelsen 2005: 174–191; 2006: 96–109.

the anthropomorphization of the legal person as a source of great confusion in legal theory; second, because he wished to avoid the suggestion that his theoretical concepts are fictions. For this reason, he preferred to employ the notion “points of imputation” (cfr. Kelsen 2002: 48).⁵⁴ Points of imputation, said Kelsen, are normative reference points in the legal system to which acts are attributed. By imputation “the legal character of the act is established” (Paulson 1999: 33). Imputation, in other words, is attribution (of an act) and “that to which the act is attributed is a point of imputation” (Ibid.).⁵⁵ The person is such a point of imputation: it is a point to which all rights and duties referring to the same human beings are imputed. Hence, the person as a point of imputation is simply “a shorthand for a *cluster of legal relations*” (Ibid.).

The (mis)fortunes of the formalist approach

Before turning to the substantive theories of personhood, let us shortly review some critiques – as well as advantages – of the formalist approach to personhood.

Naffine shows that the formalist approach appears to have one significant advantage: namely, “that legal persons can be whatever and whoever law is willing to let them be. There is room for immense legal creativity: for a proliferation of personality. Within law, it would seem, we are permitted to assume a wide variety of personae” (Naffine 2009: 45).⁵⁶ Put in other terms, in the formalist approach to personhood – at least in Naffine’s reading of it – the access criteria of the status of a person are not pre-fixed, but rather variable and flexible. Legal personhood is not understood as the legal recognition of a pre-existing natural fact that somehow makes it necessary to ascribe legal personhood to all entities have that characteristic. Rather, legal personhood is a purely instrumental notion, a tool for achieving specific legal goals, independent from any extra-legal considerations. The flexibility such an understanding of legal personhood allows the legal operators must surely be welcomed thing.

⁵⁴ His reason for doing so is double: first, because he saw the anthropomorphization of the legal person as a source of great confusion; second, because he wished to avoid the suggestion that his theoretical concepts are fictions. See Paulson 1997: 227.

⁵⁵ Cfr. a somewhat broader definition of imputation by Ferrajoli (2007: 187), who argues that imputation is the ascription to a subject of any given modality, expectation or behaviour.

⁵⁶ Cfr. also Naffine 2009: 31.

However, Naffine is also critical of the formalist approach. She argues, first of all, that this liberty in determining the person is often interpreted in terms of an obligation to “exploit this freedom fully” (Naffine 2009: 31). In other terms, the formalist lawyers are often completely unwilling to look beyond their approach – “to contemplate the way in which other understandings of the person might find their way into law and influence real legal doctrine and real people who are regulated by law, which may thus enrich their understanding of their subject.” (Naffine 2009: 32).⁵⁷ The formalists, this objection goes, appear to be stuck in the abstract universe of theoretical concepts and out of touch with the diversity of views in the legal practice that actually inform the concept. Hence, in the legal practice, the formalist approach cannot function. “Law-makers do not, nor cannot, simply content themselves with the Legalistic assertion that the legal person is a legal device which can have any content and then proceed to personify it with complete licence” (Naffine 2009: 45). When faced with particular situations, legal operators (law-makers, judges etc.) must always decide “about who and what is to count for any particular legal purpose” (Ibid.). The point is that whenever we are faced with particular legal situations a certain philosophical – ideological, if you will – basis always informs the choices regarding the attribution of legal personality. Hence, the formalist approach is unsustainable.

This critique seems to be somewhat ill-founded. First of all, because the formalists themselves do not appear to hold that the choices in this regard are completely unbound. You will remember that even the one radical claim as to who or what can be deemed a person in law came with a qualification, namely that anything or anyone can be ascribed legal personhood “*as long as it is compatible with the purpose of any particular law*” (emphasis mine; see above). This shows that even the most fervent formalists appear to admit that there are certain *functional limits* to who or what can be a person in law. The attribution of personhood is, in other words, at least in part, determined – and delimited – by the function of the status-ascription.⁵⁸

Beyond this, Naffine’s critique seems to be founded upon an inexact representation of the formalists’ claims. Naffine argues against the formalist approach by saying that in any given

⁵⁷ Naffine (2009: 32) continues her critique by saying that, in the final instance, “[l]egalism even becomes irresponsible when it refuses to reflect on whether it is a good thing for Rationalist or Religious or Naturalist ideas of the person to determine the content of legal personality.”

⁵⁸ Similarly, Jessica Berg (2007), as far as “juridical persons” are concerned, argues that while there may be few, if any, *legal* limitations on the legislator’s freedom to designate as a juridical person whichever entity it might desire, there are *conceptual* limits to that freedom.⁵⁸ She suggests that the extent of rights “accorded a particular juridical person should follow from the reason for the designation” (Berg 2007: 380).

context, be it in adopting a law or a judicial decision, the deciding authority will always have to make a choice as to who or what will be considered a person – and this choice is always based in some substantive consideration. But while this may be true, it needn't count as an objection against the formalists. As Thomas notes, “Legalists need not deny that, in particular contexts, the law makes claims, or relies on tacit assumptions, about the nature of persons. ... Nor must the Legalist deny that these claims or assumptions about persons are sometimes drawn from lawmakers' extra-legal, metaphysical conceptions of personhood” (2011: 634). All that the formalists (need to) claim is that the concept of person in law “is not built around any *fixed* or *singular* conception of the person” (Ibid.), that is, that in law as a whole, there are great inconsistencies and a diversity of views informing the concept, so much so that it is impossible to provide a single definitive answer as to who is the law's person.⁵⁹

Finally, with regard to Kelsen's approach to legal personhood – and more specifically regarding his use of the notion “point of imputation”, Paulson (1999) points to several difficulties. We have seen that Kelsen adopted this notion instead of the more traditional notion of legal person in order to escape the objection of basing his theory on fictitious terms. He argued that points of imputation are notions appertaining exclusively to the legal system and thus can only be perceived by means of normative cognition. As such, they are “the proper objects of normative cognition, as ‘real’ as anything in the legal system can be” (Paulson 1999: 37). The problem that Paulson notes, however, is that the points of imputation, which represent legal subsystems, refer to other points of imputation at more fundamental levels. Finally, these points of imputation make reference to the legal system itself – which is the final point of imputative reference. But, says Paulson, what is its basis? The answer is that the legal system, as the final reference point of imputation must presuppose itself (Ibid.). If this is so, says Paulson, we have a clear case of a *petitio principii*. “If the notion of the legal system must presuppose itself, then far from providing an independent ground for assessing Kelsen's scheme of pure constructions, the notion simply poses anew the question as to the basis of these constructions” (Paulson 1999: 38).

On the other hand, by using this notion Kelsen sought to escape the widespread problem in the legal theory of the time: anthropomorphization. He believed, as we have previously emphasized, that the world of facts and that of norms are to be clearly distinguished. In this

⁵⁹ Similarly, Brožek argues that “[t]o this day the notion of the person in law (the physical person and the legal person) has a technical character and is not connected with any *concrete* philosophical content” (2017: 8; emphasis mine) and that it can be shown that “legal regulations do not presuppose any concrete philosophical view of the person” (Ibid.).

optics, the human being is out of reach for the legal science – the latter can only deal with its own, purely legal concepts, concepts precisely like that of “point of imputation”. If we subscribe to this methodological dualism we must admit that there can be no connection between the world of facts and the world of norms; between the notions of human being and that of point of imputation. However, we have seen that Kelsen also argued that in the final instance rights and duties that are imposed upon the person have as their content the actions of human beings. Hence, as lawyers we should admit of a fundamental connection between these two worlds. The two claims together, of course, are antinomous (see Paulson 1999: 38–40) and Kelsen’s theory seems to be inconsistent.

3.2.2. Substantive approaches to personhood

Metaphysical Realists believe that “the legal person is an expression of some important defining attribute of human nature” (Naffine 2009: 22). Differently than the Legalists, the Realists all believe that the person in law is not some artificial construct, but rather that it is a real-life entity which the law ought to recognize as such. The reason an entity is considered a person (in real life and consequently in law) is, we said, due to some special, essential characteristic of hers. Whatever this personhood-defining feature may be, the law should identify it and reflect it in its (legal) subject (Ibid.).

Although Realists differ as to the exact basis for personhood-attribution and, in consequence, regarding the extension of personhood, they all agree that the paradigmatic person is the human being – the adult human being of sound mind, I should add –, while also acknowledging that legal personhood may be extended to non-human entities as well (here they mostly refer to corporations).

In the following, I will briefly present three major perspectives falling under Metaphysical Realism approach.

The Rationalists

The Rationalist perspective is informed by the notion of the human being as a rational individual, capable of autonomously adopting her own decisions as well as assuming responsibility for them.⁶⁰ These qualities, argue the Rationalists, are unique to man and make those who possess them persons – both moral and legal.

In the following passage, Naffine summarizes the basic ideas of this position:

To Rationalists ... the true legal person is the rational human being; legal rights in essence derive from the human ability to reason. Rights run with mental ability or capacity. The focus here is on human autonomy and independence as the basis of rights and personality. Law is for rational human subjects, for sane rational adults, intelligent agents who because of their capacity to reason can assume moral as well as legal responsibility for their actions and so enter into moral and legal community with others of a similarly rational nature. Only practical reasoners, persons who act for reasons, are the type of people to whom law directly communicates its norms (Naffine 2009: 23).

The Rationalist's is arguably the most diffused approach to moral and legal personhood in the Western world. Pietrzykowski, for instance, argues that the "concept of inherent human dignity resulting from the uniquely human capabilities of rational thinking and decision-making" (Pietrzykowski 2016: 14; 2017: 49)⁶¹ lies at the core of Juridical Humanism – the philosophical outlook that underlies contemporary Western legal orders.

The Rationalist view draws, above all, from the Enlightenment philosophy and the liberal social contract theory.⁶² This (fictitious) account of the establishment of modern political society is based on the idea that rational, free and self-interested individuals voluntarily give up a part of their natural freedom in order to join together into a new society that regulates her relations with others by imposing on them laws, thus providing them protection and

⁶⁰ Perhaps the most famous and influential "rationalist" definition of person is Locke's. In his *An Essay Concerning Human Understanding* (Book 2, Ch. XXVII), he writes that the person is "*a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing at different times and places*". Cfr. Moore 2010: 596.

⁶¹ On human dignity see, for instance, Kateb 2011; for a concise argument see Becchi 2012.

⁶² The most influential liberal account of the social contract is of course Locke's from *Two Treatises of Government*.

predictability.⁶³ What the social contract theory allows, above all, is to focus on the importance of the rational and autonomous decision for entering into society. The contract is the *par excellence* instrument of free will and only individuals of sound mind may validly enter into one. The standard set by this account for contractual capacity is a fairly high one. From these premises, springs the Rationalist view of the person as

an active, autonomous actor: someone who is positively able to bear legal duties and to assert legal rights in their own capacity. This person is imagined as an attentive, articulate litigant or defendant, who can appreciate the complexity of law's demands and respond directly and personally, for his own reasons. This is someone who can choose to heed or reject those demands and can fairly be blamed if the choice is made to refuse the dictates of law (Naffine 2009: 60).

This can be called the “robust and sophisticated reasoner” approach or, alternatively, the thick concept of the person.⁶⁴ This view of the person is perhaps most influenced by Kant's philosophy. On Kant's view, man is naturally endowed with reason and morality. The capacity for reason enables her to arrive at the universal law that all rational beings (including herself) ought to be treated not as means (as instruments) but rather as ends in themselves. “[A] rational being”, argues Kant, “belongs as a *member* to the realm of ends if in this realm it gives universal law but is also itself subject to these laws. It belongs to it *as supreme head*, if as giving law it is subject to no will of another” (Kant 2002: 51f). This is the core of Kant's notion of autonomy which, in turn, is central for explaining the dignity of human beings.⁶⁵ Those that are not autonomous are, in Kant's view, no persons at all.

Kant's theory of personhood is purely theoretical or speculative. As Naffine notes, Kant “saw no need to turn to the study of society or anthropology or to any of the empirical sciences for his account of the nature of reason, properly understood” (Naffine 2009: 64), because he believed his moral philosophy to be based on natural, objectively ascertainable laws. This, however, made Kant blind for the true empirical experience of law in which numerous weak, sub-normal or feeble-minded individuals nevertheless participate in the legal theatre. Alternatively, there are scholars who argue that the standard should be lowered and we should rather “seek to define and assert *the minimal cognitive abilities* needed for self-management and self-determination” (Naffine 2009: 60; emphasis mine). These thinkers, for instance,

⁶³ The most influential and well-known historical account of the birth of the modern society is Maine's *Ancient Law* (1906).

⁶⁴ Cfr. Kurki (2017: 8 & 10), who notes that in Western legal systems those who are paradigmatically considered natural persons are i) human beings, ii) who have been born, iii) are currently alive, iv) sentient and are of v) sufficient rationality and vi) age.

⁶⁵ See Kateb 2011.

would acknowledge that mentally impaired adults and young children, to name just two groups, should also count as persons in law. This may be deemed the thin conception of the person.⁶⁶

The “robust” or “sophisticated thinker” conception of the person lends itself well to the so-called *will theory of rights*.⁶⁷ In extreme synthesis, the will theory of rights “says that having a right of some kind is to do with the legal or moral recognition of some individual’s choice as being preeminent over the will of others as to a given subject matter in a given relationship” (MacCormick 1976: 20).⁶⁸ On this view, having, let’s say, a property right over an object, means having the power to determine whether or not and if, in what manner, others may interact with that object. In this sense, right-holders are “sovereigns” over the objects of their rights.

The major downside to this theory of rights is that it “cannot acknowledge any rights in beings incapable of exercising sovereignty” (Wenar 2015) since “sovereignty”, or control over another’s duty, is the essence of the will theory of rights. Thus, it is impossible on this view that young children or the comatose adults would hold rights.⁶⁹

Besides this objection against the will theory of rights and, in general, against the overall theory of personhood, other objections against the Rationalist approach have also been wielded. Naffine presents the following:

First, *the cultural specificity* objection. According to this objection, the supposedly universal character of this rational agent is, in fact, highly culturally specific and belongs to the modern Western world. This world is highly individualistic, with the individual “self” understood as the basic unit of society, whereas in some other cultures, “the self, including its boundaries, is primarily defined in terms of its relationship to others” (Naffine 2009: 76).⁷⁰ That the “rational thinker” view of the person is proper to the Western legal tradition is confirmed by other authors as well (see the Juridical Humanism thesis above). What may, however, be

⁶⁶ More on this conception in Naffine 2009: ch. 6.

⁶⁷ There are two predominant theories as far as the question of the function of rights is concerned: namely, the will theory and the interest theory of rights. For an introductory examination of theories of rights, see Wenar 2015.

⁶⁸ In other terms, “a will theorist asserts that the function of a right is to give its holder control over another’s duty”; or put in Hohfeldian terms, “will theorists assert that every rights includes a Hohfeldian power over a claim” (Wenar 2015).

⁶⁹ For a classical rejection of the will theory of rights, see MacCormick 1976.

⁷⁰ Naffine here quotes Rita Carter (*Consciousness*. London: Weidenfeld & Nicolson, 2002)

problematic with this objection is that it is not clear whether the Rationalists Naffine has in mind actually deny the cultural specificity of their position (see Thomas 2011: 635).

Second, *the staticness* objection. It is said that the rational agent presumed by the law is “a curiously static being: a permanent, autonomous, rational adult, unaffected and undiminished by time and circumstance” (Naffine 2009: 76). Referring to the subject imagined by social contract theorists, Naffine adds: “Not only is he without a birth, but he is without a death. Physical decline and cessation are not parts of the story. He is a perpetual mature adult, possessed of an enduring, abstract, autonomous will” (Naffine 2009: 77). Thus, the theory lacks explanation for all the phases of the human life, from early childhood to old age, in which an individual’s cognitive capacities are not fully developed – being either still underdeveloped or declining.

Third, *the exceedingly rational* objection. Here, Naffine takes up John Grey’s argument about how human beings think of themselves as intelligent, rational agents, while being, in fact, quite different kinds of creatures: the kind “who tend to act unthinkingly, reactively and barely know [their] own minds” (Naffine 2009: 77).⁷¹ Gray, in Naffine’s reconstruction, is quite harsh with the Rationalists and insists that “our actions are not the products of our conscious decisions, of our free will. We are not really rational beings who know our own minds, whose thoughts control our actions” (Naffine 2009: 78). On my mind, while it may certainly be true that human beings are not as rational as the Rationalists would have us believe, the opposite notion that our actions are utterly out of our rational control also seems exaggerated. The truth, I believe, lies somewhere in between: while certain, more complex actions are the results of wilful and deliberate processes, other, simpler and repetitive actions result from unconscious or automatized reactions.

Finally, given the demanding conditions for status-attribution, the Rationalist perspective ends up with a very small batch of potential legal persons. This objection was already raised with regard to the will theory of rights. Here we can repeat that the demanding criteria for status attribution exclude from consideration all those who lack one (or more) of the essential characteristics of personhood: on the one hand, the biologically human beings that for some reason have never (and will never) or do not yet or no longer possess sufficient cognitive

⁷¹ Naffine quotes John Grey, *Straw Dogs: Thoughts on Humans and Other Animals* (London: Granta Books, 2002).

abilities; and on the other hand, it also excludes from personhood non-human animals that are cognitively highly developed – but are not biologically human.⁷²

Rationalism remains the dominant philosophical perspective on legal personhood – despite the fact that advances in science and technology are seriously undermining its viability. Pietrzykowski, for instance, argues that certain “implications of the discoveries and inventions of our times undermine the belief in human exceptionalism being the backbone of the modern legal approach to personhood” (Pietrzykowski 2016: 15).⁷³

The Religionists

We have seen that on the “sophisticated reasoner” approach, the Rationalist theory cannot justify the ascription of legal personhood to “borderline cases”, such as human foetuses, demented or comatose individuals and even young children. *A fortiori*, it is unable provide justification for the legal personhood of non-human animals, no matter how evolved their cognitive capacities are.

Conversely, the Religionist approach does appear able to provide the necessary justification for the personhood of at least some of these groups. It does so by arguing, contrary to the Rationalists, that intellect, consciousness or freedom of choice do not represent the defining characteristics of the human – and thus of the person. Indeed, on the Religionist view these attributes could even be altogether absent and yet one would not cease to be a person (see Naffine 2009: 110).

That is because the *diferentia specifica* that separates men from other beings is to be found elsewhere: namely, in their (human) *sanctity* – which is often equated with the notions of (human) *dignity* and *ensoulment*. To invoke human sanctity, or dignity, is to invoke the idea that human beings, for no other reason but for being human, are “innately special and that we are somehow always elevated above the animal world, regardless of our individual abilities and capacities” (Naffine 2009: 100). This means that all human beings, regardless of their individual cognitive capacities, should be considered as persons. Whether or not they are able

⁷² Here, I am referring to, first, “future persons” (either unborn or young children), second, those that have lost their superior cognitive abilities, either due to old age, sickness or accident and, finally, to the anencephalic babies or permanently comatose. See more in Naffine 2009: Ch. 6.

⁷³ He calls this the Juridical Humanism Decline Thesis. More will be said about it in the next section (3.3.)

to make their own decisions (in law), is irrelevant: “Human life alone generates legal claims that arise out of the sheer fact of humanity. One does not need to be able to engage directly and in person as a rational agent with other rational agents to be said to be a fitting legal subject” (Naffine 2009: 23f). Given that this characteristic is *inherent*, it is also *pre-legal*: “The sacred human person is said to possess inherent value with or without law expressing that value” (Ibid.). Law, in order to be considered legitimate, should recognize this fact and properly reflect it.

Clearly, this kind of reasoning is based on religious grounds. In the orthodox teachings of the Catholic Church, the human being is placed at the centre of all things (of the universe), for she is created by God in his own image (*imago Dei*). Being endowed with “a spiritual and immortal soul”, man is superior to all other beings. As God’s creature, the human is endowed with inherent dignity, which serves as the foundation of human rights (see Naffine 2009: 110).

While deeply entrenched in religious philosophy, the notion of human sanctity isn’t foreign to Rationalist thinkers. Some (perhaps most) Rationalists would be willing to accept the notion of sanctity as providing for the protection of all human beings, regardless of their capacities (Naffine 2009: 101). Thus, in law, the term might be used in such a way as to blur the lines between the religious and the secular basis. Both types of thinkers may agree on the value of the human being and needn’t enter into disagreement because of the terms employed for expressing it. Indeed, for the most part, Religionists and Rationalists may overlap in their conceptions of the person. Nevertheless, they will probably disagree in fringe cases that regard the beginning and the end of life.

Let us first briefly look at an area where the two approaches are easily compatible (human rights) and then proceed to an issue where they appear to clash (abortion).

The idea that human beings, as such, possess inherent and absolute worth is the cornerstone of the post-World War II human rights philosophy.⁷⁴ Whether this idea is expressed in terms of human sanctity or human dignity makes little difference. The 1948 Universal Declaration of Human Rights (UDHR) is a paradigmatic example of such an understanding of human rights. The story of its drafting process is especially illustrative of the fact that with the

⁷⁴ See also below, Part II: 6.1.

transplantation of the notion of human sanctity into the legal ambit we easily lose track of its religious origins.

The UHDR, in its opening lines, bears a striking resemblance to the Enlightenment-era human rights declarations: the first paragraph of the Preamble states that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. Clearly, the UDHR bases its legitimacy on the idea of an inherent human dignity, equally present in all human beings, as the basis of inalienable human rights.

In a pluralist environment, as the UDHR drafting committee certainly was, terms such as human sanctity or human dignity tend to become a kind of “umbrella terms” that anyone can quickly agree upon, while at the same time differ greatly in the exact understanding of its meaning. According to Morsink, the use of such language created a presumption “that the drafters of the Universal Declaration had an Enlightenment view of human or natural rights as somehow located in human beings simply by virtue of their own humanity and for no other extraneous reason” (Morsink 1999: 281). This, however, was not the case, as Morsink notes that “most of the drafters of the Universal Declaration did not share this Enlightenment belief in a single, transcendent source of value” (Morsink 1999: 283). Indeed, given that they came from very different ideological backgrounds, the drafters, although believing that rights were grounded in human nature, “did not think that the rights in the Declaration were attached to any particular characteristic or set of characteristics” (Ibid.). Thus, in order to reach some internal agreement, but also to appeal to the broadest (universal) community, a compromise with regard to the specification of the source of human value had to be made. The Declaration was consequently intentionally stripped of its essentialist, Enlightenment, religious and other ethically “tainted” characteristics (cfr. Morsink 1999: 289).⁷⁵

Famously, Ronald Dworkin attempted to reconcile the religious and the secular (Rationalist) approaches in his analysis of human sanctity. While he believed that the notion can be given both a religious and a non-religious interpretation, he actually ended up exposing an important rift between his, more Rationalist-leaning approach and the orthodox religious views of the Catholic Church.

⁷⁵ Famous, in this respect, is Rene Cassin's statement that the drafters of the UDHR all agreed on the rights, on the condition that no one asks why.

On Dworkin's view, human sanctity is an objective, intuitively ascertainable and universal truth. He believes we all (or almost all) share in this idea that each human being has intrinsic value. However, what makes Dworkin's position particular is that he also espouses ideas that are inherently Rationalist and even proposes a Naturalist origin of human worth. Namely, Dworkin holds that reason and choice are fundamental to a human life; that they are what makes life worth living. Moreover, he also acknowledges the role of evolution in bringing us to this point. We are the result of natural selection and random mutation, Dworkin argues, but this result has special, absolute value (Naffine 2009: 106).⁷⁶

As Naffine notes, these ideas have some interesting consequences when it comes to issues of abortion and euthanasia. On Dworkin's view, human fetuses also possess intrinsic value, for they are developing human beings and thus it would be bad to end their lives. However, as the early fetus cannot think or feel, it cannot develop its own interests and thus cannot have its own rights. Nevertheless, the fetus does have "detached" value – some intrinsic worth that is independent from any proper interest or right the fetus might have (Dworkin 1993: 11). Thus, while it would be wrong to talk about fetuses as persons, Dworkin nevertheless believes that, within US law, the State, at some point, does have a particular interest in preserving the fetus and thus may intervene with the mother's right to privacy by prohibiting abortion of late-term fetuses.⁷⁷

On the subject of euthanasia, Dworkin's views on the "life worth living" are particularly important. Thus, while Dworkin maintains the principle of the sanctity of all life, it is, for him, particularly important that a life has some meaning – that it is worth living. If, on account of permanent incapacitation, one cannot be expected to ever again make use of her uniquely human abilities, then, on Dworkin's view, life loses its special value – and the right to die should be granted.⁷⁸

These views, however, bring Dworkin squarely at odds with the Church's dogmas, for the latter sustains that "it is not intellect, consciousness and freedom that define the person" –

⁷⁶ On Dworkin's view, we do not have to believe in God to recognise that the human species is a remarkable achievement of biology and that we are now set above the animal kingdom, each one of us now possessed of intrinsic worth (cfr. Dworkin 1994).

⁷⁷ Jessica Berg (2007) argues that natural personhood can either be ascribed to certain entities because of their own interests or because of the interests of other, currently recognized natural persons. The latter is the case when the genetically human beings would otherwise not be eligible for natural personhood status because they are unable to form their own interests, namely anencephalic infants and (temporarily or permanently) incapacitated individuals (e.g. the comatose).

⁷⁸ Cfr. Naffine 2009: 106–109.

these characteristics can even be altogether absent from an individual; it is the “natural dignity which each human person is endowed [with], as God’s creature, [that] provides the foundation of human rights and such rights are said to apply ‘to every stage of life’” (Naffine 2009: 110, quoting *The Compendium of the Social Doctrine of the Church*). As regards the right to life, on the Church’s view, it is the most fundamental human right which “endures ‘from conception to its natural end’ and so ‘implies the illicitness of every form of procured abortion and euthanasia’” (Naffine 2009: 111).

Let us now briefly look at three objections that Naffine wields against the Religionist approach.

First, the Religionist approach has *illiberal consequences*. If absolute value is placed on all human life, and hence the right to life is recognized to the human being from conception onwards, then it is clear that the price to pay for this recognition is the reduction of “respect for individual autonomy and personal choice”, in this case of the pregnant woman (Naffine 2009: 116).

Secondly, Naffine is perplexed by the notion of the soul, so central to the Religionist view, yet replete with paradoxes. For instance, discussing Finnis’s definition of the person⁷⁹ she is baffled by the fact that “the soul is a life force which is somehow present from conception until death; it requires a human body and yet it is fully present in a fertilised human egg; it entails the ‘radical capacity’ to reason but is nevertheless to be found in the embryo and the terminally unconscious” (Naffine 2009: 114). She wonders about the nature of this “mysterious human essence” and the reason why the law should have to make it the criterion of its concept of the person. “In the absence of a Christian belief in the soul”, says Naffine, “this essence seems to have little meaning, nor does its translation into law” (Naffine 2009: 117).

Finally, while on the Religionist account the extension of legal personhood is wider than on the Rationalist view, Religionists still promote a kind of speciesism (human exceptionalism). On this view, “humans, and only humans, possess special value and fundamental rights *simply* because we are human” (Naffine 2009: 116f). Human rights then are for the fruition of human

⁷⁹ Cfr., for instance, Finnis 2005 & 2011.

beings while non-human beings, such as animals, are still to be excluded from their protection.⁸⁰

The Naturalists

“[T]he Second World War and its immediate aftermath”, says Naffine, “served to consolidate the species divide in the name of natural human rights and to affirm a strong metaphysical stance: that law is for humans essentially understood as non-animals – as moral and spiritual persons” (Naffine 2009: 122). Indeed, our contemporary (Western) legal systems are based on the philosophical view – which some call Juridical Humanism – which neatly distinguishes between persons and things, putting human beings (and certain other entities such as corporations) in the former box and all other living and non-living entities in the latter.

Despite significant advancements in scientific knowledge about human genetics as well as about cognitive and other abilities of animals, the moral and legal understanding of the human-animal divide has not changed significantly. Naturalists, however, argue for and offer a possible justification for extending legal personhood to (at least some) animals.

The Naturalists build their argument on scientific grounds, taking inspiration in Darwin’s (and his successors’) evolutionary biology. The basic idea springing from this branch of scientific knowledge is that humans are but one of the animal species that has in time evolved from a common form of life. Consequently, all life on Earth is biologically related, with the human species finding its closest genetic relative in the Great Apes. It follows that man is not in any way special, qualitatively different from other animals. The Naturalist therefore dispense with the idea of human exceptionalism and speciesism.

One would image that these findings – corroborated and further developed by the most recent discoveries regarding animal cognition which prove that certain types of animals, especially large apes, possess skills such as symbolic communication, tool-making, morality etc. (see Pietrzykowski 2017) – would resonate in and have an important impact on our social and legal understanding of non-human animals. “In particular”, says Naffine, “we might have

⁸⁰ This, however, does not mean that animals cannot be provided with some kind of legal protection. The Religionists needn’t oppose to animal protection laws granted that they are not based on the idea of some special worth of animals but rather on some interest of the human beings.

expected some modification of the legal conceptual divide between persons and property as it applies to humans and animals respectively” (Naffine 2009: 122). But such a shift has not occurred – or at least not to a significant degree. “Instead, there remains a firm cultural and legal understanding that humans and animals should be characterised in quite different ways: humans as persons; animals as property” (Ibid.).

While Naturalists ideas have yet to fall on more fertile grounds, they have nevertheless recently been gaining in import, with several courts and legislative bodies around the world already ascribing certain fundamental rights to animals and even declaring particular animals and even non-animal beings as legal persons.⁸¹

Naffine describes the common core of the Naturalist approach as the view that “we are best regarded as natural corporeal beings who can feel pleasure and pain, and who live natural mortal lives, and that this is how law should think of us” (Naffine 2009: 24). However, Naturalists disagree as to how the question of animal personhood should be resolved.

There are, on the one hand, those who (in the most extreme version of the argument) argue for the abandonment of the fundamental (legal) divide between humans and animals. On their view, humanness should not be the (exclusive) criterion for attributing moral and legal value (personhood). Depending on what personhood-attributing criteria they propose, these authors argue for a more or less extensive granting of personhood to non-human animals. On the other hand, there are less radical – and also more influential – voices arguing that the human-animal divide is legitimate and should be maintained but that the law should rather be “better attuned to our biological natures” (Naffine 2009: 125). For the purposes of this presentation only the former group of Naturalists scholars is taken into consideration.⁸²

Within this stream of Naturalist scholarship there are different proposals as to how far (legal) personhood should be extended and on the basis of which reasons should this be done. The utilitarian philosopher Peter Singer – widely considered the father of the animal liberation movement – argues that the relevant criterion for attributing moral (and thus legal) worth is not intelligence or rationality, but rather sentience, i.e. the ability to suffer (Singer 2015: 38). Regardless of the being’s nature, on Singer’s view, “the principle of equality requires that its

⁸¹ For instance, in 2014 an Argentinian court declared an orangutan to be a non-human person who was unlawfully held in captivity in a ZOO, whereas in 2017 a river in New Zealand was granted legal personhood by a special law adopted by the Parliament. For a classical theoretical argument for environmental rights, see Stone 2010.

⁸² For the latter group see Naffine 2009: Ch. 9.

suffering be counted equally with the like suffering ... of any other being” (Ibid.). However, for Singer, beings that have self-awareness, a sense of the past and the future and are able to relate to others – beings that Singer calls persons – have greater moral value as he shows that, for instance, killing a person is morally more reproachable than killing a sentient being that is not a person (see Singer 2011: Ch. 4). Thus Singer rejects speciesism and rather embraces the criteria of sentience and self-awareness – both of which admit of degree.

Singer’s position is controversial because he follows his argument to the conclusion that some animals – those which are self-conscious – have greater moral value than certain human beings – those that are not self-conscious, such as new-borns. Thus, on Singer’s view, “there could be a person who is not a member of our species”, just as there “could also be members of our species who are not persons” (Singer 2011: 74). This leads Singer to conclude that infants do not have a strong claim on the right to life and it may even be, under appropriate conditions, justifiable to deprive them of their lives.⁸³

On the other hand, Steven Wise, a leading animal activist and legal scholar, focuses on dispelling the rigid human-animal division by arguing that the ample scientific evidence on the cognitive similarities between animals and humans prove the divide to be morally (and legally) unsustainable. On Wise’s view, it is not sentience but cognitive capacities that are the appropriate criteria for personhood-attribution.⁸⁴ For this author, legal personhood means “the capacity to hold at least one legal right” (Wise 2010: 1). Wise argues for the ascription of dignity-rights to (some) non-human animals – by that he means especially bodily integrity and bodily liberty (see Wise 1998: 823; 2013: 1282). The capacity to hold rights, however, is not a matter of some natural characteristics that make it possible for the right-holder to effectively exercise that right; rather, it is a matter of recognition. It is not that animals are (physically) incapable of possessing rights – rather, they lack this capacity because they are not legally recognized as persons (Wise 2010: 5).⁸⁵ Should they be recognized as having this capacity, they would be also recognized as persons.

⁸³ It should be noted that Singer is an utilitarian and thus applies a utilitarian calculus when discussing and deciding on such questions.

⁸⁴ This is so for purely practical reasons: Wise notes that common law judges do not accept sentience as a sufficient condition for legal personhood. See Wise 2013: 1286.

⁸⁵ Wise’s position in this regard seems to follow Salmond’s (1913). He too believed that a person “is any being whom the law regards as capable of rights and duties. Any being”, Salmond argued, “that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man” (Salmond 1913: 272). For a critique of Wise’s position, see Kurki 2017: especially ch. 3.

Wise argues that – in common law jurisprudence at least – autonomy is a sufficient basis for being ascribed human rights – and so for being recognized as a legal person. Practical autonomy – “the minimum level of autonomy sufficient for legal personhood” (Wise 2013: 1283) – has, on Wise’s view, three elements: i) sufficient cognitive complexity for being able to want something; ii) the ability to act intentionally in order to achieve one’s desires; iii) a sufficiently complex sense of self so that “it matters to whether one’s achieves one’s own goals” (Ibid). Wise then shows that there is ample scientific evidence proving that certain animals possess the same basic cognitive capacities as human beings do: highly cognitively developed animals, shows Wise, are self-conscious, possess communication, have a theory of mind etc.⁸⁶ This shows that there is actually no sharp qualitative divide between humans and animals but rather that the differences between them are a matter of degree. Certain animals are much more similar to human children, than they are to inanimate objects. “Whether we call it self-determination, autonomy or volition,” argues Wise, “it is sufficient for basic legal rights” (Wise 2002: 30). By analogy, then, certain highly intelligent animals should be declared capable of holding at least one legal right and hence, declared legal persons. If in the past intelligent beings like women and black men were consigned to the status of property – but with time were acknowledged as persons, it is now time that intelligent animals are also welcomed within that family.⁸⁷

Legal data shows that Wise’s characterization of the thick wall separating humans from nonhumans is exaggerated. More or less all Western contemporary legal systems contain some kind of animal protection laws. Cass Sunstein, for example, even claims that “it would not be too much to say that [US] federal and state law now guarantees a robust set of animal rights, at least nominally” (Sunstein 2000: 1336). Hence, he believes that US law does not treat animals as mere objects (Ibid., note 14). Pietrzykowski, for his part, shows that there is a growing number of legal orders that are ceasing to formally treat animals as things, with some countries even providing constitutional-level protection of animals (see Pietrzykowski 2017: 53). On this view, therefore, animals have a mixed legal status: they are “a heavily-protected form of property, endowed with some basic rights” (Naffine 2009: 138).

While one needn’t necessarily agree with the claim that animals are already endowed with rights, their mixed or intermediate legal status is nevertheless a matter of fact. This *de facto*

⁸⁶ See Wise 2013: 1284ff.

⁸⁷ The analogy with slaves and women is common in this respect, yet, as Berg rightly points out, there is a nevertheless difference between these groups for women and slaves are biologically human, whereas chimpanzees are not. See Berg 2007.

intermediate category, however, lacks proper theoretical (as well as doctrinal) elaboration as we are currently still working within the basic dichotomy of persons and things. In the next section, I will discuss a novel theoretical proposal for a just such new formal intermediate legal category.

3.3. New conceptualizations in the personhood debate

I believe that the above-presented theories, despite their substantial differences, all share at least three common suppositions: first, they all view the person as fundamentally a rights-and-duties-bearing unit; second, they all accept the ontological dichotomy between persons and things; and third, all accept that the paradigmatic person in law is the (adult, mentally and physically sane) human being. While the last supposition appears to be firmly established – I know of no one who would claim that human beings do not, as a matter of course, qualify as persons in law –, the former two have been disputed at various times. I imagine that it is due to its widespread acceptance and historical entrenchment that the “person as rights-and-duties-bearing unit” has only recently received a full-scale critique (see Kurki 2017). A comprehensive discussion of this critique and its potential incorporation into this thesis are impossible at this time and I believe nothing of relevance is lost if I continue to assume the standard conception of the person as a rights-and-duties-bearing unit. Thus, in this subsection, I will focus on the second presupposition. More precisely, I will show that the exclusive conceptual person-thing dichotomy is today no longer sustainable and will present one proposal for the expansion of our conceptual universe in this matter.

I should emphasize that this section of the thesis bears no immediate relevance for the remainder of my arguments. The main purpose of its inclusion in this chapter, then, is completeness of the argument. I find it appropriate, when discussing questions relating to the extension of legal personhood, to include reference to issues that are currently at the centre of scholarly debate and may have significant consequences for the way we conceptualize legal personhood in the future.

Juridical Humanism & its insufficiencies

I said that of the three suppositions shared by all contemporary theories of legal personhood (at least of those presented above), the one about the adult human beings being the paradigmatic persons in law is the most firmly established and practically undisputed.

The entrenchment of this idea in contemporary legal philosophy can be explained by what some have called the Juridical Humanism Thesis (Pietrzykowski 2016 & 2017). The thesis holds that “one of the key philosophical foundations of the contemporary legal order is the belief that the law ultimately serves to promote human good and that the community of law is actually composed of all but only human beings” (Pietrzykowski 2016: 14). Put simply: the human being is both the creator and the main subject of law; the law exists because of human beings and it exists in order to protect and further their interests.⁸⁸

Ours, then, is an utterly anthropocentric world – and consequently the law as well.⁸⁹ In this world, the human being is placed in the centre of all things: the human, because of some special distinguishing feature of hers, reigns supreme over all other earthly creatures (so-called human exceptionalism). This view of the world is said to be the result of a combination of Christian personalism (see the Religionist position) and the Enlightenment rationalist thinking (see above the Rationalist position) (Pietrzykowski 2017: 52).⁹⁰ On this (mixed) view, it is the unique reasoning capacities and consequent dignity that sets men apart from the rest of the natural world:⁹¹ because of these qualities human beings are imbued with inherent worth, whereas all other creatures only have instrumental worth.

Of course, this central position of human beings does not mean that in law other entities have no place amongst its persons. As we well know, artificial, non-human constructs, such as corporations, have historically also been attributed the status of persons in law: such entities

⁸⁸ Cfr. Douzinas, how, for example, argues that “[l]egal humanism posited man as the author and end of law and culminated in the idea of human rights” (2000: 243).

⁸⁹ For a comprehensive and radical criticism of anthropocentrism in this ambit, see Braidotti 2014.

⁹⁰ Cfr. Brożek (2017: 1.3.), who argues that the 20th century debate on the notion of person is, broadly speaking, held between the “descriptive” conception of the person which defines the person on the basis of certain empirical criteria and the “axiological” conception which holds that the person is a “bearer of values”.

⁹¹ Cfr. Pietrzykowski (2016: 14) who argues that the Juridical Humanism Thesis “relies on the concept of inherent human dignity resulting from the uniquely human capabilities of rational thinking and decision-making”.

have usually been called juridical persons in order to distinguish them from natural persons, i.e. human beings *qua* persons in law.

However, the reasons for the attribution of legal personhood to human beings differ significantly from the reasons for the ascription of personhood to these artificial entities. While attribution of personhood to human beings is functional to the protection of their own interests, the attribution of personhood to artificial entities serves to protect and promote the interests of others – that is, of (the currently recognized) natural persons.⁹² In other terms: whereas the attribution of personhood to human beings is based on moral reasons, the attribution of personhood to artificial entities is based on instrumental reasons (cfr. Pietrzykowski 2017: 49). This distinction is reflected in the fact that “natural persons are entitled priority over juridical persons in a hierarchy of rights” (Berg 2007: 374). This doesn’t mean that juridical persons cannot be granted the same level of legal protection as natural persons are; rather, it means only that the level of rights-attribution to juridical persons will be determined by the interests natural persons have with regard. “[N]atural persons”, says Berg, “function as the baseline against which other rights allocations are judged” (Ibid.). Ultimately, the human good (interest) lies at the basis of all law (*Hominum causa omne ius constitutum est*).

Regardless of the extension of legal personhood in a given time and place – whether, for instance, personhood is ascribed only to fully capable adult men or also to other human and even non-human entities – it is a fact that our legal systems have long been based on a neat division between persons and things (subjects and objects). The origins of this distinction can be traced to Roman law and its classical division of law into persons, things and actions.⁹³ An entity in law is either qualified as a person – and thus granted the capacity to hold rights and duties – or, alternatively, it is qualified as a thing – and is as such considered an object of the rights and duties of others (i.e. persons). The dualism of persons and things is an exhaustive one: an entity is either a person or a thing (cfr. Pietrzykowski 2017: 51). *Tertium non datur*.⁹⁴

This strict division persists still today, despite scientific and technological advancements in psychology, neurology, genetics etc. providing ample proof of the similarities between human

⁹² More on this issue, see Berg 2007: 374–387.

⁹³ See Gaius’s *Institutiones* (1.8.).

⁹⁴ Cfr. Ferrajoli 2007: 181-2 who similarly argues that subjects have a status in virtue of which they are not objects. It follows, says Ferrajoli, that “subject” and “object” are “syntactically incompatible predicates” – meaning, basically, that if one is considered (treated) as a subject, then she is not an object, and *vice versa*. See also Davies & Naffine 2001: 51.

beings and great apes as well as evidence of cognitive and other capacities of these and other non-human animals. While we might assume that these discoveries will have led towards a relaxation of the division, if anything, the opposite seems to be the case. As I have already indicated when discussing the Naturalist theories of personhood above (see 3.2.2.), the horrors of World War II have only served to deepen this divide and reaffirm the belief in human exceptionalism. This trend can easily be seen in the numerous human rights declarations and national constitutions adopted in the immediate aftermath of the Great War, with all of them declaring the human being with its inherent dignity which is protected by inalienable human rights to be the cornerstone of the juridical system.

What are the reasons for the persistence of this state of affairs? Why does this conceptual and normative abyss between human and non-human beings still exist? Surely some changes have occurred in this respect: animals are today more legally protected than ever before, with even some sporadic cases of personhood attribution to animals like dolphins and chimpanzees already occurring; indeed, recently in New Zealand a former national park has been legally declared a person in law.⁹⁵ These changes in law no doubt reflect, at least in part, altered social perceptions as to who – and why – ought to be valued for its own sake. However, these changes are too few and far apart to enable us to talk about any significant structural conceptual and jurisprudential changes taking place. The basic division between persons (humans) and things is so deeply entrenched in our underlying social habitus that it prevents too sudden and too extreme changes in the superimposing law.⁹⁶

Changes, however, both in our common understanding as well as in the legal sphere, are called for. This necessity for re-defining the notion of person is not so much brought about by the “traditional” hard cases of human embryos, anencephalic infants or patients in a permanently vegetative state as it is by “potentially more devastating challenges ... [that] include the status of higher animals, human-animal biological mixtures, the cyborgization of the human body and brain, as well as the development of artificial autonomous agents” (Pietrzykowski 2016: 15). These cases provide a real challenge for the foundations of Juridical Humanism. The Juridical Humanism Decline Thesis, as Pietrzykowski calls it, is based on the claim that “some implications of the discoveries and inventions of our times

⁹⁵ See, for instance: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11818858 (visited on 15 May 2017).

⁹⁶ On the reasons for this entrenchment of the notion person in our culture, see Brożek 2017; also Geertz 1974.

undermine the belief in human exceptionalism being the backbone of the modern legal approach to personhood” (Ibid.).

This conceptual inadequacy of the traditional ontology is perhaps most clearly seen on the example of animals and their legal status. Historically, animals have been understood as things: both legally as well as in our common imaginarium: be it as tools used in fields and factories or as food, animals have always been exploited to serve human interests and desires. However, scientific discoveries regarding animal consciousness – realizations that animals, especially higher ones, possess similar cognitive and emotional structures, as well as skills that have previously been considered uniquely human, such as communication, tool-making, morality etc. (see Pietrzykowski 2017: 52) – have gradually influenced both our social understanding and legal treatment of animals. The growing awareness “that animals are sentient creatures which may have their own interests deserving recognition and respect in the form of laws protecting them for their own sake”, in this way, “undermines the image of the world composed only of persons and things” (Pietrzykowski 2017: 54). This may be seen, for instance, in the development of anti-cruelty laws: a growing number of legal orders have been engaged in the process of dereification of animals, i.e. excluding them from the category of things (for some examples see Pietrzykowski 2017: 53). These efforts that try to instil the image of animals as “living creatures endowed with sensitivity” or “creatures capable of suffering” are morally speaking highly laudable. As a consequence, however, they provide a real challenge for our philosophical and theoretical distinction of all entities into persons and things. In the legal practice today, animals (at least some highly developed ones) are, as a matter of fact, understood neither as things nor as persons, finding themselves in a sort of conceptual limbo.

The necessity of conceptual refinements: the introduction of non-personal subjects of law

In order to resolve this conceptual, but in the final instance also a practical legal problem, Pietrzykowski (2007: 56) suggests that one of two things should be done: either we revise our approach to personhood or we revise the conceptual division (the ontology) as such. The first approach is taken by the “animal welfare” activists (see above 3.3.1.) seeking to obtain recognition of personhood for animals – specifically, the status of non-human persons.

Pietrzykowski finds this approach inopportune. It is true that at least some (vertebrate) animals are sentient, having morally relevant interests of their own and should not, as a consequence, be reduced to things having only instrumental worth for men. However, according to this author, animals fit neither of the two categories of persons that we traditionally identify (i.e. natural and juristic persons). It would make little sense – and would miss the moral point – to fit animals within the category of juristic persons: juristic personhood, you will remember, is based on instrumental reasons related to the promotion of human interests, whereas the whole point of a possible attribution of personhood to animals is to protect and promote their own interests and with that “restrain rather than expand the ways in which human good may be legitimately pursued by means of the instrumental use of animals” (Pietrzykowski 2017: 57).⁹⁷ On the other hand, animals, quite clearly, cannot be fitted within the category of natural persons either. Despite all their similarities, human beings, in general, are unique among animals as regards the scope of their cognitive abilities since they are “able to intentionally control their own behaviour, acting upon specific kinds of reasons and volitions” (Ibid.). It is this capacity, says Pietrzykowski, that is crucial for the idea of personhood as it is necessary (the capacity) for the attribution of most personal rights. These empirical differences between humans and other animals heavily influence the underlying philosophical views on personhood. Thus, as said before, the philosophical (and consequently legal) conception of a person is “intimately related to the capacity to act rationally and deliberately decide about one’s own actions (Pietrzykowski 2017: 58). All this makes it the case, according to Pietrzykowski, that attempts at fitting animals within the existing conceptual categories are doomed to failure.

Lack of personhood-defining properties should not, however, automatically relegate these entities to the status of things. “[N]ot being a person should not be identified with an inability to have any subjective interests that matter morally and deserve legal protection solely for their own sake” (Ibid.). Animals have subjective mental states and thus relevant interests of their own. These interests should therefore be given appropriate legal protection. This could be achieved if the traditional idea that personhood is a necessary prerequisite for right-holding would be abandoned (2017: 58). If rights would be conferred upon entities without having to simultaneously ascribe legal personhood upon these right-holders, that would mean that animal interests could be given the appropriate legal protection while the status of personhood

⁹⁷ Contrary to this position, Berg believes animals could be fitted within the category of juridical persons. See Berg 2007: 404ff.

would remain reserved for human beings. The way to achieve this state of things is, says Pietrzykowski, in constructing a new, intermediate, conceptual category, different from both personhood and thing-hood.⁹⁸

These new subjects of law – which the author calls *non-personal subjects of law* – are, on the one hand, opposed to object-hood (thing-hood), since the underlying idea implies “the capability to possess one’s own subjective interests, the moral relevance of which may merit legal consideration” (Pietrzykowski 2016: 21). Given that animals have subjective mental states, they consequently have morally relevant interests that ought to be granted some kind of legal protection. On the other hand, this new status is opposed to personhood as well, since it does not “imply the ability to make intentional use of rights or to be held liable for the fulfilment of duties” (Ibid.). This shows the key difference between persons and non-personal subjects of law: whereas the former can be ascribed both with interest-rights as well as with choice-rights, the latter lack the capacities for holding choice-rights.⁹⁹ Thus, their status is only dedicated to protecting their interests. Indeed, according to the author, “the essence of non-personal subjecthood of law may be reduced to the legal recognition of one single right only, namely the right to be taken into account” (Pietrzykowski 2017:59).

What is the point of this right and what does it entail?

The attribution of the right to be taken into account upon certain entities would render their interests legally relevant, i.e. it would transform their moral claims into “legitimate legal considerations that have to be accounted for in each case of a practical decision”

⁹⁸ In Italy, an interesting question arose recently, namely whether the legislator is allowed to dissociate – by virtue of a simple legislative utterance – between *subjectivity* and *capacity*, individuating (creating) in this manner a subject that does not have legal capacity or, alternatively, a legal capacity held (legally) relevant despite the absence of a subject (Lipari 2013: 63). This problem came up with respect to a statute regarding medically assisted procreation which determined as its personal scope of application “all involved subjects, including the *conceived*” (ita. *il concepito*) (Lipari 2013: 64; italics are mine). This provision apparently came in conflict with civil code’s Art. 1, which ties the acquisition of *legal capacity* to the fact of birth. With this legislative i(nte)rvention, it seemingly became possible that legal subjectivity may, in fact, be acquired before (or independently from) legal capacity – and *vice versa*. While on one instance, the Italian Supreme Court (*Corte di cassazione*) decided that the unborn can acquire legal subjectivity (and thus a series of rights, such as the right to life, health, respect, personal identity etc.) even before birth (see sentence n. 10741, from 11 May 2009), later on it overturned this decision (see decision n. 16754, from 2 October 2012), arguing that it is unnecessary to conceive of the unborn as a subject of law in order to grant it law’s protection. Rather, the court concluded that the *nasciturus* should be viewed as an *object* of progressive protection on the part of the legal order.

⁹⁹ According to Pietrzykowski, whereas “being a person implies being a subject”, the opposite does not necessarily hold: “being a subject by no means has to imply being a person” (2017: 58). Cfr. Ferrajoli (2007: 342–346), who argues that all persons are legal subjects (and all legal subjects are subjects), the opposite is not also the case: legal subjects such as the *nasciturus* or, in international law, collective subjects such as peoples, are not also persons.

(Pietrzykowski 2017: 60). This basically means that in any legally relevant case in which the interests of such a right-holder would be in play, the decision-maker (be it the legislator, a judge or some other legal operator) would be required to take the interests of such a subject seriously when handing down her decision. This, as Pietrzykowski points out, does not mean that such interests are infeasible – that they cannot be outweighed by other, more relevant considerations. “It means only”, he says, “that the subjective good cannot be ignored and has to be balanced with all relevant considerations following the general principle of proportionality applicable in resolving such conflicts” (Pietrzykowski 2017: 59).

To whom the right should be extended, what should be the extent of the interest of such subjects that ought to be taken into consideration and what weight ought to be ascribed to them, are questions that cannot be answered apriorily. The answers to these questions rather depend on concrete circumstances of each case, as well as of the type of right-holder in question. Any such decision should be, according to Pietrzykowski, based on available scientific data as to the capacities of different kinds of animals for having subjective experiences (Pietrzykowski 2017: 62). Seeing how this capacity is necessary for having subjective interests, the author argues that the status surely could not be ascribed to non-sentient organisms, both non-animal and animal alike. Moreover, he does not believe this conceptual category would be applicable to artificial intelligent agents (see Pietrzykowski 2017: 64). He does, however, believe that it could be extended to some species of invertebrate animals, and, of course, to vertebrate animals, particularly mammals and birds.¹⁰⁰

Pietrzykowski defends his approach in light of a possible objection that affording only one very general legal right to non-personal subjects instead of a longer catalogue of more specific rights is somehow selling the idea short. He offers two arguments in his own support. The first argument is a conceptual one and is based on the qualitative distinction between persons and those who could (potentially) hold the status of non-personal subjects. Persons are aware of their legal situations and have the capacity to plan their future behaviour on the basis of predictable (legal) consequences of their actions. It is thus imperative for their autonomous decision-making that they have rights determining their legal position that are specific as possible (see Pietrzykowski 2017: 60). Non-personal subjects of law, on the other hand, do not have such capacities. The protection of their interests does not depend on their individual

¹⁰⁰ Moreover, Pietrzykowski believes the status could be usefully applied to certain types of creatures, such as human-animal chimeras and hybrids. Finally, he believes the status could be helpful in finding solutions to the controversial cases of purely human creatures that are not recognized as persons, such as, above all, human foetuses. See Pietrzykowski 2017: 63.

choices and preferences – instead, it is much more paternalistic, as it is basically constructed by third persons on the basis of their best understanding “of the species-typical needs and the preferences of a given species of animals” (Ibid.). Given that the individual will of a particular non-personal subject is not fundamental for the protection of its interests, “there is no point in granting an animal specifically defined rights that would let it rationally plan and self-govern its own situation” (Ibid.).

The second argument in support of the author’s approach is a pragmatic one. Pietrzykowski is a realist about the possible changes in the social attitudes towards animals. He knows that there is no chance that humans will accept full abandonment of animal exploitation practices any time soon. In such circumstances, any workable framework for animal rights “has to be reconcilable with the most existing practices of human use of animals, bringing together some potential to gradually improve the boundary conditions in which they may take place, as well as to influence the perception of animals exploited in such practices” (Pietrzykowski 2017: 61). This is why Pietrzykowski proposes a flexible framework, one in which the concrete protection of non-personal subjects could be adjusted on a case-by-case basis as to “reduce the risk of producing results that would be unacceptable from the point of view of predominant social attitudes to animals” (Pietrzykowski 2017: 60-61). Law cannot be used in order to force some radical change in social attitudes – any sudden or extreme change in this respect would surely be met with great aversion. That is why animal interests should not, from the beginning, be given specific and/or high legal value. However, requiring that individual animal interests be taken into consideration when adopting a given policy decision – even if such interests are ultimately overridden by other, human interests – may serve to provoke certain changes in the underlying social attitudes. Such an approach may contribute the development of the view that “each individual animal [is] an entity whose subjective good counts under the law” (Ibid.).

CONCLUSION

In this first Part, I attempted to shed some light on two important legal notions that form the backbone of this thesis. “Legal status” and “person” are concepts that are often overlooked in theoretical discussions, dispensed with hastily, or presupposed to mean this or that without much emphasis being given to what exactly this or that meaning is. I also declared in the beginning that I will be defending a claim that the person in law is a particular kind of legal status.

Upon analysing several conceptions of legal status, I came to accept the view that a legal status is, on the one hand, an intermediary legal term that connects the access criteria of a status and the normative consequences attached to it; on the other hand, it is also an institute that exists due to some underlying reason (a social interest to be satisfied or protected) and whose point it is to address that very reason (i.e. to satisfy or protect the underlying interest). This is achieved by ascribing to the status a content (in the form of entitlements, rights and duties) that ought to enable the underlying reason to be properly addressed; in consequence, access criteria enabling acquisition of the status cannot be random or arbitrary, but rather reasonably determined so that they correspond to the rights and duties attached to the status – so that the holder of the status will be, at least in theory, able to exercise the rights and duties in a way that properly addresses the underlying rationale of the status.

The person, for its part, is one of the central concepts in our culture and has, as such, been extensively discussed in numerous fields such as sociology, anthropology, psychology, (bio)ethics, theology etc. It is also a fundamental legal concept, indeed, a constitutive element of law as such as well as a key element of any specific legal system. There can be no law without there being a subject of law. Considering the person as a legal status in the earlier described sense, I proposed that it be seen as an intermediate legal term just like any other. The person, however, is much more than just any legal status: it is, I claimed, a primary and a fundamental legal status that by constituting subjects of law enables the game of law to be played in the first place; as a consequence, it is also a threshold status enabling the distinction between subjects of law and objects of law.

In order to be able to actively participate in the legal game, law’s person must of course be adequately equipped: hence, I further argued that the content of the status of a person in law is to be seen as specific legal capacities – capacities for being a beneficiary of legal provisions

aimed at protecting some entity's interest; capacities for being ascribed certain benefits or burdens of legal transactions; capacities for being held liable for one's own actions; and capacities for autonomously performing legal acts with valid legal effect. Not all entities, however, are equally capable – both in real life as well as in law. If we take the example of children, who in our contemporary legal systems possess passive incidences of legal personhood but not the active ones, we may conclude that entities, considered as persons by a given legal system, may be endowed with legal personhood to a different degree. Both the reasons for the attribution of different types (thicknesses) of legal personhood as well as the actual (physical) capacities needed to sustain them differ: it suffices for the attribution of the thinnest kind of legal personhood that some “state of affairs is conceived of sufficient value to merit some legal protection for its own sake”; consequently, the so endowed entity needn't possess any kind of human- or animal-like capacities in order to sustain such a personhood.

However, common to all persons in law – being the reason why they are considered persons – is that the law finds certain of their interests of sufficient value to provide them with a particular kind of protection. Persons and their interests are valued for their own sake, while objects, which do not have their own interests, are valued only instrumentally. The law, then, is for persons – and persons are those entities that are, according to the law, valuable for their own sake.

Next, I enquired into which entities – and for what reasons – have been normally conceived as eligible for legal personhood: theories of legal personhood, which can simply be distinguished into formal and substantive ones, determine which access criteria should be prescribed for acquiring the status. Formal theories of personhood, arguing that the status is a purely legal construct and hence independent of any extra-legal criteria, settle on no fixed criteria for personhood-attribution; rather, they rely on reasons for attribution on a case-by-case basis. Hence, if a given entity's interests are deemed sufficiently valuable on their own, legal personhood can be ascribed to such an entity – be it real or institutional, animate or inanimate. On the other hand, substantive theories of personhood focus on extra-legal criteria of personhood, claiming that law should only recognize as legal subjects those entities that are, because they possess a certain determining characteristic, already (morally speaking) persons. Depending on the selected criterion, the extension of legal personhood varies in these theories: while some would extend personhood only to born alive human beings, others argue for a more liberal approach to personhood, including also cognitively highly developed non-human animals. Regardless of their differences, however, all theories agree that the

paradigmatic person in law is the adult human being of sane mind. In the continuation of this thesis, if nothing will be specified, I will take as the model of a legal person precisely such a fully capable adult human individual.

In discussing legal personhood, I have made two crucial realizations: first of all, it is necessary to distinguish the notions of human being and that of a person. The two notions belong to two different ontologies even though today we take it almost for granted that legal personhood is unconditionally ascribed to all human beings (to leave aside all controversial cases). It is precisely this presupposition that I intend to put to the fore and show that this arrangement is not one of necessity. What I will attempt to show is that legal personhood is not some inalienable feature of each and every human being, but rather that it is, depending on concrete circumstances, susceptible to manipulations, limitations, deformations, diminutions etc. As legal personhood admits of degrees, so too can it be gradually (or fully) taken away.

There are numerous historic examples on which these problems could be analysed. In Part II of the thesis I will focus on the case of the Erased citizens of former Yugoslav republics in Slovenia. The case primarily regards deprivation of citizenship and permanent residency, but as I will hopefully show, it also resulted in alterations in the personhood status of the affected individuals.

PART II.

LEGAL PERSONHOOD & THE ERASURE

INTRODUCTION

In the previous Part, we established that legal personhood is a status admitting of degrees: depending on the reasons for personhood-attribution and the actual capacities to sustain it, persons are “thicker” or “thinner” – they are endowed with more or less legal capacities. While persons differ in their specific capacities, they all have access to a certain minimum level of legal protection of their interests. If an entity’s interests are in no way legally protected or if they are not protected in the entity’s own interest but rather in the interest of someone else, then that entity cannot be considered a person in law. For the above-stated reasons, legal personhood can be characterized as a threshold legal status (the persons-things distinction) as well as a primary or fundamental legal status of persons.

While undoubtedly of fundamental importance, legal personhood, especially in its thinnest version, is by itself quite inert. Interests can be furthered and desires realized only if persons effectively acquire different rights and duties. Rights and duties an individual person may acquire differ in many respects and may have different personal value for the individual as well as impact his or her legal position to various degrees. Inheriting a painting from one’s grandmother, for example, may be of great personal value, but this acquisition has little importance for one’s overall legal position. On the other hand, some legal statuses may have a sweeping effect on one’s legal position. Citizenship is one such fundamental legal status because it grants access to a broad array of important rights, such as the right to participate (actively and passively) in the political life of one’s country, the right to diplomatic protection on the territory of a foreign state, and a wide host of other fundamental rights. While many of these rights are granted to non-citizens as well, often the full extent of legal protection in the territory of a given state is available only to its citizens. Nowadays residency in a given country is an equally important status. Residency status usually gives one, regardless of her citizenship status, access to a series of important, especially socio-economic rights on the territory of the country of residence.

Citizenship in particular has often been seen as having a very strong connection with personhood. This bond was established by the great human rights declarations of 18th century, such as the American Declaration of Independence (1776) and especially the French Declaration of the Rights of Man and of the Citizen (1789). While they declared the natural and inalienable rights of all men, these acts were fundamentally intended to legitimize the power of the new nation-States which, as the name already suggests, emphasize nationality above everything else and so make citizenship (nationality), not personhood, the primary source of recognition and rights protection.¹⁰¹ Hannah Arendt (1973) famously argued that the right to citizenship is actually the most fundamental of all rights, a right to have rights as she called it. Without it an individual may find herself utterly rightless, nothing but a bare life. Ferrajoli (1999), for his part, has shown that the two concepts have often been confounded: citizenship is interpreted as a fundamental legal status that gives access to a broad set of civil, political and social rights. As this scholar notes, interpreted in this way, citizenship actually overlaps with *status personae*. The strong connection is felt on the level of social practices as well. As Dal Lago (2012) demonstrates, individuals (refugees, migrants) who because of the way they had entered and reside on a territory of a foreign country are labelled as “irregular” or “illegal”, will often suffer not only legal problems but also social exclusion in the host country. Extensive marginalization and social exclusion from all aspects of a community’s life has led this author to describe the condition of these individuals as one of non-persons.

The profound connection between the statuses of a person and that of a citizen cannot therefore be denied. On my interpretation of legal personhood, should something (an event or an action) cause an individual to lose her status as a person in law, that would, of necessity, result in the loss of her citizenship as well as all other legal statuses. The loss of legal personhood equals relegation to thing-hood, i.e. being considered a potential object of rights and duties of others (persons). Enslavement is, of course, a typical example of this. However, as Arendt and Dal Lago, among others, have shown, the connection also seems to work in the opposite direction. Namely, it appears possible that the loss of citizenship status, due to their strong interlacement, brings about changes (loss or limitation) in the personhood status. This claim, if it can be proved correct, appears problematic for the understanding of legal statuses I have come to adopt. How could it be that a loss of a legal status, whose acquisition is only possible upon the prior holding of a more fundamental legal status, can cause alternations and

¹⁰¹ Cfr. Douzinas 2000: Ch. 5. On the confusion between the notions of nationality and citizenship, see Mindus 2014: especially 116–120.

even the loss of this latter status as well? We understand that if we cut the trunk of a tree, the whole of the tree will fall down, branches included. But how can it be that if we chop off a branch, we take the rest of the tree with it as well? Something does not seem right in all this. I will explore this key problem in the present and the following part of the thesis.

Some of the scenarios in which this troublesome link between personhood and citizenship has or still may emerge have already been indicated above: for one, the radical redrawing of European borders as a result of the end of World War I left millions of individuals stateless and, in consequence, without any legal protection whatsoever; a few decades later, the almost total eradication of millions of Jews during the second World War was made significantly easier if not possible only once these people were stripped of their citizenships and all other legal bonds. Today, wars and increasingly devastating natural disasters are causing millions of people to leave their homes, with most of them coming to Europe and North America without any proper legal basis, often carrying no personal documents at all. With European countries (seemingly) unable to process all of them in accordance with valid international norms, many of these individuals are either put in administrative detention centres, which function as kind of legal black holes or are left to their own devices, to wander Europe illegally and unprotected, exposed to unchecked violence and any number of legal sanctions. Finally, the recent announcement of “Brexit” – the exit of the UK from the EU – is already stirring much debate about the possible consequences for individuals “trapped” on both sides, i.e. citizens of EU Member States in the UK and UK citizens in EU states. Resident non-citizens who until today were in almost every sense equal to counterparts with citizenship now face losing all their acquired rights of UK’s decision to dissociate from the EU (cfr. Mindus 2017).

Our history as well as present times are replete with cases demonstrating the force to radically alter legal statuses of individuals. While events may be at the root of such changes, by themselves they are inert – it takes conscious actions of men in order to enforce particular changes in the legal (and other) sphere. It took the Nuremberg Laws to exclude Jews from German (Reich) citizenship, just as now it takes active omission of the exercise of binding international agreements to cause thousands of refugees in Europe to be left with no legally regulated status. In order to fully understand the mechanisms of such status-deprivation in relation to such “conditioning events”, one would need to examine all or at least some of them in greater detail. Here, however, I do not have sufficient space to conduct such an extensive investigation. Rather, I will focus on just one such example.

The Erasure, as has popularly come to be known, was an act performed by Slovenian state authorities in the early 1990s, whereby more than 25.000 individuals – residents in Slovenia hailing from other SFRY countries – were deprived of their status as permanent residents. The cancellation of their residence status, including the physical destruction of their personal documents, followed their unwillingness or inability to obtain citizenship of the newly-created state of Slovenia following its secession from SFRY in 1991. This (administrative) act left the larger part of the affected individuals almost completely rightless, in a legal situation that could best be described as a state of “legal limbo”: some were deprived of any citizenship and were thus left stateless; having lost their residency status all of them found themselves without a legal basis for being on the Slovenian territory which made them vulnerable not only to constant administrative sanctions and imprisonment, but also to deportation; the loss of residency also meant the loss of a legal basis for a whole range of other rights, such as the right to work, medical insurance, pension rights, right to education, etc. By being pushed to the fringes of law, these individuals often found themselves also socially marginalized, left without any kind of a social safety net. For a long time, their existence as a specific group was unknown, for they were left without a proper voice in the public arena. The legal aspects of Erasure are the subject of Part II of the thesis.

This Part has three chapters. In Chapter 4, I present the legal framework necessary for understanding the Erasure. Specifically, in section 4.1., I examine the legal regulation of citizenship and residency in the former SFRY, that is, prior to Slovenia’s secession. In 4.2., I then present the most important legal acts relating to the secession of Slovenia from SFRY and for the establishment of a new sovereign state. Finally, in section 4.3., I analyse the crucial “independence legislation”, namely the Citizenship Act and the Aliens Act: the former regulated the modes of citizenship acquisition in the newly-established state, including specific provisions for this particular group of residents, whereas the latter act regulated the position of foreigners on Slovenian soil, but also included special norms on the legal position of those individuals who were eligible to obtain the new Slovenian citizenship but, for one reason or another, did not.

In Chapter 5, I build on the analysis conducted in the previous chapter in order to examine in detail the legal mechanisms implemented in the Erasure. Narrowly looking, the Erasure regarded the deprivation of residency status; however, the citizenship policy implemented by the newly-formed Slovenian state is actually the key for understanding the phenomenon in its wider sense. Thus, in section 5.1., I demonstrate how the disenfranchisement of a particular

group of individuals on the territory of the newly sovereign state proved to be a crucial step in the Erasure. Here disenfranchisement should not be understood in the narrow sense of the word – after all, strictly speaking, the affected individuals were free to take up the Slovenian citizenship offered to them. Rather, it should be seen as a more complex process of excluding a specific population from the Slovenian body politic. Indeed, it was only when these individuals were both left without the legal protections offered to citizens as well as socially stigmatized as enemies, anti-citizens, the Others etc. that the authorities were able to proceed with the Erasure in the narrow sense. The latter is the subject of section 5.2. There, I examine in detail the exact manner in which more than 25.000 individuals were deprived of all their most fundamental legal rights. I look at the Instructions the Ministry of the Interior transmitted to the local administrative offices that were charged with putting the Erasure to effect. Finally, in section 5.3. I present the most important judicial decisions relating the the Erasure in the wider sense. Here two decisions of the Slovenian Constitutional Court as well as the verdict of the ECtHR in the case *Kurić and others v. Slovenia* will be examined and their most important findings highlighted.

Finally, in Chapter 6, I first discuss (6.1.), in a general manner, the consequences State actions may have on the legal personhood of specific, vulnerable groups of individuals. On the basis of the argument that even today legal personhood can still be, if not completely deprived at least diminished in its effects, I proceed (6.2.) with an analysis of the consequences of the Erasure for the underlying status of a person. One important realization that stems from both this and the previous section is that legal personhood is highly interconnected with other legal statuses. Hence, in the last section (6.3.), I first propose how this connection should best be visually represented. Seeing, however, how this model has great difficulties, I finally propose *de lege ferenda* a different visual representation that is also an invitation for re-thinking and re-modelling these fundamental relations between legal personhood and all other legal statuses.

I should emphasize that the following is not a detailed and comprehensive analysis of all legal and social aspects of the Erasure in the wider sense, which includes the period prior to the actual Erasure as well as the acts and events following the Erasure itself. Rather, I focus on the facts that I perceive as immediately relevant for the thesis at hand. I will therefore omit reference to many historical facts that had occurred prior to the Erasure as well as to numerous legal and broader social developments in the aftermath of the Erasure.

CHAPTER 4.

A RECONSTRUCTION OF THE LEGAL FRAMEWORK

In this chapter, I will address the following questions: first, what was the legal regulation of citizenship and residency status in the former SFRY, given its federal form of government? In this regard, I will be particularly interested in knowing, what was the status of citizens of one republic on the territory of another republic: under what conditions could they travel to, work or reside in another republic? What were their rights and duties in this regard?

Second, with regard to Slovenia's separation from SFRY, I will be looking into the legal and political foundations of this process: which political acts and legal declarations, laws, constitutional acts etc. provided for the legitimization of the secession as well as the legal basis of the new State? Related to this issue, the legal position of those residents of Slovenia who at the time of its separation from SFRY held the citizenship of one of the other republics will be of particular importance. How were these individuals treated legally in this transition period? What was their role in the secession process: were they a disruptive, counter-productive presence or were they in some way a positive factor in the independence efforts? Were they, in other words, treated by the authorities as foreign elements in need of being eliminated or were they rather seen as an integral part of the body politic?

Finally, upon independence the new Republic of Slovenia had to, among other key political decisions, determine its citizenship policy – in other words, it had to determine who and under which conditions will be able to obtain its citizenship. What kind of a citizenship policy did Slovenia choose? Was the model it chose a liberal and extensive one or more conservative and restrictive one? Was its citizenship policy built on the idea of the primacy of the nation, understood as a group preceding the creation of the State and determined by a common ethnic (blood) origin, culture and language; or was it rather built upon an idea of a nation that is constructed only once the population of a given territory is given its own State? Moreover, in relation to the citizens of other SFRY republics residing in Slovenia, I wish to see whether the new authorities respected their promises given in the transitional period. Could these individuals automatically obtain Slovenian citizenship or were they given some special conditions under which they could apply for it? Were they now that the ethnic Slovenians obtained their own country still seen as an integral part of the political body? What was to be their destiny in the newly formed independent and sovereign Slovenia?

4.1. Citizenship & permanent residence in the former SFRY

The Socialist Federal Republic of Yugoslavia (SFRY)¹⁰² was a federal state composed of six republics and two autonomous provinces.¹⁰³ Stemming from this structure was the regulation of citizenship, which was two-tiered: each citizen held both the federal and the republican citizenship. The predominant citizenship-acquisition principle at the federal level, which was followed by all the republics as well, was *jus sanguinis*,¹⁰⁴ although other manners of acquiring citizenship were also possible (i.e. by naturalization, in accordance with international agreements or by birth on the territory if the child's parents or their citizenship could not be identified or if they were stateless). All Yugoslav citizens were considered equal before the law in their rights and duties, regardless of their national, racial, religious, gender, language or any other difference.¹⁰⁵ The same applied to their republican citizenship as well.

Two phases can be distinguished in the relationship between the federal and the republican citizenship: until 1974 the federal citizenship was “the primary” one, meaning that only Yugoslav citizens could hold citizenship of one of the republics and, consequently, that the loss of federal citizenship also meant the loss of the republican one. After the adoption of a new constitution in 1974, which began a process of decentralization, republican citizenship took precedence: Art. 249/2 of the Constitution stated that each citizen of a republic is also a citizen of the SFRY and that citizens of one republic have the same rights and duties on the territory of any other republic as its own citizens. It should be noted that each republic had to adopt its own internal laws regulating citizenship which had to be harmonized with the federal law. In practice these laws differed between each other only in less important issues.

This shift of primacy from the federal to the republican citizenship was mostly theoretical as it had little or no practical effect. In both phases, all Yugoslav citizens, regardless of their republican citizenship, held equal rights and duties and were able to move freely, work and

¹⁰² The name SFRY was introduced in 1963. Until 1918 the territory was part of the Austro-Hungarian empire. After World War I, the country became known as the Kingdom of Serbs, Croats and Slovenes. In 1929 it was renamed as the Kingdom of Yugoslavia. In 1945, after World War II it was first named Democratic Federal Yugoslavia and soon thereafter renamed as Federal People's Republic of Yugoslavia.

¹⁰³ The republics were: Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia, whereas the two provinces, Vojvodina and Kosovo, were initially part of Serbia.

¹⁰⁴ *Ius sanguinis* can be defined as principle according to which “a person's nationality is determined on the basis of the nationality of his or her parents – or one (particular) parent – at the time of the person's birth” (Bauböck et al. 2006: 121).

¹⁰⁵ Cfr. Article 33 of the 1963 Constitution and Article 154 of the 1974 Constitution.

reside in any republic they wished. Yugoslav citizens frequently exercised this right and moved often, especially for work-related motives. In this way, a considerable number of individuals resided outside of the republic of their origin. In Slovenia, for instance, the number of non-Slovene residents at the time of its secession in 1991 was approximately 200.000, which made for roughly 10% of the entire population. Moreover, changing the republican citizenship was fairly easy: although conditions differed slightly from republic to republic, the essential requisite was that the applicant, being of full age, was able to prove residence in the specific republic at the time of filling the application. It has been noted that due to the unproblematic nature of the republican citizenship and the full equality enjoyed by all citizens, “many (perhaps most) SFRY citizens did not devote much attention to this feature of their citizenship; many may not even have known which republic’s citizenship they held” (Kogovšek Šalamon 2016: 40).

Seeing how federal citizenship guaranteed all the same civil rights, regardless of their republican citizenship, one's day-to-day legal relations were significantly more influenced by her (permanent) residency status. Yugoslav citizens were able to register their permanent (or temporary) residency in any of the republics, granted that it was the republic where they effectively lived. Permanent residence was in SFRY, and still is its successor countries, including Slovenia, a fundamental legal status in that it gave access to a series of socio-economic rights, including the right to health care, a host of social benefits, the right to work and to study etc.; additionally, in certain cases it even gave access to the right to vote (and still does).¹⁰⁶ Hence, for any Yugoslav citizen, his or her residency status was, within the country itself, the most important legal status, determining the greater part of his or her public rights and duties.

The keeping of citizenship and residence records is a special chapter in the Erasure story. A detailed and a comprehensive presentation of regulation of this area would require much more space and it is not my intention here to go into detail on the matter. I shall only point to matters that I find particularly relevant for a general understanding of the Erasure.

For one, it is important to note that all population registers in Yugoslavia (from 1945 until 1991) were kept only at the level of the republics. Municipalities were obligated to keep records on their (permanent) residents and citizenship was recorded in the place where the

¹⁰⁶ See more in Ragazzi & Štikš 2010: 3.

individual had her permanent residence.¹⁰⁷ After 1963, however, republican citizenship was no longer consistently recorded. “Beginning in that year”, notes Kogovšek Šalamon, “the population registers contained records on all SFRY citizens, regardless of the republic in which they had citizenship” (2016: 45).¹⁰⁸ Soon thereafter population registers began to be abandoned. While in 1976 separate citizenship records were abolished and information on citizenship was entered into the birth registers, in 1982 population registers were abandoned altogether (see more in Kogovšek Šalamon 2006: 45, including note 69).

In order to better understand the complexities of the legal regulation in this area as well as the consequent confusion it created among the affected individuals – constituting in this way a relevant element of the Erasure –, I should add that in addition to the two statuses – citizenship and (permanent) residency – the SFRY introduced in 1976 the “unique personal identification number” (EMŠO).¹⁰⁹ The EMŠO allowed for unique identification of each individual and it was used for the maintenance of population databases, the integration of data in various such databases and for the purposes of other official bodies authorized to use the EMŠO. A federal law defined the structure of the number and the obligation to enter it into certain documents, while the republics were in charge of all other aspects of its implementation. In Slovenia, all permanent residents obtained the EMŠO, including those permanent residents who did not hold Slovenian republican citizenship. This fact proved to be one of the biggest problems in the time of the Erasure since “many erased individuals erroneously thought that their ‘Slovenian’ personal identification number was proof that they were not obliged to apply for Slovenian citizenship, thinking that they would not have received the Slovenian personal identification number unless they held Slovenian republican citizenship” (Kogovšek Šalamon 2016: 42).¹¹⁰

¹⁰⁷ In SR Slovenia, until 1965 only data on Slovenian citizens was entered in the registers. That meant that if an individual was born in Slovenia before 1965 to parents who resided in Slovenia but were not Slovenian citizens (either both or the one after whom the child obtained her citizenship), the information on the citizenship of this child was not entered into the Slovenian population register. See Kogovšek Šalamon 2016: 45.

¹⁰⁸ I.e. of all citizens, regardless of their republican citizenship, with permanent residence in Slovenia. However, it should be noted that due to the relative unimportance of the republican citizenship individuals moving to other republics often did not change their republican citizenships nor did they register the changes of their residence. See Ragazzi & Štiks 2010: 5.

¹⁰⁹ See the Law on the Introduction of the Unique Master Citizen Number, *Official Gazette of SFRY*, n. 58/1976.

¹¹⁰ As Kogovšek Šalamon also notes, from this it can be seen that the government did not provide sufficient information to the population regarding the differences between the population register, the EMŠO number and the role of the republican citizenship. This, she also notes, had especially serious consequences for the lower working class immigrants in Slovenia from other Yugoslav republics – who represented the majority of those later erased.

In summary, three points relevant for understanding the Erasure should be emphasized in relation to the just discussed matters. First, while individuals in SFRY held a dual citizenship, the republican citizenship had almost no practical value. The practically most relevant legal status was rather permanent residence. Individuals were often unaware of their republican citizenship and the data entered into population records was frequently incorrect or outdated. All this proved particularly important at the moment of the break-up of Yugoslavia when, with federal citizenship ceasing to exist, the republican citizenship became the main criterion for determining one's citizenship of one of the newly formed states. Secondly, citizenship and residency records were kept at the level of the republics. However, due to constant changes in the legislation, their maintenance was highly irregular and thus the data they contained became unreliable. This fact proved critical when Erased individuals attempted to provide proof of their citizenship and residency but were unable to do so. Finally, due to a mix of political and legal circumstances (promotion of Yugoslavianism, freedom of movement and equal rights regardless of republican origins), as well as of a widespread disinterest, there was both a lack of information as well as misunderstanding regarding the functions of the various statuses (federal and republic citizenship, permanent residence, unique identification number), including lack of knowledge about one's own precise legal situation.

All these facts proved to be crucial for the events that followed. Since the secession of Slovenia from SFRY and the transition from one legal system to another is highly relevant for understanding the Erasure, the next step is to look at the most important documents adopted by the Slovenian authorities at that time.

4.2. The transition: legal foundations for the independent state

The process of Slovenia's secession from the SFRY began in the 1980s.¹¹¹ With the overarching influence of Tito gone, the growing economic crisis and the rise of nationalist tendencies, the Yugoslav federation began to crack. Serbian calls for greater centralisation were met with resistance from the other states, especially Slovenia and Croatia. Following the amending of the federal constitution in 1988, which sought to give more powers to the central

¹¹¹ Here, I am only interested in certain internal legal aspects of the Slovenian secession. For the internal law perspective, see for instance Iglar 1992, Radan 2002, Crawford 2007.

government on the account of the republics, in 1989 the Slovenian authorities also began amending their republican constitution – presumably in order to bring it in line with the amended federal constitution following the principle of the supremacy of the federal constitution. However, the amending process in fact served to begin the process of dissociating Slovenia from the federation.¹¹² The adopted amendments paved the way for the transition into a new, independent and sovereign state by seeking, among others, greater liberalization of politics and economic life, strengthening democratic processes and, most importantly, providing the legal foundations for the re-acquisition of sovereign powers which were (temporarily) transferred to the federation. One of the most important amendments (Amendment X) explicitly declared the right to self-determination of the Slovenian people, including the right to secede from the federation (see Iglar 1992).

Although the process of disassociation was met with criticism, both internally and internationally, the Slovenian authorities pressed on and in April of 1990 the first multiparty elections after the Second World War were called in Slovenia. One of the defining moments in the process was the referendum on the sovereignty and independence which took place on 23 December 1990 (the plebiscite). The plebiscite was called on the basis of the Referendum on the Sovereignty and Independence of the Republic of Slovenia Act (the Referendum Act) adopted on 6 December 1990.¹¹³ The Referendum Act set the date of the plebiscite, determined the question and defined the electorate. It also established that if the majority would vote in favour of the secession, the parliament was to adopt within six months all the necessary measures and legal acts in order for the Republic of Slovenia to assume the exercise of all of its sovereign rights. With regard to the electorate, the Referendum Act stated that all persons who had the right to vote under the Law on the Elections to the National Assemblies had the right to take part in the referendum. That meant that all adults over the age of eighteen with permanent residence in Slovenia on the day of the plebiscite were able to participate – that included non-nationals from other SFRY republics with permanent residence in Slovenia.

On the same day as the aforementioned act, the Statement of Good Intentions (the Statement) was adopted.¹¹⁴ The Statement, likewise adopted by the National Assembly, was intended as a reassurance of the domestic and the international public as to the future actions of the Slovenian authorities following the (positive) result of the referendum. It laid out the basic

¹¹² More on how this process was conducted, see Hayden 1990.

¹¹³ Official Gazette of RS, n. 44/90.

¹¹⁴ Official Gazette of RS, n. 44/90.

political intentions of the new state: it declared, for instance, that once independent, Slovenia will be a democratic and a welfare state governed by the rule of law and will safeguard civil rights and liberties. It vowed continued protection of the Italian and Hungarian national minorities and promised all other ethnicities and nationalities the right to a comprehensive cultural and linguistic development. Most importantly for our purposes, the Statement clearly provided that citizens of other republics with permanent residence in Slovenia will be able to obtain Slovenian citizenship if they will so desire.

In this context, we should add that on the same day (6 December 1990), all parliamentary parties and groups signed an agreement on joint action at the plebiscite (the Agreement). In it (point 9) they pledged that the political status of the members of the Italian and the Hungarian national minorities, as well as of all members of other Yugoslav nations will not be altered because of the referendum – they poetically declared that these individuals will “share our common destiny”. They finally reiterated the pledge that members of other Yugoslav nations with permanent residence in Slovenia will be able to acquire the Slovenian citizenship if they wanted to.

The plebiscite was held on 23 December 1990: the turnout was 93,2% with those voting in favour of the independence amounting to 88,5% of all eligible voters. On the basis of this overwhelming decision in favour of the secession and independence, the national authorities were obligated to begin preparing the legal basis for establishing a new sovereign state. In the six months following the referendum decision, the National Assembly adopted a series of crucial legislation which was symbolically called “the independence legislation” (see below, 4.3.). The process culminated in the adoption of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (the Basic Constitutional Charter) on 25 June 1991.¹¹⁵ The Charter is the most important state-founding legal act as it was with its adoption that Slovenia formally declared its independence.¹¹⁶ Besides its general fundamental importance, the Charter and the Act for its implementation¹¹⁷ are particularly relevant for evaluating the Erasure. Among the reasons for the secession, the Preamble of the Declaration states that the SFRY no longer functioned as a state ruled by law and seriously violated human rights. Moreover and more importantly, Article III of the Declaration states

¹¹⁵ Official Gazette of RS, n. 1/91.

¹¹⁶ While normally these effects are achieved by the declaration of a new constitution, the Constitution of the Republic of Slovenia was adopted only six months later, on 23 December 1991.

¹¹⁷ The Charter was implemented on the basis of the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (the Constitutional Act) adopted on the same day as the Charter. See the *Official Gazette of RS*, n. 1/91.

that Slovenia guarantees the protection of human rights and fundamental freedoms to all persons on its territory, regardless of their nationality, without any discrimination. Finally, we need to bear in mind Art. 13 of the Constitutional Act which determined that citizens of other SFRY republics with permanent residence in Slovenia who actually resided there on the day of the referendum held equal rights and obligations as citizens of the Republic of Slovenia – that is, until they obtained the Slovenian citizenship (under the conditions set in the Citizenship Act) or until the deadline specified in the Aliens Act expired.

The documents I have briefly presented just now legitimized and legalized Slovenia's secession from the SFRY. They represent the basis upon which the transfer of powers from the federation to the new sovereign state was made (albeit unilaterally). They set up the fundamental political and juridical characteristics of the Republic of Slovenia (i.e. a democratic republic, founded on the principles of rule of law and respect for human rights etc.). Beyond this fundamental State-constituting role, these acts also demonstrate the legal (constitutional) and political commitment of the new authorities towards all of its residents, especially those who were not ethnic Slovenes. While members of the Italian and Hungarian national minorities were already prior to independence granted privileged protection, these acts served to appease the significant population of citizens of other SFRY republics who (permanently) resided in Slovenia. The pledges made in these documents represented an important legitimization of the new state, especially for the international community, while at the same time they aimed to convince as many of these individuals to vote favourably in the referendum and back the independence efforts. By allowing citizens of other SFRY republics with permanent residence in Slovenia to vote in this all-important referendum, the Slovenian state demonstrated, both legally and symbolically, that it perceived them as co-equal members of its body politic.¹¹⁸ In so doing it raised in them legitimate expectations that once under the rule of the new sovereign State, they will be treated equally to Slovene nationals and will be afforded the right to obtain the Slovenian citizenship.

The manner of the acquisition of the new Slovenian citizenship was determined by the new Citizenship Act. This and relevant other “independence” laws are examined in the next section.

¹¹⁸ While this is true, we should not overlook the fact that there was already in this initial period a slight, yet important shift in the treatment of citizens of other SFRY republics. While in the pre-independence period they were treated (at least at the declarative level) as equal to Slovene citizens in all respects, this equality is already temporally limited and conditioned in the Constitutional Act. See more on this in Zorn 2007 and below (4.3. and 5.1.)

4.3. The “Independence legislation”

As is well established in international law, one of the fundamental conditions of statehood is a permanent population.¹¹⁹ When a new state emerges, it is crucial that it determines who its citizens will be. There is no pre-fixed rule of international law determining how the new state should go about determining the status of the individuals residing on its territory at the time of its coming to be. The determination of who its citizens will be is largely a sovereign right of each country, although certain limitations of this right do exist. The State must, above all, respect each individual’s right to nationality, prevent statelessness, assure equality of men and women and respect the principle of non-discrimination.¹²⁰ Particular rules of international law in regard apply in cases of state secession (see Dedić 2003: 39–49).

Having declared its secession from the SFRY, Slovenia had to establish who, and under what conditions, it will treat as its citizens. The basic principles of this policy were already determined in the independence documents presented in the previous section. These principles were then elaborated in the Citizenship of the Republic of Slovenia Act (the Citizenship Act).¹²¹ Below, I discuss the pertinent elements of the Citizenship Act, especially with regard to citizens of other SFRY republics. Pertinent in this regard is also the Aliens Act,¹²² which I will also examine below.

The Citizenship Act

In its general clauses, the 1991 Citizenship Act determined the normal manners of acquiring and losing citizenship, as well as the manner of keeping the citizenship records. For our purposes, however, the most important clauses are found in its transitional provisions.

These provisions determined two ways in which Yugoslav citizens could be “transformed” into Slovenian citizens. Article 39 determined that all who until then were citizens of the (Socialist) Republic of Slovenian and of the SFRY automatically become citizens of the new Republic of Slovenia. Thus, for Slovene nationals the acquisition of citizenship was automatic

¹¹⁹ See, for instance, Crawford 2007: Part I.

¹²⁰ On this, see Kogovšek Šalamon 2016: 49–52; Dedić 2003: 35–39.

¹²¹ Adopted on 5 June 1991, came into force on 25 June 1991. *Official Gazette of RS*, n. 1/91.

¹²² *Official Gazette of RS*, n. 1/91.

or *ex lege*.¹²³ This continuity with the former republican citizenship represents one manifestation of the general rule of continuity with the former legislation, established in the Constitutional Act.¹²⁴ More importantly, this principal policy choice demonstrates that Slovenian citizenship is based on the idea of the Slovenian nation as the primary bearer of statehood.¹²⁵

The other manner was “application-based”: following Art. 13 of the Constitutional Act, Article 40 of the Citizenship Act determined the conditions under which citizens of the former SFRY could obtain the new Slovenian citizenship.¹²⁶ Eligible to receive citizenship under this article were individuals who,

- were citizens of one of the other SFRY republics,
- had their permanent residence registered in the Republic of Slovenia on the day of the independence referendum (23 December 1990) and
- actually resided on the territory.

In order to obtain the citizenship under these favourable conditions,¹²⁷ the eligible individuals had to submit their applications within six months from the day of the enforcement of the Citizenship Act (25 June 1991).

Given the fundamental importance of this provision for the subsequent Erasure, let us shortly look at the named conditions.

In order to satisfy the first condition, individuals were required to provide birth certificates as proof of their citizenship. If they weren’t able to obtain them or could not prove they were citizens of one of the other SFRY republics, they were denied Slovenian citizenship and were subsequently erased. This manner of satisfying the first criterion, subsequently upheld by the Supreme Court,¹²⁸ has been criticized by Kogovšek Šalamon (2016: 58). She argues that this

¹²³ This rule established the prevalence of the principle of continuity with the former Yugoslav legislation in this matter. See Kogovšek Šalamon 2016: 55.

¹²⁴ Par. 1, Art. 4 of the Constitutional Act determined that until appropriate legislation is adopted, those federal laws which were applicable in Slovenia and do not contradict the legal order of the Republic of Slovenia, continue to be applicable.

¹²⁵ This emphasis, repeated many a times over in the fundamental independence acts as well as in the 1992 constitution, reveal that Slovenia’s is an ethno-democracy. Cfr. Zorn 2007. More on this notion below.

¹²⁶ While regular conditions were determined in Par. 1, minors who were citizens of other SFRY republics were able to obtain citizenship under the conditions set for the naturalization procedure (Art. 14 of the Citizenship Act)

¹²⁷ This possibility of obtaining citizenship under such favourable conditions was dubbed a “one-time extraordinary naturalisation”. See Kogovšek Šalamon 2016: 57.

¹²⁸ Judgment U 317/94-4, from 1 February 1996.

requirement was excessively burdensome for the applicants, since these facts should have been available to public officials from official records. The same author also argues that this was an overly formalistic requirement that disproportionately affected certain individuals.

The second condition, that of having a registered permanent address on the day of the independence referendum, was based on the pledge made in the Statement of Good Intentions and in the Agreement and followed Art. 13 of the Constitutional Act. This basically allowed access to the citizenship to those residents who were not already Slovenian citizens but were nevertheless allowed to vote in the 1990 referendum. While formally this statutory criterion does not seem problematic, several authors have nevertheless found it too narrow and formalistic.

Kogovšek Šalamon argues that the supposed underlying reason for the introduction of this condition was to assure that citizenship went only to those who had genuinely strong ties with Slovenia (2016: 58). Following such a narrowly determined criterion, however, prevented many individuals who nevertheless had strong and effective ties with Slovenia from accessing the citizenship. For instance, individuals who for one reason or another registered their permanent residence after the prescribed date, although they actually resided in Slovenia for a longer period and had here the centre of their economic and other activities, were not eligible for citizenship. Likewise, individuals with only a temporary residence permit who similarly exercised all their social and economic rights in Slovenia, were unable to obtain citizenship (cfr. Jalušič & Dedić 2008: 94f).

Kogovšek Šalamon also argues that the distinction between permanent and temporary residence should not have been made so relevant. She argues that there were numerous reasons why someone did not register his or her permanent residence in Slovenia, despite actually residing there for a longer period of time: they may have been unaware of the possibility or did not devote sufficient attention to the matter (see above, 4.1.); moreover, in some situations it was actually impossible to register permanent residency – as when, for instance, foreign workers lived in special dormitories (see Kogovšek Šalamon 2016: 59).¹²⁹ On the other hand, Kogovšek Šalamon notes that an individual who only recently moved to Slovenia and registered her permanent residence only shortly before the referendum was eligible to receive Slovenian citizenship (Ibid.). In light of the established principle in

¹²⁹ Cfr. Kogovšek Šalamon 2016: 59f for a short review of the reason for which individuals only held temporary residence, such as they are apparent from the Supreme Court's case law.

international law, according to which States, especially in cases of succession, ought to take an individual's "genuine and effective link"¹³⁰ with the host country in consideration when deciding on granting its citizenship or not, Kogovšek Šalamon's criticism appears justified. The individuals she is referring to undoubtedly had just as strong a connection with Slovenia at the time of its independence (on the date of independence referendum) as did their compatriots who registered their permanent residence in Slovenia. From this perspective, their *a priori* exclusion from the possibility of obtaining Slovenian citizenship on the basis of Article 40 was unjustified.

The last condition – the condition of actually living in Slovenia, was not included in the pre-independence acts (the State of Good Intentions and the Agreement), but was rather inserted only in the Constitutional Act and then the Citizenship Act. It has been argued that the motive behind its inclusion was to further guarantee that the recipients of the citizenship indeed held genuine ties with and were "loyal" to the country.

The condition is a so-called "indeterminate legal concept", whose content needs to be specified in each individual case. Such concepts are used whenever the legislator is unable to foresee all possible situations that may occur or prove relevant in a given case. While its use does give the decision-making officials sufficient freedom to take into consideration different circumstances, this freedom is limited. The deciding officials must "take into consideration the meaning and the purpose of the law or regulation and the nature of the matter concerned" and in so doing pay sufficient respect to the principle of equality before the law. This means, above all, that the administrative authority must follow the way in which previous like cases were decided and decide in a like manner – if there are no justified reasons for deviations (see Constitutional Court decision Up-77/94, from 16 September 1997).¹³¹

Kogovšek Šalamon's analysis of the Supreme Court's case law on this criterion demonstrates that the said criterion was interpreted narrowly, with numerous circumstances understood as manifesting one's termination of actual residence in the territory. Thus, while the condition as such does not appear illegitimate, I would agree with Kogovšek Šalamon who claims that "it should have been interpreted in its wider sense while taking into account the constitutional principle of proportionality" (2016: 65). Numerous reasons could have prevented the eligible individuals from being permanently present on the territory of Slovenia from the date of the

¹³⁰ The test was first established in the *Nottebohm* case of the International Court of Justice. Cfr. Dedić 2003.

¹³¹ For the discussion of how this condition was understood in the case law of the Supreme Court, see Kogovšek Šalamon 2016: 60–66.

plebiscite until the resolution of his or her application. If the authorities were truthful in their intention of granting citizenship to those individuals who actually held strong and effective ties with Slovenia, they should not have based their evaluation only on the objective fact of one's physical presence on the territory, but rather also on the subjective fact of whether or not that individual actually had the intention to permanently reside in that territory (cfr. Kogovšek Šalamon 2016: 64).

Subsequent amendments to the Citizenship Act: "The Exclusion Clauses"

Less than two weeks prior to the expiration of the deadline for presenting the applications, an amendment to Art. 40 of the Citizenship Act was passed, containing two new "exclusion clauses".¹³² These two amendments provided for the possibility of rejecting applications for citizenship if the applicant had committed a criminal offence against the State (Art. 40, Par. 2) or if one was judged to present a threat to the public order, security, or defence of the State (Art. 40, Par. 3). While Par. 2 proved to be useless – and so all cases intended to be processed under it were subsequently processed under Par. 3,¹³³ the latter's purpose – so it is argued by its critics – was primarily to legitimize the "blacklist" that was previously compiled for excluding from citizenship and prohibiting entry in Slovenia of certain individuals – primarily officers of the YPA.¹³⁴

These provisions were introduced in order to enable the protection of "the national interest", i.e. of the public order and of the State. However, the amendments manifest at least three large problems: first, with their introduction, "the legislator further curtailed the promise given in the Statement of Good Intentions, as well as the provision in Article 13 of the [Constitutional Act], which did not contain conditions of exclusion" (Kogovšek Šalamon 2016: 68; cfr. Zorn 2007: 25). Moreover, the late introduction of the amendments which were applied to cases that were at the time pending raises serious questions in relation to the prohibition of retroactivity.¹³⁵ I confront this issue below (see Part III, Ch. 9.2.3. & 10.2.3.). Finally, as argues Zorn, these new provisions allowed for arbitrary decision-making of the

¹³² See *Official Gazette of RS*, n. 30/1991, from 14 December 1991.

¹³³ Cfr. Kogovšek Šalamon 2016: 67-8.

¹³⁴ More on this clause and the blacklist and on the fact that the provision from Par. 3 referring to a threat to public order was later judged unconstitutional. See Kogovšek Šalamon 2016: 70.

¹³⁵ I confront this issue below: see Part III: Chs. 7.2.3. & 8.2.3.

executive authorities which could now base their decision on their evaluation of the applicant's personality, i.e. on moralistic reasoning (Zorn 2007: 26).¹³⁶

On 26 December 1991, the deadline for submitting the application for citizenship under Article 40 of the Citizenship Act expired. By that date the majority of eligible individuals applied for citizenship and successfully acquired it.¹³⁷ Those citizens of other SFRY republics who permanently resided in Slovenia but did not obtain the new Slovenian citizenship until that date were to become foreigners (aliens). Their legal condition was now regulated by the Aliens Act.

The Aliens Act

The legal position of foreigners in Slovenia is regulated by the Aliens Act.¹³⁸ The Act in general regulates the conditions for entering and staying in the country for foreigners – defined as all those who are not citizens of the Republic of Slovenia –, required documentation, conditions for forced removal of aliens from the territory, the position of refugees, records of aliens on the territory etc. While the larger part of the statute regulates the legal position of individuals who are only entering the State for the first time, the transitional provisions of the 1991 Aliens Act also regulated the legal position of two further “types” of foreigners: first, those individual who already had alien status under SFRY law and second, those individuals who were citizens of other SFRY republics with permanent residence in Slovenia but did not apply for citizenship or had their applications rejected.

As far as the first group is concerned, Art. 82, Par. 3 determined that permanent residence permits issued to foreigners with permanent residence on the territory of the Republic of Slovenia under the SFRY law on aliens continue to be valid even after the adoption of this law.

On the other hand, the legal position of the latter group was regulated by Art. 81. Paragraph 1 of the said article determined that the Act's provisions will not apply to those citizens of

¹³⁶ It should be noted that a few years later, the Constitutional Court declared part of Paragraph 3 unconstitutional. See decision U-I-89/99, from 10 June 1999.

¹³⁷ Of roughly 200.000 eligible individuals more than 174.000 applied and more than 170.000 obtained citizenship. It is estimated that some 29.000 did not obtain citizenship: while about 2400 had their applications denied, others did not even apply.

¹³⁸ See *Official Gazette of RS*, n. 1/1991 (and subsequent modifications).

former SFRY republics with permanent residence in Slovenia who had (or will) applied for Slovenian citizenship within the deadline prescribed by Art. 40 of the Citizenship Act. This provision followed the guarantee established by Art. 13 of the Constitutional Act (see above).

Par. 2, however, applied to individuals who either did not apply for, or had their application for citizenship denied. It determined that the provisions of the Aliens Act will become applicable for them two months after the expiration of the deadline for applying for citizenship or, alternatively, two months after their application was denied. Hence, the provisions of the Aliens Act, in respect to this group of individuals, came into force on 26 February 1992 at the latest.

This regulation reveals two important points: first, by explicitly determining the legal status of those foreigners who held permanent residence status under SFRY law but not doing the same, *mutatis mutandis*, for those individuals who were now for the first time “becoming” foreigners, the Aliens Act introduced a discrimination between “the old” and “the new” foreigners.¹³⁹ Secondly, the Aliens Act did not regulate the legal status in the 2-month transit period between the expiration of the 6-month application period and the date of the enforcement of the Aliens Act of those individuals who under Art. 40 were eligible for Slovenian citizenship but did not apply for it. Nevertheless, their legal position was protected on the basis of Art. 13 of the Constitutional Act which afforded them equal rights with Slovenian citizens.

And here, we might say, lies the crux of the matter. The citizens of other SFRY republics with permanent residence in Slovenia at the time of its secession who either did not apply for the new Slovenian citizenship or had their application rejected were considered, until 26 February 1992, as equal in rights and duties to Slovenian citizens – and not, as one could assume, to other foreigners. After that date, however, when they officially became foreigners, their legal position was not regulated in the same manner as that of other foreigners who also held permanent residence under SFRY law – these latter continued to hold the same status under Slovenian law as well. Rather, the Aliens Act was silent as to the exact legal position of the “new” foreigners. Specifically, it was not made clear, as it was for the “old” foreigners, whether their residence permits will continue to be valid – though they had every reason to believe that they will, given the promises made by the authorities prior to independence and seeing how up to the last moment they were equal to Slovene citizens in almost every aspect.

¹³⁹ I deal with this problem below. See Part III: Ch. 8.2.1.

Yet, as we will see in Chapter 5, it was precisely this legal gap, created by the ambiguous and underspecified language of Article 81, Par. 2 of the Aliens Act that created the basis for the Erasure (cfr. Zorn 2007: 28).

*

The coming into force of the Aliens Act is one of the defining moments of the Erasure. It signified the moment in which those individuals who were eligible to obtain Slovenian citizenship under Art. 40 of the Citizenship Act, but for one reason or another did not, officially became foreigners in the Republic of Slovenia. This consequence was not unexpected and it was, moreover, willed by the affected individuals – at least the greater part of them.

However, the relevant provision (Art. 81) of the Aliens Act was not at all clear as to the exact nature of the foreigner status of these individuals. Indeed, the provision was vague and indeterminate and provided little support for a proper understanding of these individuals' future legal status.

What did it mean that the (provisions of the) Aliens Act will become applicable for the individuals who did not obtain Slovenian citizenship on the basis of Art. 40 of the Citizenship Act? Perhaps more importantly, what did or could the affected individuals expect will happen on the relevant date?

Consider, first, that the pre-independence acts (especially the Statement of Good Intentions and the Agreement of all the political parties) declared that the new Slovenian citizenship will be available to all those who will so desire – implying that they were not in any way required to obtain it – and that, moreover, their political status will not be altered. Consider also that the “independence acts” of constitutional status, especially the Constitutional Act, determined that these individuals will have the same rights and duties as Slovenian citizens until they have obtained the citizenship in accordance with the Citizenship Act. This provision also applied to those individuals who did not apply for citizenship until the expiration of the deadlines determined in the Aliens Act (see Art. 13 of the Constitutional Act). Consider, finally, that citizenship is a status quite different and independent from the status of permanent residence. Our previous discussion has shown that many individuals were not fully informed as to the meaning of these various statuses and were not well aware of their own legal position. Many believed, for instance, that due to being born in Slovenia or because they

lived and worked in Slovenia for so long, they were somehow entitled to its citizenship automatically; others believed that by obtaining this citizenship, they would lose the other one – and they did not want that; others still “simply did not want to apply for citizenship because they wanted to continue to live in Slovenia as foreigners with a permanent residence permit” (Kogovšek Šalamon 2016: 83). Finally, there are reports of those who attempted to apply but whose applications were never resolved or had their requests arbitrarily rejected by administrative officers.¹⁴⁰

All of the above said generates a picture of individuals who legitimately expected that their legal status after the relevant date will not be altered beyond that what they anticipated and wished for – that is, that they will become foreigners with permanent residence in Slovenia. This was indeed the status they already held and they did not anticipate, nor had they any reason to, any further and more profound implications for their legal position.

¹⁴⁰ Kogovšek Šalamon 2016: 83-4; see also different stories in Dedič, Jalušič, Zorn 2003.

CHAPTER 5.

THE LEGAL MECHANISMS OF THE ERASURE

The previous chapter provided us with the necessary historical context and legal framework for understanding the Erasure. When we talk about the Erasure, we should distinguish between (i) Erasure in the narrow sense, i.e. the act of cancelling (erasing, removing etc.) a specific set of individuals from the register of permanent residents of Slovenia that took place on 26 February 1992; and (ii) Erasure in the broader sense.

In Section 5.2., I will deal with the Erasure in the narrow sense. There, I will be interested in the way the Erasure was executed: on the basis of which legal acts, and on whose authority was the cancellation performed. I will also inquire into the exact manner in which this enterprise was organized: was it perhaps a centrally coordinated affair or did legal officials rather act uncoordinated? These questions may lead to answers that go beyond the narrow technical confines of the section. The broader legal context of the Erasure will be discussed in Part III (Ch. 8) of this thesis.

The Erasure can also be understood in a broader sense. In this sense, I understand the Erasure as the whole set of legal acts and actions preceding and enabling the Erasure in the narrow sense, as well as the activities of the authorities following the cancellation itself. A key feature of the Erasure in the broader sense is what may be called “disenfranchisement” of the relevant group of individuals. For the purposes of this work, disenfranchisement should not be understood in its narrow, technical sense of intentional deprivation of one’s citizenship rights, especially the right to vote (although this aspect should of course be considered an integral part of the meaning); rather, it should be understood as a complex process, a series of legal and extra-legal actions of Slovenian authorities, prior to and immediately after the secession from SFRY, that resulted in the exclusion of the targeted set of individuals from the Slovenian “body politic”. This process, as we will see, was crucial for the subsequent Erasure in the narrow sense. This problem will be the subject of the next section (5.1.), where I will be seeking answer to the following questions: first, what was the nature of the citizenship policy instituted by the new Slovenian authorities? Second, how did this new policy, if at all, contribute to the Erasure (in the narrow sense)?

In the last section (5.3.), I examine the most relevant judicial decisions pertaining to the Erasure.

5.1. Disenfranchisement as a precursor to the Erasure

The problem that I will be addressing in this section is this: the Erasure from the registry of permanent residents affected individuals who did not wish (or were otherwise unable) to obtain Slovenian citizenship on the basis of Art. 40 of the Citizenship Act. Prior to Slovenia's independence, these citizens of other SFRY republics with permanent residency in Slovenia, were, however, considered equal members of its polity: though not Slovenian citizens, they were, formally speaking, as SFRY citizens and permanent residents, equal to their Slovenian counterparts in virtually all rights and duties. Beyond that, the authorities of the nascent independent Slovenia conferred on them the right to vote in the plebiscite on the founding of the new state, hence treating them as its co-founders.

Yet, in February 1992, these same individuals were deprived of their residency status and made "illegal". How then can their erasure from the registry of permanent residents be explained? In particular, how can their exclusion from the political and legal community be made sense of in light of their status as co-founders of the new sovereign state?

I believe an answer should be sought in the construction of Slovenia's citizenship policy. In particular, I argue that the new state orchestrated a radical, yet almost undetectable shift in its official citizenship policy. Independence and sovereignty enabled Slovenian authorities to modify the extension of subjects that were considered the state's *demos*. While prior to the secession inclusion was based on the affectedness principle, upon independence the leading criterion became ethnic affiliation. This modification enabled the exclusion of those individuals who no longer fitted the new citizenship criteria. This tentative answer clearly requires further qualification.

Above (see 4.1.), we established that in the SFRY federal citizenship prevailed over the republican one, which was of little practical value. Yugoslav citizens had equal rights and duties in the territory of the entire federation. One thing this shows is that despite the fact that citizenship acquisition policies in the SFRY were built primarily on the principle of *jus sanguinis*, and thus put emphasis on ethnic affiliation, there were certain superior values (i.e. the philosophy of pan-Yugoslavism, embodied in the ideology of "brotherhood and unity") that prevailed over the ethnic policies of individual republics, both politically as well as legally speaking.

Formal equality of all permanent residents in (the Socialist Republic) Slovenia, citizens or not, was fully accepted by the pre-independence authorities in developing their secession policies. Their equality was also substantive, which is perhaps most clearly seen in the determination of the electorate for the plebiscite (independence referendum). We should remember that the Referendum Act, and all other independence-related acts, based their legitimacy on the right to self-determination of the Slovene nation (people). From the very beginning, then, the new state was to be a state of the Slovenian nation foremost.¹⁴¹ However, by including resident non-nationals into the electorate for this all-important referendum, the authorities made a bold statement that these individuals counted as an equal part of the nascent state's *demos*.

Democracy (*dēmokratía*) literally means “rule of the people”. Bobbio argued that any meaningful discussion of democracy (as a system distinct from autocracy) is possible if democracy is considered “as characterized by a set of rules (primary or basic) which establish *who* is authorized to take collective decisions and which *procedures* are to be applied” (1987: 24). One common sense principle in this regard is that in order for a decision to be accepted as a “collective decision”, binding on all members of the community, it ought to be adopted by all those individuals who are or will be affected by it. This, in short, is the essence of the so-called *all-affected principle*, a fundamental principle of democratic government (cfr. Mindus 2016: 105).¹⁴² While today most collective political decisions are adopted by elected representatives (representative democracy), some are also taken directly by all (almost all) members of the polity (direct democracy). “For there to be direct democracy,” argues Bobbio, “there should be no intermediary at all between those who make decisions and those affected by them” (Bobbio 1987: 52). Referendums are the most effective instruments of direct democracy nowadays – according to Bobbio even “the only mechanism of direct democracy which can be applied concretely and effectively in most advanced democracies” (Ibid.) – but are (should be) used only in extraordinary circumstances. Surely a vote on secession from one state formation and establishment of a new one qualifies as such a circumstance. Hence, given the gravity of the decision, it appears correct to assume that the Slovenian authorities were

¹⁴¹ I discuss this dimension in greater detail below.

¹⁴² Here, I should note that scholars have come to distinguish between the all-affected principle and the all-subjected principle. The latter “takes the existence of a political unit for granted. It assumes the state as a primary boundary or threshold for inclusion and exclusion and then argues that all those subjected to a political rule within its boundaries ought to have a say in its making” (Näsström 2011: 117). Given the context of my discussion, I will be referring to the all-affected principle in this latter sense.

obligated to follow the all-affected principle in determining the eligible voters in the upcoming plebiscite.

Establishing the appropriate extension of the right to participate in political decision-making requires, first of all, a determination of who is to be seen as affected by a given decision. Different definitions of affectedness have been proposed: for instance, on a minimal definition, an individual is affected (by a political decision), if he or she is present on the territory of a given state and thus *de facto* lives under its jurisdiction (Mindus 2016: 105); on a “thicker version”, the right to participate in decision-making ought to go only to those individuals whose “interests are likely to be *in a significant way* affected by the decision” (Lagerspetz 2015: 9; emphasis mine).

Regardless of the definition of affectedness we adopt, I argue that the circumstances of our case clearly show that the relevant batch of subjects (i.e. non-national residents in Slovenia) met the condition of affectedness: they were both present on the territory in question and were significantly affected by the decision in the referendum. You will remember that these individuals often resided in Slovenia for decades prior to the secession, were employed and raised their families there, and were also very active participants in the life of their local communities. Thus, I do exaggerate when I say that they had an important stake in the future destiny of the territory and the political community which was inextricably tied to their own.

Having thus established that the relevant population met the affectedness criterion, we may conclude that the decision to extend the right to vote in the plebiscite to all permanent residents of Slovenia, that is, to all those who actually lived (often for a very long period of time) and had the centre of their economic and social interests there, was a correct one and it consequently provided a strong political legitimization of the independence plebiscite.¹⁴³

With the overwhelming majority of the voters in favour of secession, the authorities declared the establishment of a new independent and sovereign Slovenian state on 25 June 1991. It is from this point onwards that we must examine the changes that occurred in the legal treatment of non-national residents. What were some of the most relevant circumstances that affected these changes?

¹⁴³ It should be emphasized that this decision was not entirely autonomous. Seeing how initially the international community was not in favour of Slovenia’s secession, this meant that “if Slovenia’s bid for international recognition was to succeed, the state had to demonstrate respect for human rights norms and democratic principles”. This caused even the most fervent nationalist politicians to acknowledge “the need to extend Slovenian citizenship to residents from other republics of the SFRY”. Rangelov 2014: 131.

Foremost, with the declaration of independence Slovenia ceased to be part of the SFRY and became an independent and sovereign state. Among the consequences stemming from this fact, the following two are particularly relevant: first, with Slovenia no longer a part of the SFRY, the latter's federal citizenship and other policies lost any import they previously had on the territory of the new state; second, as a sovereign state, Slovenia gained the right to determine its own "original" *demos* as well as its own (future) citizenship policy.

Slovenia chose a nationalist-oriented, ethnic-based citizenship: the clearest sign of this policy was the decision that Slovenian nationals (holders of the former republican citizenship of the Socialist Republic of Slovenia) will automatically obtain the citizenship of the new state and, moreover, that the principle *jus sanguinis* will be the primary citizenship-acquisition criterion (see above, 4.3). On the contrary, non-national residents were not automatically extended the new citizenship but rather had to apply for it. Thus, differentiation between the two groups began immediately.

This decision is certainly open to criticism: why didn't these individuals, co-founders of the new state, also automatically obtain Slovenian citizenship? Why, if they had an equal say in the decision to secede from SFRY as others, did they not also share their faith with regard to citizenship acquisition? While these doubts are, in my view, valid ones and certainly pose a challenge for the legitimacy of the entire independence project, the differentiated treatment of these individuals as such nevertheless cannot be judged unfounded or illegal. It has to be admitted that all pre-independence documents indicated, more or less clearly, that after the secession these individuals will be able to obtain the citizenship if they will so desire – indicating, thus, that they will not obtain it automatically and will be required to apply for it.

None of this, however, explains, and much less excuses, the consequences that the individuals who did not choose to obtain the citizenship suffered as a result of this choice.¹⁴⁴ For it was not only that they became foreigners in Slovenia – a consequence they were aware of and accepted and whose legitimacy we will not put in question here – but they were, for this reason alone, also subsequently deprived of their residence status, which in effect turned them into illegal aliens. This crucial step – from Erasure in the broader sense to the Erasure in the narrow sense – which is difficult to understand, still needs to be made sense of.

¹⁴⁴ *A fortiori* the matter is that less justifiable with regard to those who did apply for citizenship but were rejected.

I believe that the Erasure can be explained as a kind of sanction or a punishment for those who did not wish to voluntarily take up the new Slovenian citizenship when presented with the opportunity (a type of punitive disenfranchisement). I should emphasize that this is a purely speculative argument – however, I do believe I can provide several convincing reasons to sustain it.

First of all, similar exclusionary practices where loss of rights follows some prohibited or undesired act come to mind, such as, for example, felony disenfranchisement. Felony disenfranchisement is the deprivation of the right to vote of individuals convicted for particular criminal offences.¹⁴⁵ While felony disenfranchisement policies differ greatly from country to country in the types of offences that lead to the loss of voting rights, in the length of disenfranchisement and in other modalities,¹⁴⁶ they are more or less all philosophically founded on the underlying idea that “serious offenders are generally morally corrupt and that the process whereby the policies and laws are decided should not be open to the influence of such people” (Beckman 2009: 134).¹⁴⁷ In broader terms, felony disenfranchisement rests on the idea that individuals who have gravely violated the social contract ought to be excluded from it (at least temporarily if not permanently).¹⁴⁸ A fundamentally similar argument for exclusion seems to underlie the Erasure.

This argument, however, cannot here be sustained in this form. It fails because, as Mindus (2016) notes, felony disenfranchisement – along with other such types of disenfranchisement as that of mentally handicapped individuals or children – is an exceptional type of disenfranchisement. Mindus distinguishes between ordinary and extraordinary types of disenfranchisement with the requirement of justification being the distinguishing criterion: whereas the latter types of disenfranchisement “are those that the system does not presuppose or take for granted, those for which there is a requirement of reason-giving” (Mindus 2016: 109), the former are the ones “that the system presupposes or takes for granted, those for

¹⁴⁵ In general on this issue, see for instance Beckman 2009.

¹⁴⁶ For a comparative analysis of criminal disenfranchisement laws, see Ispahani 2009.

¹⁴⁷ The issue of felony disenfranchisement is fascinating for our discussion also because of its historical ties to the medieval institutes of civil death and slavery. Dayan (2011: Ch. 2) shows how in the US after the abolition of slavery states made increasing use of the institute of civil death for a wide variety of felonies. She refers to a 1998 Human Rights Watch report which clearly links contemporary felony disenfranchisement laws to civil death. It states: “Disenfranchisement laws in the U.S. are a vestige of medieval times when offenders were banished from the community and suffered ‘civil death’. Brought from Europe to the colonies, they gained new political salience at the end of the nineteenth century when disgruntled whites in a number of Southern states adopted them and other ostensibly race-neutral voting restrictions in an effort to exclude blacks from the vote.” See: Human Rights Watch 1998. The Sentencing Project (2016) claims that the vast majority of the estimated 6.1 million Americans who today are disenfranchised as felons are blacks.

¹⁴⁸ Cfr. Demleitner 2009: 100; Beckman 2009: 55ff.

which therefore there is no requirement of reason-giving or justificatory practice” (Ibid.). Exclusion of non-nationals is just such a form of disenfranchisement.¹⁴⁹ The exclusions of non-nationals from the right to vote in the country of their residence is not only an ordinary form of disenfranchisement, it is a form of exclusion that is constitutive of the very system (Mindus 2016: 111).

To understand this point, we need first to understand the distinction between two conceptions or models of citizenship. Following Marshall (1950), Patricia Mindus distinguishes between the political and the legal conception of citizenship.¹⁵⁰ The former is related, above all, with the issue of political (democratic) legitimacy, i.e. the legitimacy of the power to adopt decisions binding on the collective (cfr. Mindus 2014: 61–64).¹⁵¹ In this conception of citizenship, says Mindus, “legitimacy in principle stems from the participation of ‘the people’, i.e. the sum of citizens, in shaping the common rules under which they live” and so exclusion from such participation must be motivated (Mindus 2016: 112). The citizen, on this view, “is the active member of the state, contributing to the formation of collective auto-determination by making decisions or voting for representatives” (Mindus 2014a: 738). On the other hand, those who are excluded from decision-making (from citizenship) are deemed “subjects” – they are those individuals “to whom directives and norms are addressed yet ... are not entitled to take part in shaping these norms, in whatsoever form. The subject”, adds Mindus, “is under the political obligation to obey the laws to which he or she has not given direct or indirect consent (Mindus 2016: 109, n. 9).¹⁵²

Different than the political model, which is concerned with democratic legitimacy, the legal model of citizenship stresses the principle of state sovereignty and the consequent right of the state to determine who it will include – i.e. who it will consider its citizens; and who it will exclude – who, from the perspective of its legal order, will be considered an alien. The principle of sovereignty allows the state to follow virtually any substantive criteria for determining its citizens: the state's power to include and exclude is utterly discretionary.¹⁵³ Indeed, the state may even reserve for itself the power to exclude from citizenship individuals who possess the same characteristics as those who participate actively in its political life (cfr.

¹⁴⁹ Remember, however, that what is on trial here is not the disenfranchisement itself, but rather the Erasure!

¹⁵⁰ Mindus, in general, distinguishes three types of citizenship. Besides the two already mentioned she also identifies the sociological conception of citizenship. See Mindus 2014.

¹⁵¹ It is this conception of citizenship that we dealt with above in this section.

¹⁵² More on the political model of citizenship in Mindus 2014: Ch. 2.

¹⁵³ For a criticism of this approach and a proposal for instituting an obligation of justification, see Mindus 2014: Ch. V (especially 293ff).

Mindus 2014: 75). It may do so, moreover (and more importantly), without having to provide any reasons for its decision (Ibid.; see also Mindus 2016: 112).

With the rise of the modern nation States, citizenship became heavily confounded with the principle nationality and so the dichotomy established here is one between citizens/nationals and aliens/non-nationals: included into citizenship are those who belong to the nation, whichever way we understand it, be it based on some natural affiliation (*jus sanguinis*) or as some particularly strong political bond (*jus soli*).¹⁵⁴ Excluded, on the other hand, are all those who do not belong to the nation – the aliens, foreigners, the Others.

The two central concepts of this model of citizenship, namely the principle of sovereignty and the principle of nationality allow us to further understand the actions undertaken by the Slovenian authorities. For one, the principle of sovereignty makes it easier to understand – though offers no justification – how it was possible for the authorities of the new state to (morally) dissociate themselves from the promises made prior to independence to that part of its population that were not Slovene nationals. The explanation, I submit, is quite simple. If the independent and sovereign state of Slovenia was formally established with the adoption of the Basic Constitutional Charter that the Republic of Slovenia on 25 June 1991, and if it was in that moment that the state authorities were vested with all the rights accruing to a sovereign state, including the right to determine its own citizens, then it may have seen reasonable to them that they were not in any way bound by the promises made and decisions adopted by the authorities and the people in the former state. That there is some validity to this interpretation can be seen, for example, by the evolution of the language used in the relevant legal acts which increasingly emphasized the right to self-determination of the Slovene nation and its “property” of the new state and, on the other hand, continuously piled new conditions for the “acceptance” of non-nationals into the citizenship.¹⁵⁵

For its part, the principle of nationality is fundamental for understanding the Erasure. Comprehending its underlying role in the creation of citizenship policies ought to provide us with the answer to the pressing question of how it was possible that the authorities dealt with individuals who did not take up the offered citizenship in such an extreme manner. While the

¹⁵⁴ This bifurcation is of course simplified and also surpassed. Pure models cannot be found in practice. See Mindus 2014: 120–125.

¹⁵⁵ This reasoning, however, can be refuted by the fact that in general the principle of continuity with the former legal system was respected: all legislation that did not directly contradict the new constitutional order was, until the adoption of new laws, left in place. Indeed, there are still today several SFRY-era laws in vigour in Slovenia.

influence of this principle extends to all levels and aspects of the Erasure, I will here focus to exploring only its immediate influence on the creation of nationalist citizenship policies in Slovenia.

As argued, Slovenia adopted a nationalistic citizenship policy, basing acquisition criteria primarily on ethnic grounds. Nationalism, in this context, should be seen as “a form of discourse premised on a particular theory of legitimation of state power, one that ‘regards the nation as the only source of legitimacy’” (Rangelov 2014: 7). When “nation” is used as a (quasi)legal category for the purpose of devising a particular citizenship policy, as it was here, it is usually defined “in ethnocultural terms, emphasizing markers such as descent, language, or religion” (Rangelov 2014: 21). In the specific case, it has been noted that the consolidation of Slovenian ethno-nationalism began in the 1980s with a particular emphasis given to the problem of the Slovenian culture and language as key elements of Slovenian identity that were being suppressed in the context of the SFRY (cfr. Rangelov 2014: 120ff; Zorn 2007: 20–22).

Invocations of nation-hood as part of political strategies are diverse and depend on the specific political and legal context as well as the goals pursued by those who invoke it. One such strategy specifically targets exclusion by way of asserting “‘ownership’ of the polity on behalf of a ‘core’ ethnocultural ‘nation’ distinct from the citizenry of the state as a whole” (Rangelov 2014: 19).¹⁵⁶ The strategy, then, is based upon a differentiation between different types of citizens. While formally equal, on this view, a state’s citizens are actually to be distinguished: on the one side, we have members of the “core nation”, who are in some way the only “true citizens” and thus (ought to) enjoy privileged status; on the other side, there are those (presumably the minority) who do not belong to that nation and are (again: ought to be) as a consequence relegated to second-class status. Such differentiation of citizens, “defined in ethnic terms and enshrined in law” is the hallmark of the concept of “ethnic citizenship” as defined by Rangelov (2014: 21).

The tendency to “appropriate” the state on the basis of the nationalist principle and establishment of ethnic citizenship is evident from the Slovenian fundamental constitutional documents. For one, the Basic Constitutional Charter opens with the assertion that the plebiscite result represents the “will of the Slovene nation” (and residents of the Republic of

¹⁵⁶ Here Rangelov quotes R. Brubaker, 2004: In the Name of the Nation: Reflections on Nationalism and Patriotism. In: *Citizenship Studies* 8 (2004) 2: 117.

Slovenia). More importantly, the Constitution in its Preamble bases the foundation for its adoption, among others, on “the fundamental and permanent right of the Slovene nation to self-determination”; moreover, in the first paragraph of Article 3, it states that Slovenia is a state of all its citizens and again reiterates that it is founded on the permanent and inalienable right of the Slovene nation to self-determination.¹⁵⁷ References to “the Slovene nation” and its inalienable right to establish an independent state are thus plentiful in the crucial constitutional acts; so much so that critics have pointed out that this “inflation” of constitutional provisions emphasizing the national character of the republic leads to a differentiation between citizens who are Slovenes and those who are not. If the constitutional order is not based on the equality of all its citizens before the law, goes the argument, then we can no longer speak about a truly democratic regime, but rather of something like an ethno-democratic one (see Zorn 2007: 58; cfr. Kuhelj 2011).¹⁵⁸

Here, it should be noted that the nationalist principle was imbued into all levels of the Slovenian legal system, not only into the most important constitutional provisions, but also into systemic legislation (i.e. the Citizenship Act and the Aliens Act) and – as we will shortly see in the next section – it was also furthered in the sub-statutory decrees of executive authorities. The permeation of the “constitutional and legal structure that privileges the members of one ethnically defined nation over other residents in a particular state” has been named “constitutional nationalism” (Rangelov 2014: 23f).¹⁵⁹

Ethnic citizenship, in its legal guise, can be employed in the context of different nation-building strategies. Rangelov distinguishes between strategies of incorporation, “which produce differentiated frameworks of first- and second-class citizens” (2014: 22) and strategies of exclusion that are “aimed at restricting access to citizenship or revoking citizenship status and rights of particular groups” (Ibid.).

Rangelov notes that that constitutional nationalism related with incorporationist strategies “does not neglect, marginalize, or seek to assimilate cultural difference; instead, it tends to reify it by adopting a monolithic, billiard-ball understanding of culture and paves the way for the incorporation of minorities in a constitutional association of unequal status and power

¹⁵⁷ This same right is invoked in the Referendum Act as the grounds for the calling of the plebiscite.

¹⁵⁸ Sammy Smooha, the first to coin the term ethnic democracy, defines it as “a democratic political system that combines the extension of civil and political rights to permanent residents who wish to be citizens with the bestowal of a favored status on the majority group. This is democracy that contains the non-democratic institutionalization of dominance of one ethnic group” (Smooha 2001: 24).

¹⁵⁹ The definition is originally Hayden’s. See Robert M. Hayden, 1992: Constitutional Nationalism in the Formerly Yugoslav Republics. In: *Slavic Review* 51 (1992) 1: 1–15.

relations” (Rangelov 2014: 24). He adds that constitutional law in such cases serves to perform two functions: first, “to distinguish between members and nonmembers of the nation” and second, “to incorporate them in a framework of first- and second-class citizenship” (Rangelov 2014: 25). As far as the association of ethnic citizenship with strategies of exclusion are concerned, he argues that “minorities with legitimate claims to citizenship are transformed into denizens and may even become stateless persons, with harsh consequences for those affected” (Rangelov 2014: 28).

Turning to the Slovenian situation, we may contend that the Slovenian citizenship policy was very particular, indeed contradictory, as Rangelov puts it, incorporating both strategies of incorporation and of exclusion. Here is how the author describes the contradictory character of Slovenia’s citizenship policy (Rangelov 2014: 112):

On the one hand, the vast majority of permanent residents who were ethnic non-Slovenes were able to acquire Slovenian citizenship on the basis of the publicly adopted legislation and the procedures put in place for its implementation. On the other hand, the same body of law opened up the possibility for serious abuses and discriminatory policies adopted by executive decision and pursued covertly by the agents of the state.

It is true that the larger part of ethnic non-Slovenes were able to acquire Slovenian citizenship.¹⁶⁰ This, in part, can be explained – or so argues Rangelov – by the distribution of influence of different conceptions or positions regarding and during Slovenian democratization. Rangelov holds that the fact that the large majority of non-Slovene residents were able to acquire citizenship speaks to the relative strength of the position, promoted by civil society movements, “which associated democracy with pluralism and respect for minorities” (2014: 123).¹⁶¹ However, I believe that these same facts also help to explain the reasons for the Erasure. While one may agree with Rangelov that the relatively small number of the Erased speaks of the relative weakness of the exclusivist position, I believe, however, that the focus should be put on the intensity of the Erasure, rather than on its extent. We have already seen that due to both external and internal forces, the authorities were unable to execute a wide-scale, all-encompassing disenfranchisement of the ethnically non-Slovene population. Such a feat was more or less “successfully” performed, for example, in the Baltic countries in the same period of time. In Estonia, for instance, highly restrictive citizenship acquisition conditions prevented almost a third of the residence from being able to acquire

¹⁶⁰ One part of the reason for this was already mentioned above: see n. 39. More in Rangelov 2014: Ch. 4.

¹⁶¹ The other was a conception that promoted and conflated concepts of “ethnos” and “demos”. Cfr. Rangelov 2014: 124.

citizenship, thus being left without a regulated citizenship status; the number was approximately the same in Latvia.¹⁶² In circumstances that made such a full-scale exclusion difficult, if not impossible, it does not seem impossible to understand that the focus of Slovenian authorities rather turned to the question of the intensity of the exclusion. Hence, I believe (and I repeat that this is purely speculative) that this new strategy conceived the exclusion of a much smaller number of individuals that were now made to serve as symbolic representatives of the entire ethnically non-Slovene population. In simple terms: what the authorities could not do in terms of numbers they compensated in intensity.

I should like to add one final point in defence of the argument I have been sustaining here. On my view, the intention to disenfranchise the entire ethnically non-Slovene population originating from the former SFRY can be seen in the fact that only a few years after the Erasure, a bill was proposed in the National Assembly which would enable the withdrawal of the citizenship of ethnic non-Slovenes, i.e. of those individuals that had acquired it on the basis of Art. 40 of the Citizenship Act. At the time, the public opinion was strongly against the “new” citizens – partially this was due to the nationalist politicians who pushed for the revision of the citizenships acquired on the basis of Article 40, invoking the problem of dual citizenship; other reasons for the increasingly hostile treatment of this segment of citizens were to be found in the economic crisis and especially the growing unemployment numbers, with the blame somehow always passed on “the Southern immigrants”.¹⁶³ Ultimately, it is true, the Constitutional Court (see decision U-I-266/95, from 20 November 1995) did prohibit the referendum on the initiative, citing potential violations of the right to personal dignity and the right to privacy and the principle of the rule of law should such a law be adopted; however, the intention of the authorities to perpetrate a full scale exclusion was, in my mind, obvious.

To summarize. The nationalist, ethno-centric policy was embedded in the core of the nascent Slovenian state from the beginning. A wholesale exclusion (disenfranchisement) of all ethnic non-Slovenes, though surely contemplated at one point or another, was made impossible by a series of internal and external factors: for instance, by a strong liberal civil society, fundamental in the independence efforts, which was calling for a more liberal, pluralistic and inclusive approach to citizenship; or, by the external pressure created by the need to legitimize

¹⁶² Cfr. Kogovšek Šalamon 2016: Part VI.3.

¹⁶³ Cfr. Zorn 2007: 65f; Rangelov 2014: 124–127.

the independence referendum in front of the international community suspicious of the secession which resulted in the necessity to include all permanent residents into the electorate for the referendum and in formal promises to these individuals that after the independence they will be able to acquire the citizenship. The necessity for ethnical auto-identification by way of exclusion of ethnic non-Slovenes, however, remained. Since the strategy of extensive exclusion was unrealistic, plans focused on the intensity. The most obvious target were those citizens of former SFRY republics who did not obtain the citizenship despite being given the chance. These individuals, now symbolic representatives of all ethnic non-Slovenes, were branded as traitors, speculators, profiteers and the likes. Justifying their exclusion in such conditions was not a difficult task for the authorities.

5.2. The Erasure in the narrow sense (deprivation of residency status)

On 26 February 1992, 25,671 individuals were erased from the registry of permanent residents in Slovenia when the Aliens Act became applicable with respect to those permanent residents who were citizens of other SFRY republics and did not obtain Slovenian citizenship in the six months following the implementation of the Citizenship Act. This act has become known as the Erasure.

As detailed above (4.3.), the statutory basis of the Erasure can be found in Art. 81, Par. 2 of the 1991 Aliens Act which determined that the it was to become applicable to all those citizens of other SFRY republics who either had not applied for Slovenian citizenship (within the prescribed six-month period) or had their applications rejected. The provision itself was indeterminate: what did “applicability” mean in this case? Were these individuals simply to become foreigners with permanent residence – a consequence they expected and, for the most part, desired? This wasn’t immediately clear. The uncertainty was increased by the fact that the following provision (Art. 82) clearly stated that those foreigners who prior to independence held valid permanent residency permits will have their validity extended *ex lege*. Art. 81, on the contrary, was silent on the matter. However, if the same consequence was not to apply for the addressees of Art. 81/2 – what exactly was to occur? Most importantly: was this consequence foreseeable?

Preparations and the first instructions

The day when the Aliens Act became effective – and the Erasure was carried out – may have come as a surprise to the affected individuals, but it certainly wasn't so for the Slovenian authorities. As I shall argue, the Erasure was well-planned and there is ample evidence that when the Aliens Act was being adopted in the National Assembly the possible consequences of its implementation, specifically of Art. 81/2, were already well-known to the political authorities.¹⁶⁴

The physical acts of erasing individuals from the registers had to be carried out at the local level, that is, by the officials of local administrative units that were charged with keeping the registers of permanent residents. In order to ensure that the Erasure would be implemented in a uniform manner, the actions had to be centrally coordinated. The task of preparing the Erasure and coordinating the efforts fell to the Ministry of the Interior. For that purpose, the Ministry organized a series of “consulting sessions” with the local administrative bodies in order to train them for the new procedures that came into force when Slovenia became an independent country; moreover, the Ministry communicated all the relevant information regarding the treatment of Yugoslav citizens, and of the future Erased in particular, by way of “detailed unpublished in-house instructions” (Kogovšek Šalamon 2016: 100). In what follows, I will briefly present the instructions most relevant for the Erasure and only insofar as they relate immediately to our investigation.¹⁶⁵

The first instruction (n. 0016/8-S-010/14-91), dated 26 June 1991, issued in order to guarantee a uniform implementation of the “independence legislation”, particularly the Aliens Act, emphasized the difference between two groups of citizens of other SFRY republics. Those who had their permanent residence registered in Slovenia on the day of the plebiscite (23 December 1990) were eligible to apply for citizenship (see the conditions in Art. 40 of the Citizenship Act) and had, on the basis of Art. 13 of the Constitutional Act, until the resolution of their application or, alternatively, until the expiration of the six-month application deadline, equal rights as Slovenian citizens. On the other hand, those who did not have their permanent residence registered on the date of the referendum – either because they registered it later or

¹⁶⁴ Numerous scholars have reported on the parliamentary discussions that took place in the time of the adoption of the Aliens Act which made clear that some political parties were very much in favour of adopting the law in its final form, whereas others warned about the possible negative effects it might have if adopted in that form. See, for instance, Kogovšek Šalamon 2016: Part II, Ch. 1; Dedić 2003: 47f; Zorn 2007: 63–65.

¹⁶⁵ For a detailed analysis of the in-house instructions, see Kogovšek Šalamon 2016: 100–110.

because they only had temporary residence – were not eligible to obtain Slovenian citizenship and were to be considered as aliens with unregulated legal status.

Related to this was another instruction (n. 0016/8-S-010/4-91) from 30 July 1991, which overrode the previous the instruction with regard to the second of the two groups mentioned above. Given the implementation of the Brioni Declaration, which imposed a three-month moratorium on all independence activities,¹⁶⁶ the Ministry notified the local administrative units that the individuals in question ought to be now treated as all other citizens of SFRY, thus as equal in rights to Slovenian citizens and not as foreigners without a properly regulated legal status.¹⁶⁷

Criticisms of the distinction between SFRY citizens on the basis of possessing permanent residence at the time of the referendum have already been mentioned (see above, 4.3.). I will not repeat those criticisms here – suffice it to say that the former of two mentioned instructions served only to reaffirm the already exceedingly strict construction of citizenship-acquisition criteria and related it to a very narrow interpretation of the legal status of the individuals who did not register permanent residence in Slovenian prior to the independence referendum.

Despite the moratorium, the Ministry of the Interior nevertheless continued with preparations for the eventual enforcement of Par. 2, Art. 81 of the Aliens Act – for “the administrative processing” of individuals who they knew would eventually be erased (see Kogovšek Šalamon 2016: 102). Given the ambiguous wording of the said provision, direct administrative action on its basis was impossible. Hence, further clarifications and instructions by the Ministry were necessary. A new set of instructions from early 1992 focused on explaining “the rules to be applied when issuing visas, temporary and permanent residence permits, revoking residence permits, expelling foreigners from the country, and handling their personal documents” (Kogovšek Šalamon 2016: 102).¹⁶⁸ It should be noted that these instructions did not refer only to individuals who would eventually be erased, but more generally to all SFRY citizens who did not obtain Slovenian citizenship. These instructions

¹⁶⁶ The Brioni Declaration was an accord signed on 7 July 1991 by representatives of Slovenia, Croatia and the SFRY that ended hostilities between Slovene and SFRY armed forces and, as mentioned, imposed a three-month moratorium on the independence activities of the Slovenian and Croatian authorities.

¹⁶⁷ As to the practical effects of this change, Kogovšek Šalamon notes that it meant that “people in both groups could continue to exercise all the rights they had enjoyed until then (e.g. unemployment benefits), that their legal status in Slovenia was unchanged, and that they could not (yet) be expelled from the country” (2016: 101).

¹⁶⁸ Instruction n. 0016/9-S-26/3-92, from 5 February 1992 and Instruction n. 0016/4-1255-8, from 18 February 1992.

are particularly relevant because, firstly, they referred to some of the most important legal statuses and personal documents used to prove them (citizenship and passports, residency (permits), visas, work permits etc.) and, secondly, as a rule, they prescribed – in violation of fundamental constitutional principles – either a more narrow interpretation of status-acquisition criteria then determined by the law or provided additional conditions that were not contained in the relevant legislation.¹⁶⁹

Instructions authorizing the Erasure

On 26 February 1992 the two-month transition period (following the six-month timeframe for the acquisition of citizenship on the basis of Art. 40 of the Citizenship Act) expired. On the following day, on 27 February 1992, the Ministry of the Interior issued the Instruction on the implementation of the Aliens Act that effectively ordered the Erasure.¹⁷⁰

The language of the Instruction was apparently straightforward and highly technical. In the first paragraph, it recalled that with the expiration of the aforementioned deadline in the Aliens Act its provisions will enter into force in relation to citizens of other SFRY republics who did not apply for Slovenian citizenship or who had their applications denied. Thus, continued the Instruction, these individuals' status had to be "resolved" (or fixed). Simultaneously the "clearing" of registers was to take place. In the second paragraph, the Instruction explained that any document, even if issued by competent Slovene authorities and still valid, cease to be valid for these individuals given the change in their status.¹⁷¹

With these words, the Erasure in the narrower, technical sense was ordered. The "logic" of the Ministry's interpretation of Par. 2, Art. 81 of the Aliens Act is here made explicit: because these individuals did not apply for Slovenian citizenship in the prescribed timeframe, or had their applications denied, and thus were to become foreigners, as a consequence they also lost their *right to reside* as permanent residents in the Republic of Slovenia (cfr. Kogovšek

¹⁶⁹ This was especially the case with questions such as the validity of passports and ID cards. Cfr. Kogovšek Šalamon 2016: 102–105.

¹⁷⁰ See Instruction n. 0016/4-1496-8.

¹⁷¹ Note that the Ministry foresaw problems with the status of the individuals who became aliens but did not, until that point in time, applied for a new residency permit. Given the fact that the Aliens Act did not in any way determine what their new status as aliens would be nor did it determine the termination of their residency permits, almost no one had thought about re-applying for a residency permit.

Šalamon 2016: 105). Officially, then, their status had (to be) changed into that of aliens – now residing on the territory of the Republic of Slovenia without legal permission, hence illegally.

The (distorted) logic of the Ministry's interpretation of the situation can also be seen in its treatment of problems related with deportation. The police insisted that individuals who were to be deported because they entered or resided illegally on the territory ought to be served with appropriate orders before being deported. The Ministry refused this interpretation and argued, along the lines of a strictly literal interpretation of the relevant statutory provisions, that such an official decision was required only when the foreigner in question resided in Slovenia legally;¹⁷² however, if the alien in question has entered the territory illegally and resided here without permission, no such decision was necessary and the person was to be escorted to the state border by the police. The problem was, as Kogovšek Šalamon has shown, that “citizens of other SFRY republics who lived in Slovenia did not need to present these documents when they entered Slovenia, because at the time Slovenia was still part of Yugoslavia and there were no borders between republics” (2016: 107). Hence, they had no way of proving that they had entered the territory legally.

On 15 June 1992, the Ministry issued further explanations and instructions regarding the treatment of records of the erased individuals.¹⁷³ The Ministry was very clear as to the condition of these individuals: it stated that individuals, who are not Slovenian citizens cannot be entered in the registry of permanent residents. Upon establishing that an individual is not a Slovenian citizen, the local administrative officials were ordered to instruct the individual to regulate his or her status as an alien as well as to remove that individual from the registry of permanent residents. The same Instruction determined that if such individuals were in possession of an ID card issued in the Republic of Slovenia, the card was to be destroyed.

*

One of the more interesting aspects of the Erasure is that the language used by the Ministry in its Instructions was impersonal and technical, specifying in great detail the different technical administrative operations to be carried out. In this way, it seems, the “human” aspect of the operation was brushed aside as administrative officials were focus on these purely technical operations. In general, this kind of *modus operandi*, including rule by executive decree or internal orders, focus on technical details, operational secrecy, impersonal treatment of

¹⁷² On the basis of a valid passport, a visa, temporary residence permit etc.

¹⁷³ Instruction n. 0016/2-S1.-92.

individuals etc., is characteristic of the way the bureaucratic apparatus functions. (In Part III, I discuss in greater detail the role of the bureaucracy, of its organizational structure and work organization, on the Erasure).

The consequences of the Erasure were profound and long-lasting: individuals who only a day ago were entitled to the same rights as Slovenian citizens found themselves in a situation of quasi-, if not total, rightlessness.¹⁷⁴ Already without Slovenian citizenship, they were now also considered illegal aliens without a regulated residency status. As we will later see, the deprivation of the latter status caused a cascade-like effect whereby the affected individuals were deprived of numerous public rights and were virtually unable to re-obtain their previous status. Many of them faced violations of their most basic human rights by being exposed, among other things, to incarceration and even deportations.

5.3. The unlawfulness of the Erasure

For Rifet, whose story you will remember from the Prologue, it was a mid-day encounter with a couple of police officers doing routine check-ups in the city centre; for Srečka, whose story was also featured in the Prologue, it happened during a visit to the social services office, where she went to take care of her son's kindergarten application; others had to renew their expired identity documents, while some were even awakened in the middle of the night by the police.

These are just some of the ways in which the Erased individuals found out about the “changes” that had occurred in their legal status after 26 February 1992. The Erasure was conducted in secrecy, without forewarning or notification of its effects. Most Erased individuals only found out that they had been erased by chance and always *ex post facto*.

The legal consequences of the Erasure were profound for the affected individuals and expanded to all areas of their lives. Without a Slovenian citizenship and a valid residency permit, without any valid personal document – which were often seized and destroyed in front

¹⁷⁴ See more in Ch. 6.1. & 6.2.

of their eyes –, the Erased individuals were consequently deprived of numerous, if not all, civil and economic rights that (in)directly depended upon the former statuses.¹⁷⁵

While in Ch. 6, I will analyse the specific consequences of the Erasure for the status of a person in law, let me here just quickly sketch the various ways in which the Erased were affected: they were, for instance, deprived of their social security benefits, including financial assistance for unemployment, child benefits or pension; they were unable to acquire or renew their driver's licences and were so exposed to fines and having their vehicles confiscated; they had great difficulty in obtaining and renewing work permits which put their day-to-day survival at risk; they also lost their housing rights, often evicted from their homes and left homeless; secondary and tertiary education was suddenly made unavailable to them; due to the loss of their legal statuses, they lost their right to stay on the territory and so were exposed to deportations and expulsions. In addition to a more or less complete “de-legalization” of their lives, the Erasure also produced serious physical and psychological distress among the affected – in some case, due to poor health and lack of medical assistance, death was an (in)direct consequence of the Erasure.¹⁷⁶ Finally, even though it was primarily a legal matter, social marginalization was a process that greatly contributed to the Erasure and was also one of its most important consequences.¹⁷⁷

For years, details of the Erasure were unknown to the public – although, it should be emphasized that the office of the Human Rights Ombudsman in Slovenia noted the problem as early as in 1995 in its first annual report. The secrecy of the Erasure was surely the prime cause of this situation,¹⁷⁸ but the attitudes of the affected individuals were also relevant in this regard: they often perceived the Erasure as somehow being their own fault, a bureaucratic mistake or just bad luck; often times they did not even mention to anyone what had happened because they were too ashamed of their situation. The problem was furthered by those cases that did end up before the courts. In the initial period, the lower-level court proceedings often lasted unreasonably long and the courts tended to interpret the legislation narrowly,¹⁷⁹ confirming the actions of the executive authorities. The Supreme Court especially played out

¹⁷⁵ For an extensive overview of the consequences of the Erasure, see Kogovšek Šalamon 2016: 110–133; see also Kogovšek Šalamon et al. 2010.

¹⁷⁶ Cfr. Lipovec Čebren 2010 & 2011.

¹⁷⁷ On this aspect of the Erasure, see for instance, Zorn 2003; Kogovšek Šalamon et al. 2010; a special issue of the *Journal for the Critique of Science* dedicated to the Erasure: *Journal for the Critique of Science* 35 (2007) 228.

¹⁷⁸ See more below in Part III: Ch. 8.2.2.

¹⁷⁹ Some Erased have even spoken of other violations by the judiciary, including extortion. See, for instance, Zorn 2003: 139ff.

an important pro-establishment role in this regard. With respect to the role of the Supreme Court, Kogovšek Šalamon argued that it [the Supreme Court]

“acted as a proxy for the executive branch of the government. It only corrected the restrictive administrative practices of the Ministry of the Interior minimally, and failed to deal with important issues such as the retroactive application of declarations of a threat to the public order, security, and defence of the country. Despite the unconstitutionality of the Aliens Act, the court confirmed the practice of local administrations that deprived people of their status” (Kogovšek Šalamon 2016: 173).¹⁸⁰

The legal resolution of the Erasure was in great part due to the positive and active role of the Slovenian Constitutional Court. Kogovšek Šalamon is even convinced that were it “not for the Constitutional Court’s ruling, the erasure would probably never have been recognised as unlawful” (Kogovšek Šalamon 2016: 223).¹⁸¹

Kogovšek Šalamon here raises an important point for this thesis. Namely, if the Erasure was positively declared illegal, unconstitutional and a violation of the ECHR-protected human rights, why then, should this be an interesting *legal* problem? Why would we want to study the legal mechanisms of Erasure, hoping to learn something particularly interesting regarding the “dark side” of the law, if we firmly know that all of this was done in direct violation of constitutional principles and fundamental human rights?

This illegality objection is here, I believe, irrelevant and for the following reasons: first of all, we should remember that the Erasure was conducted in 1992 whereas Slovenia became a member of the Council of Europe (and hence acceded to the ECHR) only in 1994. Hence, the Erasure in the narrow sense, as you will see below, was never part of the ECtHR’s review. Second of all, as you are about to see, the first time the Erasure was declared unconstitutional was only in 1999, that is, seven years after the Erasure had taken place. In the meantime, thousands of individuals lost their houses, employment and other (legal) means of survival, with many of them either deported to other countries or, if at the time of the Erasure they were already outside of the country, unable to return. While I do not possess the exact numbers, I can nevertheless claim that due directly or indirectly to the Erasure, many individuals died.

¹⁸⁰ Perhaps the most disturbing evidence of this can be found in a letter by the Ministry of the Interior advising the Supreme Court on how to handle a complaint by a particular plaintiff who received this letter by accident. See Zorn 2003: 142.

¹⁸¹ However, it should be noted that prior to its first major decision on the Erasure in 1999, the Constitutional Court also contributed to the unresolved state of affairs that persisted so long. Namely, the first petition for constitutional review of the Aliens Act was lodged with the Court as early as 1994. However, the judges could not agree on how the issue should be dealt with and it was only the next composition of the judges that actually decided on the case in 1999. More on this decision below. Cfr. Kogovšek Šalamon 2016: 223.

All of this means that that for seven years, the legislation that enabled the Erasure and the consequent actions of the executive officers were the law of the land, confirmed as such several times by the Supreme Court, the highest judicial authority in the land. It is true that consequently, with the two major Constitutional Court's decisions and the ECtHR pilot judgment, the consequences of the Erasure were annulled and the condition of the affected individuals *ex tunc* restored into their original condition. This, however, does not change the historical fact that one, the Erasure did take place and did produce concrete consequences (for some even permanently) and two, that at a given historic moment it was considered legal. It makes little difference for this argument that this state of affairs lasted "only" seven years: it could easily have lasted fifty or even a hundred years. In this latter case, we can only imagine law students would have learned about the Erasure as if it were a legal act and how many scholarly works would have been created in that period, discussing the legal details of this particular phenomenon. For these reasons, I believe that the illegality argument is here of little importance and the investigation into the legal aspects of the Erasure justified.

In this Section, I will look at the most pertinent findings and conclusions from the leading Constitutional Court decisions on the Erasure. In the end, I will also discuss the 2012 ECtHR decision in *Kurić and others v. Slovenia* which authoritatively decided on the matter.

Besides the two mentioned leading, or "systemic" decisions, the Constitutional Court decided in numerous other cases dealing with the Erasure; these cases include petitions for the review of constitutionality of different legislation, individual constitutional complaints for (alleged) violations of human rights as well as decisions on the constitutionality of proposed referenda on the matter.¹⁸² With regard to the latter, one decision in particular should be highlighted: namely, in its decision U-I-266/95 from 20 November 1995, the Constitutional Court decided that the proposal for a referendum on the revocation of citizenship of those individuals who acquired it on the basis of Art. 40 of the Aliens Act was unconstitutional and thus prohibited the referendum. The Court found that should the referendum succeed and the proposed statute be passed, there would have been a violation of the right to personal dignity and security (Art. 34 of the Constitution), the right to privacy and personal rights (Art. 35), as well as of the

¹⁸² A more detailed analysis of sixteen important Constitutional Court decisions is available in Kogovšek Šalamon 2016: Part IV. An analysis of their implementation is available in Part V.

principles of a state based on the rule of law (Art. 2), especially of the principles of legal security and of confidence in the law.¹⁸³

The first “systemic” decision: the unlawfulness of the Aliens Act

On 4 February 1999, the Constitutional Court handed down the first of two so-called systemic decisions on Erasure (decision U-I-284/94).¹⁸⁴ Deciding on the constitutionality of the Aliens Act, it unanimously held that Art. 81/2 was unconstitutional for failing to determine the conditions for the acquisition of permanent residence permits of individuals who were eligible for obtaining Slovenian citizenship on the basis of Art. 40 of the Citizenship Act upon the expiry of the time period prescribed in the latter provision (or – if they did apply – after the date of finality of the decision on refusal to grant citizenship). The Court ordered the legislator to eliminate the unconstitutionality within six months. Moreover, the Court also decided that pending the elimination of the said unconstitutionality, no further deportation of citizens of former SFRY republics who actually lived in Slovenia and had permanent residence in Slovenia can be carried out.

In its reply to the challenge of constitutionality brought by two Erased individuals, the Government argued that the Aliens Act in fact did not contain provisions that would regulate the residency status of the identified group of individuals but that for this reason their legal position was in no way less favourable and that the Aliens Act was always implemented in a way that did not violate the principle of legal security. Moreover, it argued that in issuing permanent residence permits it correctly used the provisions of the Aliens Act and so there was no discrimination of these individuals compared to those foreigners whose permanent residency permits were extended *ex lege* (see Par. 1.–4. of the decision). It is important to note that the Government did not deny that the “removal” of these individuals from the registry of permanent residents had actually taken place – the Government even claimed that this operation was based on a specific sub-statutory act (the Rule on Permanent Residence

¹⁸³ This decision should also be seen from the perspective of disenfranchisement as discussed in Section 5.1. of this thesis. It should also be remembered that had the referendum taken place and succeeded, these individuals would also have been deprived of their residence status, i.e. erased (Kogovšek Šalamon 2016: 185).

¹⁸⁴ The petition, as we have mentioned, was lodged as early as 1994.

Registration and Cancellation Form, Personal and Household Records and the Manner and Maintenance of the Register of Permanent Residents).¹⁸⁵

The Court established that the lack of special provisions regarding the particular legal position of these individuals represented a legal gap,¹⁸⁶ which in practice had been filled in different ways and that, in turn, led to different consequences for the individuals in question (Par. 9). The first of these consequences was that the legal status of these individuals was altered and the Aliens Act became applicable to them, without having been informed about it and instructed on their new condition (Par. 10). The Aliens Act provisions, however, were intended to regulate the legal position of “regular” aliens, i.e. individuals who were only entering Slovenia for the first time with the intention of remaining on the territory for a shorter or a longer period of time. As the Court noted, these provisions were not suited to regulate the particular condition of individuals who already held permanent residency permits in Slovenia and actually lived there. These two circumstances distinguished the two groups of foreigners and so the legislator ought to have regulated the position of this latter group “in a special manner in transitional provisions of the ZTuj [the Aliens Act] or in a special statute” (Par. 13).¹⁸⁷

In Par. 14 of its decision, the Court provided a clear condemnation of the Erasure. It argued that the competent authorities should not have carried out “the transfer” of these individuals from the register of permanent population *ex officio*, without any official decision or notification addressed to the concerned persons. The act, added the Court, had no statutory basis whatsoever and the Government was not authorized by law to impose a different regulation of the matter than the one provided for in the statute. The Government, when it determined that the given legislation could not be directly applied in the practice, should have proposed to the legislator to properly regulate the matter and not use executive decrees to assume legislative powers.

Consequently, the Court established that due to their legal position being unregulated, the individuals in question were put in an insecure position, unable to positively know their legal status on the day the Aliens Act became applicable for them. Hence, the Court held that there

¹⁸⁵ Article 5 of these Rules stipulated that the registry ought to contain only information of citizens of the Republic of Slovenia who had their permanent residence registered. Hence, the Government’s argument for the Erasure was that they were only bringing the registers in line with these Rules.

¹⁸⁶ As the Court noted, the legislator was aware of the problematic nature of this provision but nevertheless decided that this matter should rather be resolved by bilateral agreements with other successor states. Such agreements, however, were never concluded.

¹⁸⁷ See more on this issue below in Part III, 8.2.1.

had been a violation of the principle of legal security (predictability), a sub-principle of the principle of legality (Rule of Law), enshrined in Article 2 of the Constitution. Finally, the discriminatory treatment of these persons, compared to those foreigners whose legal status was regulated on the basis of Par.3 of Art. 82 of the Aliens Act (the “old” foreigners), constituted a violation of the principle of equal treatment, established in Art. 14, Par. 2 of the Constitution.

Despite the insistence of the Ministry of the Interior that its acts were lawful, the Court’s decision was nevertheless implemented without great controversy – the so-called Legal Status Act was adopted in July that same year.¹⁸⁸ Kogovšek Šalamon contributes this rapid and relatively uncontroversial implementation of the Court’s decision to the EU accession talks that were ongoing at the time and the consequent Government’s desire to present itself in the best possible light to the European community (Kogovšek Šalamon 2016: 228f).¹⁸⁹

The Legal Status Act determined that individuals who were erased and continued to actually live in Slovenia from the day of the Erasure onwards are to be issued permanent residency permits. It determined the same for those citizens of other SFRY republics who on 25 June 1991 (i.e. the day of Slovenia’s independence) resided in Slovenia without a permanent residence and who actually and uninterruptedly lived in Slovenia from that day onward (Art.1 of the Legal Status Act). The Act determined that applications for residency permits were to be presented within a three-month period after its enforcement (Art. 2).

The positive aspect of this arrangement was the inclusion of individuals who were not entitled to obtain Slovenian citizenship on the basis of Art. 40 of the Citizenship Act because they did not have permanent residence registered at the time of the referendum (cfr. Kogovšek Šalamon 2016: 229f).¹⁹⁰ However, the Act demonstrated two major flaws: first, it introduced a new condition for applying for the status and second, it prescribed an unreasonably short deadline for applications. As I deal with this latter problem in Part III of the thesis (see Ch. 8.2.6), I will here focus only on the former question.

The novelty introduced in Art. 1 of the Legal Status Act was the condition of continuous living in Slovenia from the day of the plebiscite onwards. The reason for introducing this

¹⁸⁸ The Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia, *Official Gazette of RS*, n. 61/1999.

¹⁸⁹ Rangelov (2014) comes to the same conclusion. See 5.1., *supra*.

¹⁹⁰ See more on this group of individuals being excluded from citizenship-eligibility above, 4.3.

additional requirement did not stem from the Court's decision – but it was emphasized in the concurring opinion of one of the judges.¹⁹¹ The problem, of course, was that a long time had passed since the independence referendum (roughly 7 years) and so the personal circumstances of the Erased might have drastically changed. For instance, the Erasure caused many individuals to leave the country, either on their own or due to deportation (cfr. Kogovšek Šalamon 2016: 232). This meant that they were unable to fulfil the requirement, even if they were somehow able to return to Slovenia at a certain point.

What made matters worse was that the condition was introduced retroactively which “meant that the erased people had to prove that they had actually lived in Slovenia for a long period in the past, during which time they could not yet have been aware of the requirement that was to be set many years later” (Ibid.).¹⁹² Hence, the requirement violated the principle of reasonable (or legitimate) expectations. Given the purpose of this legislation which was to remedy a past violation of human rights, the conditions for re-obtaining the residency permits should have been the same as they were at the time of the Erasure (i.e. citizenship of another SFRY republic and permanent residence in Slovenia at the time of the plebiscite).

Two further problems of the Legal Status Act should be mentioned: first, the Act awkwardly referred to the relevant group of individuals as “citizens of other successor states of the former SFRY”,¹⁹³ whereas all preceding relevant legislation (as well as the Constitutional Court's decision) talked about “citizens of other SFRY republics”. This change caused problems when the Ministry of the Interior required proof of such citizenship (not citizenship of the former SFRY republics) since there were several individuals who did not (could not) acquire such citizenship and were left stateless or have in the meantime gained citizenship of some other country. Moreover, due to the Constitutional Court's decision (supposedly) being unclear on this point, the Legal Status Act did not determine whether the new residence permits were to be valid *ex nunc* (thenceforth) or rather *ex tunc* (from the outset or retroactively). That the latter should have been the case stems both from the reasoning of the Court's decision in this case as well as from other subsequent decisions of the Court which confirmed the precedent.¹⁹⁴

¹⁹¹ See concurring opinion of Judge Ude.

¹⁹² On the problem of retroactivity in the Erasure see also Ch. 8.2.3. below.

¹⁹³ Meaning the citizenship of one of the new States that were created after the break-up of Yugoslavia.

¹⁹⁴ In this regard, one individual appeal, Up-333/96 from 1 July 1999, was particularly relevant. In it, the Court ordered the Ministry of the Interior to re-enter the appellant to the register of permanent residents. Although it did not state whether the re-entry ought to be retroactive and if so from which day onwards, it did identify 26

These shortcomings were addressed in the subsequent amendments of the Citizenship Act,¹⁹⁵ as well as in second systemic decision of the Constitutional Court.¹⁹⁶

The second “systemic” decision: an attempt at remedying the inadequacies of the Legal Status Act

The decision U-I-245/02 was adopted on 3 April 2003. The Constitutional Court established, among other things, that the Legal Status Act violated the Constitution because it did not recognize the erased individuals’ permanent residence from the date of the Erasure onwards. Moreover, it declared null the three-month time limit set for filing applications for the issuance of permanent residency permits. The legislator was given six months to remedy these (and certain other) violations. Finally, it directly ordered the Ministry of the Interior to issue by official duty supplementary decisions to those individuals who had already obtained permanent residency permits on the basis of the Legal Status Act or the Aliens Act establishing permanent residence status from 26 February 1992 onwards, i.e. from the day of the Erasure (*ex tunc*).

The Court emphasized that the legislator should have regulated the legal status of the Erased for the entire period from the Erasure onwards and not only prospectively. While this obligation might have been ambiguously determined in the U-I-284/94 decision, its subsequent decisions stated this obligation in no uncertain terms (see Par. 14). Seeing how the challenged Act did not allow for the re-instatement of permanent residence *ex tunc*, these individuals were for years left in an unregulated state of affairs and suffered from legal uncertainty. Hence, the Court found that the challenged Act violated the principle of legal certainty which falls under Art. 2 of the Constitution (a State governed by the rule of law) (Par. 15).

The Court also established that Art. 2 of the Constitution had been violated because the legislator did not prescribe adequate measures for establishing the fulfilment of the condition

February 1992 as the day when the illegal consequences set in. Beyond that, following this decision, the Ministry sent all local administrative authorities a circular ordering them to re-enter the erased individuals into the permanent residents registry if they so requested. See Kogovšek Šalamon 2016: 234.

¹⁹⁵ See the Act Amending the Citizenship of the Republic of Slovenia Act, *Official Gazette of RS*, n. 96/2002. See also Kogovšek Šalamon 2016: 236-7.

¹⁹⁶ Despite the problems of the Legal Status Act, more than 11.000 individuals were able to obtain a permanent residency permit on its basis.

of actual presence for acquiring a permanent residency permit. This notion, newly included among the conditions for acquiring the permit, was highly indeterminate and led to different interpretations. Given the particular situation of the Erased individuals and the various reasons for their absence from the territory, as well as the long period that has passed since the Erasure, the Court argued that in accordance with the principles enshrined in Art.2 of the Constitution, the legislator “should have defined what actual presence means according to [the Legal Status Act]”. Moreover, from the perspective of the principle of equality, the Court argued that “the status of citizens of other Republics should not have been worse than the status of those persons who had had the status of foreigner already prior to the Republic of Slovenia gaining independence”.¹⁹⁷

Finally, regarding the challenge of the three-month application period, the Court argued that the prescribed time limit was indeed too short. In determining this limit, the legislator did not adequately consider all the possible circumstances that could impede individuals from filing their applications on time. It should have especially considered “that due to the fact that their legal position was unregulated for a long period of time, citizens of other Republics could not have expected that such a short time would be prescribed for the regulation of their status. In particular they could not have envisaged that not applying within such a short period would result in a loss of the right to acquire a permit for permanent residence” (Par. 34). These individuals reasonably expected a longer timeframe for regulating their legal status. Hence, by not determining a longer time limit and thus preventing every individual that fulfilled the necessary conditions from being able to obtain the permit, the legislator violated Art. 2 of the Constitution.

The Constitutional Court ordered: first, that the legislator adopts a new law in order to remedy the established violations of the Constitution; second, that supplemental (declaratory) decisions be issued to affected individuals by the Ministry of the Interior.

Unlike the previous one, the implementation of this Constitutional Court decision did not proceed so easily. This was mainly due to a political climate that did not favour a resolution of the matter along the lines dictated by the Court.¹⁹⁸ One of the major obstacles to the

¹⁹⁷ In addition, the Court argued that the interpretation of this condition should not be, in any way, stricter than the interpretation of the same condition in the case-law relating to the acquisition of Slovenian citizenship (see Par. 30).

¹⁹⁸ In 2004, a right-wing Government came to power, composed of parties that actively opposed the implementation of the Court's decisions on the Erasure from the outset. See more in Kogovšek Šalamon 2016: 242f.

implementation of the decision was the prevailing view that the Court's decision itself is not a sufficient basis for issuing the supplementary decisions but rather that a special law needed to be passed before. Following this line of reasoning, the Government proposed two separate pieces of legislation: a "technical" law for the implementation of the order given to the Ministry of the Interior to issue supplementary decisions and a "systemic" law for the implementation of all other requirements of the Constitutional Court.¹⁹⁹ Neither of the two proposals was adopted, nor did the centre-right Government put forward a proposal for a constitutional law which sought to circumvent the previous decisions of the Constitutional Court. Lacking the support of the opposition parties, the bill did not garner the required two-thirds majority needed to pass.

It was not until 2008, when a new minister for the Interior was named that the supplementary decisions began to be issued. The processes ended in March 2010 with more than 6000 such decisions being issued. Moreover, in 2010 the Government prepared amendments to the Legal Status Act in order to implement the rest of the Constitutional Court's decision.²⁰⁰ While the amendments tackled the unconstitutionality exposed by the Court's decision, one of the most problematic elements of the previous law was retained, namely the requirement of actual residence in Slovenia after the plebiscite. The amendment determined that an absence lasting no more than a year was acceptable under this condition, while a longer absence was only justifiable if it could be subsumed under one of the enumerated exceptions. The problem here was with a further part of the amendment which determined the longest possible acceptable absence from Slovenia (ten years) along with other conditions that the applicants had to meet. As Kogovšek Šalamon sustains, these exemptions "were introduced for the benefit of those erased persons who, until that point, could not yet secure legal status due to a prolonged absence from the country"; however, additional requirements inserted into the amendments "effectively annulled the purpose and the meaning of the law" (2016: 247).

Nevertheless, the same author argues that despite its flaws, the Legal Status Act should be valued positively since it provided the possibility of legalizing one's legal status almost twenty years after the Erasure. This was especially relevant since there were, at the time, still individuals living in Slovenia that were without any legal status as well as individuals who wished to return to Slovenia (Kogovšek Šalamon 2016: 250).

¹⁹⁹ For a presentation of both these laws, see Kogovšek Šalamon 2016: 238 – 242.

²⁰⁰ Act Amending the Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia, *Official Gazette of RS*, n. 50/10 (ZUSDDD-B).

*The final resolution: Kurić and others v. Slovenia*²⁰¹

On 4 July 2006 eleven individuals lodged an application to the European Court of Human Rights (ECtHR) against the Republic of Slovenia, claiming violations of Articles 8 (right to private and family life), 13 (right to an effective remedy), 14 (prohibition of discrimination) as well as of Art. 1 of the 1. Protocol (right to private property) of the European Convention on Human Rights (ECHR).²⁰²

Before I tackle the case on its merits, several procedural question that were raised during the process should be mentioned: first of all, the Third Section of the Court decided that two of the applicants, who in the meantime have already received both *ex tunc* and *ex nunc* residency permits, have had their situation adequately resolved and so could no longer maintain victim status. Consequently, their applications were not considered admissible (see Par. 311 and 312 of the Section judgment). Moreover, the Section found that with regard to the purported violation of Art. 1 of Protocol n.1, the applicants did not exhaust all domestic legal remedies – and so also found their application in this regard inadmissible (Par. 313-314). Before the Grand Chamber, the question of the exhaustion of domestic remedies came up again: this time, the Court upheld the Government's objection that two of the applicants never took any (sufficient) legal steps in order to regularise their residency status in Slovenia. In this way, they demonstrated insufficient interest in the matter and so the Court decided that their applications should be considered inadmissible. In the final instance, then, the Court (the Grand Chamber) only considered six applications.

Secondly, the question of the Court's jurisdiction *ratione temporis* was raised, seeing how the Erasure was effectuated before the ECHR was ratified in Slovenia (in June 1994). The Section dismissed the objection claiming that it did have the competence to examine the facts of the case that occurred prior to the date of the ratification of the Convention by Slovenia “insomuch as they could be considered to have created a continuous situation extending beyond that date or may be relevant for the understanding of the facts occurring after that

²⁰¹ Application no. 26828/06. Section judgment from 13 July 2010; Grand chamber judgment from 26 June 2012.

²⁰² Note that the case was initially entered as *Makuc and other v. Slovenia*. However, during the procedure Mr. Makuc passed away and so the case was later registered as *Kurić and others v. Slovenia*.

date” (Par. 304). The Grand Chamber later confirmed this position (Par. 241-242 of the Grand chamber judgment).

Finally, after the Section judgment, which unanimously declared that there had been a violation of Articles 8 and 13 of the Convention,²⁰³ six of the eight applicants were granted both *ex tunc* and *ex nunc* permanent residency permits. Consequently, the Government argued that, just as the two other applicants in the case before the Third Section, these individuals could now no longer claim victim status. The Grand Chamber, however, took a different stance than the Section: although the violation had been acknowledged by the State and the residency permits granted to the applicants, the Court held that due to the long-term effects of the Erasure which lasted nearly twenty years and during which time the applicants experience insecurity and legal uncertainty, the issuance of the residency permits did not constitute “appropriate” and “sufficient” redress at the national level (Par. 267).

On 13 July 2010, the Third Section of the Court handed down a unanimous decision on the violation of Articles 8 and 13 of the Convention. It did not, however, find it necessary to review the claims regarding the violation of Art. 14. Likewise, all other complaints made by the applicants were also declared inadmissible. In October 2010, the Slovenian Government asked for the case to be referred to the Grand Chamber. The Chamber’s final decision was published on 26 June 2012. Herein the main arguments from the Grand Chamber's reasoning are succinctly presented.

As far as the purported violation of Art. 8 is concerned,²⁰⁴ the Court initially emphasized that the Government did not contest that the Erasure and its consequences “had had an adverse effect on the applicants and amounted to an interference with their ‘private or family life’ or both” (Par. 339). This being so, the question for the Court was whether the interference was compatible with the second paragraph of Art. 8, i.e. whether it (i) was in accordance with the law, (ii) pursued a legitimate aim, and (iii) was necessary in a democratic society.

²⁰³ The Section did not find it necessary to examine the claims regarding the violation of Art. 14, seeing how it already found violation of Art. 8 (Par. 400).

²⁰⁴ “(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The Court argued that the relevant legal provisions, i.e. Art. 40 of the Citizenship Act and Art.81 of the Aliens Act, were sufficiently accessible to any interested person. Hence, these individuals could foresee that not applying for citizenship will mean that they will become (be treated as) foreigners. However, they “could not reasonably have expected, in absence of any clause to that effect, that their status as aliens would entail the unlawfulness of their residence on Slovenian territory and would lead to such an extreme measure as the ‘erasure’” (Par. 343). Indeed, the Erasure itself lacked legal basis, whereas the existing legislation lacked any provision for the regulation of “the transition of the legal status of the ‘erased’ to the status of aliens living in Slovenia”. In consequence, they were unable to apply for permanent residence anew, only having access to temporary residence as if they were entering Slovenia for the first time (Par. 344). The Court determined that the consequences of the Erasure were not clearly regulated at least until 2010. Therefore, argued the Court, “not only were the applicants not in a position to foresee the measure complained of, but they were also unable to envisage its repercussions on their private and family life or both” (Par. 348). In consequence, the Court found that the interference was not in accordance with the law and so in violation of Art. 8.

Despite the established violation, given the widespread consequences of the case, the Court decided to continue and examine the other two requirements as well.

As far as the question whether the interference pursued a legitimate aim, the Court accepted the Government’s argument that the independence legislation was intended to protect national security (see Par. 351-353), which is one of the legitimate aims covered by Art. 8/2 of the Convention.

As to the question of the necessity of interference, the Court found that the Erasure, as a consequence of not acquiring citizenship, was a disproportionate measure in the pursuance of an otherwise legitimate aim of controlling the residence of aliens on the territory and of creating a corpus of Slovenian citizens. The State ought to have provided for the possibility that these people regularise their residency status even though they did not seek or were unable to obtain Slovenian citizenship. “The absence of such regulation and the prolonged impossibility of obtaining valid residence permits”, argued the Court, “have upset the fair balance which should have been struck between the legitimate aim of protecting national security and effective respect for the applicants’ right to private and or family life or both” (Par. 359).

Regarding the violation of Art. 13²⁰⁵ (in connection with Art. 8), the applicants claimed that none of the available remedies at the material time had proved capable of addressing their complaints and award them appropriate relief. Despite two leading Constitutional Court decisions, the Government did not adopt a comprehensive legal solution for remedying the situation.

Despite the Government's objections detailing the various legal possibilities that the erased individuals had for remedying their situation (e.g. the administrative proceedings, individual constitutional complaints etc.), the Court emphasized that the two leading Constitutional Court's decisions on the issue, which ordered the Government to adopt general measures for resolving the situation, were not implemented for several years each. Moreover, the administrative procedures that the applicants did initiate lasted unreasonably long and the overall situation in which they found themselves in, one of vulnerability and legal insecurity, caused in them feelings of helplessness and frustration with the entire system. Consequently, the Court established that these legal remedies were not "adequate" and "effective" and so held that there had been a violation of Art. 13 in conjunction with Art. 8 of the Convention (Par. 372).

Finally, whereas the Third Section did not discuss the merits of the purported violation of Art. 14 (prohibition of discrimination),²⁰⁶ the Grand Chamber nevertheless believed the question ought to be examined given the importance of the problem of discrimination in the case at hand (Par. 383).²⁰⁷ According to the Court's case-law, there is discrimination when persons in relevantly similar situations are treated differently without an objective and reasonable justification – that is, when no legitimate aim is pursued or if there is no reasonable relationship of proportionality between the means employed and the aims to be realized (Par. 386).

Accordingly, the Court, first established that after Slovenia's independence the situation of the "old" aliens and these "new" ones, i.e. citizens of former SFRY republics who did not

²⁰⁵ "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

²⁰⁶ "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

²⁰⁷ On the issue of discrimination see also Part III, 8.2.1.

acquire Slovenian citizenship, was comparable: the two groups were both composed of aliens holding citizenship of a State other than Slovenia or stateless people – yet only one of the two groups kept their residence permits. Hence, there was a difference in treatment of two comparable groups (Par. 391-392). The Court flatly rejected the Government’s argument that the differential treatment was required by the necessity of forming a corpus of Slovenian citizens, especially in view of the upcoming 1992 parliamentary elections. This argument, said the Court, is invalid, since a failure to apply for citizenship cannot justify the deprivation of residence permits and secondly, because residency status does not confer the right to vote. Hence, the Court found that there had been an unlawful and unjustified nationality-based discrimination of the concerned individuals.

Finally, in accordance with Art. 46 of the Convention, the Court may impose on the respondent State the adoption of individual or general measures for the resolution of an existing situation. In the present case, the Court found that the established violations “originated in the prolonged failure of the Slovenian authorities, in spite of the Constitutional Court’s leading judgments, to regularise the applicant’s residence status following their ‘erasure’ and to provide them with adequate redress” (Par. 408). Also, the Erasure concerned a large number of persons – an entire category of former SFRY citizens residing in Slovenia who were (systemically) denied compensation for the infringement of their fundamental rights (Par. 412). Hence, in accordance with its internal Rules, the Court established that the present case was suitable for the adoption of a pilot-judgment procedure (Par. 413). The Court consequently indicated that the Government should, within one year, set up an *ad hoc* domestic compensation scheme.²⁰⁸

²⁰⁸ On this, see more in: Kogovšek Šalamon 2016: 268–271 & 2017: 140–144.

CHAPTER 6.

THE CONSEQUENCES OF THE ERASURE & LEGAL PERSONHOOD

In the previous two Chapters, we examined the legal background of the Erasure: in Chapter 4, I presented and discussed the relevant normative framework regarding citizenship and residency prior to Slovenia's independence as well the new legal regulations enforced immediately after its declaration of independence, the Citizenship Act and the Aliens Act in particular. In Chapter 5, I focused on the two main "exclusionary steps" in our story: first, the disenfranchisement of those individuals who did not apply for Slovenian citizenship (or whose applications were denied) and second, the Erasure in the narrow sense, that is the administrative, decree-based operation, which left more than 25,000 individuals without almost any political, social or economic rights, as illegal aliens in a state of legal limbo.

In this Chapter, I will take a closer look at the consequences the Erasure had for the legal position of the affected individuals. The three stories of erased individuals in the Prologue of this thesis suggest the extent and the gravity of these consequences. While the Erased were deprived of their rights in a wide range of areas and to various degrees, I will focus on the consequences the Erasure had on their status as persons in law (legal personhood). I will claim that while the Erasure did not result in a comprehensive deprivation of legal personhood, different kinds of limitations – more generally, a weakening – of the underlying personhood status can be established.

This Chapter has the following structure: in the first section (6.1.), I introduce the problem of the effects exclusionary practices may have on the status of a person in law. Here, I draw from Hannah Arendt's discussion of the plight of the stateless migrants after World War I and its subsequent rethinking by Ayten Gündoğdu. In this discussion particular emphasis is given to the fundamental role of legal personhood as the normative basis for rights recognition. On this basis, in the next Section (6.2.), I focus on Erasure's impact on the personhood status of the affected individuals. More specifically, I look at how the four (MacCormick-ean) legal capacities comprising legal personhood had been affected by the loss of citizenship and residency statuses. In doing this, I lean on the concepts presented and developed in the first Part of the thesis. The analysis that I conduct deals in abstractions, that is, it does not consider every possible particularity of the erased people's stories; rather, it is limited to looking at the Erasure in general terms, disregarding most the surrounding contingencies, as the opposite

would require too much time and space. The analysis' results lead me to reconsider how the various legal statuses interact with one another. Thus, in the last Section (6.3), I claim that even though legal personhood is a condition for the acquisition of other legal statuses, including citizenship and residency, manipulations with the latter two statuses did, in this concrete case, have a negative impact for the legal personhood of affected individuals. In my opinion, these findings require an altered view of the connection between legal statuses.

6.1. Precariousness of legal personhood

In her classic, *The Origins of Totalitarianism*,²⁰⁹ Hannah Arendt demonstrated that there exists a particularly strong connection between citizenship status and legal personhood. In her analysis of the post-World War I Europe, Arendt noted that the reshaping of the state borders had left an unprecedented number of people stateless.²¹⁰ In the interwar period, with the rise of totalitarian regimes and their emphasis on national sovereignty, these “legal freaks”, as she called them, found themselves “outside the pale of law”: they lived outside the jurisdiction of the laws of the countries of their residence and were not protected by them (Arendt 1973: 286). On the figure of the stateless person Arendt built her critique of human rights.

Arendt saw that there is an inherent paradox in the way human rights were perceived. The 18th century declarations of human rights, beginning with the 1789 French Declaration of the Rights of Man and of the Citizen, professed that these rights were not God-given or customary but rather, as the name suggests, that man himself was their origin (cfr. Arendt 1973: 291). These rights grew from man's “nature” and belonged to her on the sole basis of her birth; as such, they were ahistorical, universal, unalienable and independent of any political community (cfr. Arendt 1973: 291; also Arendt 1990: 149).

These declarations also mark the first time in history that the legislator accepted these theories (of human rights). From that moment on they were no longer mere philosophical theories,²¹¹

²⁰⁹ See particularly Arendt 1973: Ch. 9 (The Decline of the Nation-State and the End of the Rights of Man).

²¹⁰ Arendt called statelessness “the newest mass phenomenon in contemporary history” and the stateless persons as “the most symptomatic group in contemporary politics” (Arendt 1973: 277).

²¹¹ Bobbio notes that the first phase in the development of human rights declarations is represented by philosophical human rights theories. See Bobbio 2005: 21f.

but were rather put in the centre of a new, limited conception of the State. As Art. 2 of the 1789 Declaration states, the goal of any political association is the conservation of the natural rights of man. The protection and promotion of human rights therefore became the foundation of a legitimate government (cfr. Parekh 2008: 21). With the State government now charged with protecting human rights, the paradox of human rights became apparent. While human rights (supposedly) originated in man as such, their protection was entrusted with the nation-State. As Arendt argued, just as “Man appeared as the only sovereign in matters of law”, so was the people “proclaimed the only sovereign in matters of government” (Arendt 1973: 291). The sovereignty of the people, Arendt continues, “was not proclaimed by the grace of God but in the name of Man, so that it seemed only natural that the ‘inalienable’ rights of man would find their guarantee and become an inalienable part of the rights of the people to sovereign self-government” (Ibid.). It was in this way that human rights became tied to national sovereignty (cfr. Parekh 2008: 23).

This, however, also meant that just as soon as Man appeared “as a completely emancipated, completely isolated being who carried his dignity within himself without reference to some larger encompassing order ... he disappeared again into a member of a people” (Ibid.). In other words: in this new ordering of the world into nations with their nation-States, the rights of Man became more concrete, but they also lost in their universality. They became positive (law) rights, but they were rights of Man only as long as (s)he was a member of this or that particular State that recognized them (Bobbio 2005: 23). In reality, the Rights of Man were transformed into the rights of citizens of individual nation-States.²¹²

The 20th century demonstrated the destructive force inscribed in this construction, something Arendt was well aware. She argued:

The full implication of this identification of the rights of man with the rights of peoples in the European nation-state system came to light only when a growing number of people and peoples suddenly appeared whose elementary rights were as little safeguarded by the ordinary functioning of nation-states in the middle of Europe as they would have been in the heart of Africa. The Rights of Man, after all, had been defined as ‘inalienable’ because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them (Arendt 1973: 291-2).

²¹² Cfr. According to Arendt, with the “conquest” of the State by “the nation”, citizenship was increasingly identified with those who were also “nationals”. “As a result, the equivocality between the ‘rights of man’ and the ‘rights of citizen’, which could have been politically navigated to claim equality, was increasingly effaced in the name of the ‘rights of nationals’ within the context of the nation-state” (Gündoğdu 2011: 12).

The “inalienable” Rights of Man, *human* rights, ultimately “proved to be unenforceable – even in countries whose constitutions were based upon them – whenever people appeared who were no longer citizens of any sovereign state” (Arendt 1973: 293).

One of the most important marks of statelessness is the loss of government protection, which means not just the loss of legal status in one’s own country, but in all of them (Arendt 1973: 294). “Treaties of reciprocity and international agreements have woven a web around earth that makes it possible for citizens of every country to take his legal status with him no matter where he goes Yet, whoever is no longer caught in it finds himself out of legality altogether” (Ibid.). In such conditions, it appears that the loss of one’s State implied something much more profound than just the loss of citizenship rights. Arendt understood statelessness as meaning both the loss of one’s country as well as the impossibility of finding protection from another one – in short, it meant the loss of the right to belong.²¹³ However, such an absolute loss of polity in the context where nation-States were the primary, and indeed the only institutions to protect human rights, effectively meant the loss of all rights. “The point is not merely that statelessness means that rights cannot be protected,” argues one author, “but worse, that the very existence of rights are abolished in becoming stateless” (Parekh 2008: 21). Statelessness, in other words, signified a condition of rightlessness (cfr. Arendt 1973: 293–295; Gündoğdu 2015: 94; Parekh 2008: 11).²¹⁴

On Gündoğdu’s view, three dimensions of rightlessness can be distinguished:

Legally speaking, the term denotes the loss of legal personhood that guarantees equal standing before the law. *Politically*, it captures the loss of an organized community, where one’s actions, opinions, and speech are taken into account. In addition, the term also indicates the precarious *human standing* of the stateless, highlighting their expulsion from the human world established and maintained through the activities of labor, work, and action (Gündoğdu 2015: 95f; emphases mine).²¹⁵

Herein, I will focus on the legal dimension of rightlessness, i.e., on the question of the purported loss of legal personhood as a consequence of the loss of citizenship rights.

²¹³ On this, so-called “right to have rights” see Arendt 1973: 296f; Benhabib 2004: ch.2.

²¹⁴ In this regard, Arendt (1973: 299) famously argued: “The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and special relationships – except that they were still human. The world found nothing sacred in the abstract nakedness of being human”.

²¹⁵ Cfr. the three dimensions of, or three conceptions of citizenship in Mindus 2014.

In order to render the idea of the utter lack of legal relevance of the stateless clear, Arendt vividly compares the legal position of a stateless man with that of a criminal offender (Arendt 1973: 286). On her view, a criminal offender, even though he is an exception to the norm, the exception is legally envisaged and so the criminal is legally taken into account. A criminal offender is provided with every legal guarantee foreseen by the (criminal) legal system – she has the right to a fair trial, to be represented by counsel, to be jailed only on the basis of a guilty verdict etc. The stateless, on the other hand, is an “anomaly for whom the general law [does] not provide” (Ibid.). She is not protected by any such legal mechanism but is rather subject to arbitrariness and can be jailed, tortured or deported without having committed any crime whatsoever. Indeed, as Arendt notes, “[i]nnocence, in the sense of complete lack of responsibility, was the mark of their rightlessness as it was the seal of their loss of political status” (Arendt 1973: 195).

The stateless *qua* rightless were legally invisible, irrelevant, deprived of any legal protection and so exposed to any kind of arbitrary exercise of power against them. The “worse-than-a-criminal” treatment afforded to stateless that Arendt describes proves this (cfr. Arendt 1973: 286f). The problem of these individuals, as Arendt argued, was “not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them” (Arendt 1973: 265-6). The rightless are indeed “beyond the pale of law”.

The explanation for the legal invisibility and irrelevance of these individuals lies, on my view, in the fact that as *bare life*, as nothing but human beings, they were not entitled to the protection of human rights. *Legal* human rights are not attributes of “naked” human beings – rather, they are a quality pertaining to persons in law.²¹⁶

In *On Revolution*, Arendt provides her understanding of the term *persona*, which, for the most part, corresponds to the understanding of legal personhood as an artificial construct that makes of individuals rights-and-duties bearing units (cfr. Arendt 1990: 106f).²¹⁷ Gündoğdu (2015: 100) argues that Arendt’s discussion of personhood is crucial for understanding her

²¹⁶ On the naked human being, the “homo sacer”, see Agamben 1995.

²¹⁷ I say for the most part, because Arendt argued that the “mask” of the person actually had two functions: it had to hid or replace the “actor’s” face, “but in a way that would make it possible for the voice to sound through” (Arendt 1990: 106). For Arendt speech is of utmost importance as it is that which makes man a political being. See Arendt 1998.

arguments about statelessness and human rights. It is also, in at least three respects, relevant for today's discussions on rightlessness. I will focus on two of these arguments.²¹⁸

First of all, Arendt's account of personhood draws attention to the artificial nature of rights as such as well as of the subject of rights. By emphasizing the fabricated nature of legal personhood, Arendt aligns herself with the so-called "legalist" approach and against the "metaphysical" approach to personhood.²¹⁹ This, of course, brings her at odds with the traditional human rights discourse which held that human beings have (are ascribed) rights in virtue of their (human) nature. Arendt had tried to show that the "quest for a real, true, and essential being that is hidden behind the mask, that precedes it, and that is entitled to rights by virtue of its nature" (Gündoğdu 2015: 101) is a dangerous affair. The experiences of the stateless had clearly shown that this metaphysical conception of rights is doomed to failure. Arendt rejected the possibility that individuals "stripped of all political and social qualifications, will be recognized as equals" (Gündoğdu 2015: 102); an individual without any legal or political standing "has actually lost the very qualities that enabled other people to treat her as a fellow human being" (Parekh 2008: 26). For Arendt, the experience of the stateless revealed that "equality is not a given or natural condition but instead the result of legal and political efforts to achieve equalization among a community of actors" (Gündoğdu 2015: 102). Or, in Arendt's words: "We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights" (Arendt 1973: 301). Hence, equality, on Arendt's view is not inherent among human beings – rather "it needs to be established by, and continuously reinforced with, relatively stable institutional guarantees". Legal personhood is perhaps the most important such mechanism (Gündoğdu 2015: 102).

Secondly, Gündoğdu argues that Arendt's "legalistic" understanding of legal personhood is also helpful in understanding the broader statelessness debate. Accepting that personhood is "not an inherently given essence", but rather a conceded artificial construct, we are confronted with the possibility that "not every human being is automatically recognized as a person" (Gündoğdu 2015: 102). Formally speaking, then, human beings can either be recognized as

²¹⁸ The aspect that I will not be discussing regards the fact that Arendt's particular understanding of legal personhood which functions not only as an artificial mask covering the individual behind it thus enabling her to function in law; on Arendt's view the mask also enables, through the large mouth-opening, one to speak and be heard. This ability to speak and be heard is, from the political point of view, the crucial sign of one's place in this world. Hence, we should understand "the legal recognition of personhood not merely as a juridical issue but also as a political one that is directly linked to the question of whose action and speech are taken into account in a given community". See Gündoğdu 2015: 104–106.

²¹⁹ Cfr. Part I, Ch. 3.2.

persons or not.²²⁰ Today, however, as we will soon see, formal deprivation of legal personhood, like in the case of slavery for instance, appears impossible. Nonetheless, “even when one has the formal recognition,” says Gündoğdu, “it is conceivable that personhood can be taken away, and if not completely taken away, it can be undermined so much so that some human beings might be effectively rendered semi-persons or non-persons” (Ibid).

These arguments may today appear somewhat surprising, even unconvincing and inconsistent with what we know about our law. After all, much has changed since Arendt wrote on questions of citizenship and personhood and so we should take these changes into consideration.

A key milestone with regard to our changed view of the human being and her legal condition – is undoubtedly the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. According to Bobbio, the UDHR represents the third and final phase in the development of human rights, whereby the rights affirmed therein are both universal and positive: they are universal in the sense that their addressees are no longer just citizens of some State but rather all men; and they are positive in the sense that this Declaration puts in motion a process at the end of which human rights ought to be no longer just proclaimed or ideally recognized but effectively protected even against the State that violates them. At the end of this process, Bobbio prophesized, rights of citizen will be transformed into rights of Man (Bobbio 2005: 23f).

One of the most important aspects of the UDHR, from our point of view, is the inclusion in Art. 6 of the right to recognition as a person before the law.²²¹ This right had never before been conceptualized and indeed many of the drafters either did not fully understand it or saw little reason for its inclusion into the UDHR.²²² Nevertheless, the still fresh memory of the horrors perpetrated by the Nazi regime against the Jews, who were first deprived of their citizenship and every legal attribute or affiliation before they were herded into concentration camps and executed on a massive scale, led the framers of the UDHR to realize that some basic legal recognition of every individual (man, woman and child, citizen, foreigner or

²²⁰ This, you will remember, is a fundamental deviation from the presupposition of the supposed “nature-like” character of personhood we talked about in the Introduction to Part II.

²²¹ The substantially same right is also included into the International Covenant on Civil and Political Rights (Art. 26), the African Charter on Human and Peoples’ Rights (Art. 5), the American Convention on Human Rights (Art. 3) etc.

²²² For a short drafting history of this article, see Morsink 1999: 43–45.

stateless) is a necessary precondition of a civilized life.²²³ Nowak, among others, confirms the fundamental importance of this right – which he calls a “right to existence” (2005: 369) – when he argues that “in a State governed by the rule of law,” any individual “requires the recognition of his or her existence before the law, that is, of his or her *legal subjectivity*. Without this right the individual could be degraded to a mere legal object, where he or she would no longer be a person in the legal sense and thus be deprived of all other rights, including the right to life” (Ibid.). Given this overarching importance, the right to recognition as a person before the law henceforth became one of the cornerstones of the international human rights law.²²⁴ From that point on, then, legal personhood – and not citizenship – had become the fundamental (human) right and the precondition for the attribution of all other rights (cfr. Gündoğdu 2015: 6ff; Bosniak 2010: 11).

The UDHR itself, as well as other human rights instruments, directly or indirectly on its basis, include numerous rights that aim at preventing statelessness and protecting the legal personhood of every human being (e.g. the right to asylum, the right to nationality etc.). With such emphasis given on legal personhood and prevention of its loss, it would be easy to assume that today’s international human rights system is indeed based upon a notion that is a kind of a natural and inalienable characteristic of every human being. In this sense it might appear that human rights are much more entrenched than before and that it has become virtually impossible to deprive them from anyone. Yet if we only look at the experiences of contemporary illegal migrants and refugees we are reminded that things are not as simple. Today,

migrants are still more likely to be subject to numerous forms of violence and abuse, including, among other things, arbitrary detention, illegal confinement, and inhuman and degrading treatment. In addition, various types of official and unofficial discrimination, as manifested in police profiling and racial segregation, can make it much more difficult for migrants to make use of the protections offered by human rights. These problems are further

²²³Cfr. Arendt (1973: 295f): “The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion ... but that they no longer belong to any community whatsoever. Their plight is not that they are no longer equal before the law, but that no law exists for them ... Only in the last stage of a rather lengthy process is their right to live threatened; only if they remain perfectly ‘superfluous,’ if nobody can be found to ‘claim’ them, may their lives be in danger. Even the Nazis started their extermination of Jews by first depriving them of all legal status (the status of second-class citizenship) and cutting them off from the world of the living by herding them into ghettos and concentration camps; and before they set the gas chambers into motion they had carefully tested the ground and found out to their satisfaction that no country would claim these people. The point is that a condition of complete rightlessness was created before the right to live was challenged”.

²²⁴ It should be admitted, however, that international human rights bodies (e.g. the Human Rights Committee) have produced very little case law regarding this right. For an analysis of the jurisprudence regarding art. 16 of the ICCPR see Nowak 2005: 373 ff.

complicated by the fact that most migrants cannot access protective legal mechanisms to effectively challenge or remedy the multifarious forms of discrimination and abuse they face. In fact, they are often very hesitant to assert their rights in fear of retribution (Gündoğdu 2015: 10).

These words serve to remind us that we would be mistaken were we to take personhood for some natural and inalienable characteristic of men. Rather, we would be wise to face the reality and see it for what it is: a fragile legal artefact which can be curtailed in numerous ways (cfr. Gündoğdu 2015: 103). As Bosniak notes, it is not necessary for legal personhood to be formally withdrawn: it can still be “diminished in its effect, evaded, effaced, diluted, displaced” (Bosniak 2010: 14). Thus, rightlessness today needn’t be understood as rigidly as Arendt did; we needn’t see it as lack of legal recognition *tout court*. Taking into account the mentioned post-World War II developments in the international human rights law, Gündoğdu rather “suggest[s] that ‘rightlessness’ denotes the fragility of these formal guarantees, which can be unmade in ways dispossessing various categories of migrants of their legal standing” (Gündoğdu 2015: 107). Hence, rightlessness in these new circumstances is understood as “the *precarious* legal, political, and human standing of those who are juridically or effectively deprived of the protections of citizenship status” (Ibid.).

Hannah Arendt was arguably the first to have noticed the paradox of human rights and what their actual conceptual foundations were (and functioned); and while her observations were limited to the concreated conditions of the world after the First Great War (and should as such still be so understood), we see that her penetrating analysis and questioning of the fundamentals of the way our law functions, fifty or so years later, in a world much different than hers or the one she discussed in her book, is still very much relevant. Gündoğdu, for her part, focused on the contemporary plights of migrants and has shown that today’s border control practices, deportations and detentions of refugees all over the world have the capacity to cause legal personhood to be manipulated – despite the fact that numerous international, regional and nation human rights acts demand that countries treat every individual on their territory (in their jurisdiction) as a person and hence as entitled to the protection of a series of fundamental human rights.²²⁵ On the other hand, in the next Section (6.2.) of this chapter, I will focus on the Erasure, an event that took place only some twenty years ago, and attempt to demonstrate how the actions of Slovenian authorities, directly target at depriving individuals of citizenship and especially residency status, also (indirectly) affected these individuals’

²²⁵ On this question, see also Barsky 2016; Mindus 2016.

personhood status. Thus, while times may be very different, the problems appear to be fundamentally the same: legal personhood was then, and it is now, a precarious legal status, quite different from what our initial presuppositions. It is Arendt's merit that we are still today vigilant of this fact.

6.2. Consequences for the status of a person

The immediate consequences of the Erasure were obvious: individuals who already prior to the Erasure were left without Slovenian citizenship – with many of them being without any citizenship whatsoever (stateless) –, having been erased from the registry of permanent residents lost the legal grounds for their residence in Slovenia. On the territory of Slovenia they were illegal aliens. In addition, they had their personal identification documents confiscated and destroyed by the local administrative officials.

The negative consequences of the Erasure, however, do not stop there. Besides these immediate ones, the Erased also suffered numerous indirect and less obvious losses and injuries. Herein, I refer to just some of them.²²⁶

(i) For one, due to their unregulated status, the Erased often unwillingly violated employment laws – more often than not they found themselves working without a work permit (and unable to obtain one), thus also without a regular employment contract. In consequence, they were also left without all work-related rights, such as the right to health care, safe working conditions, equal pay, unemployment benefits, pension contributions etc. (cfr. Kogovšek Šalamon 2010: 116f & 125ff; 2016: 120–124).

(ii) The Erased also faced great adversity in regulating their housing conditions. After independence, Slovenian citizens were given the possibility of purchasing the socially owned apartments in which they lived, under very favourable terms. Citizens of other SFRY republics who did not acquire Slovenian citizenship were not, however, able to buy real estate in that period (see Art. 16/2 of the Constitutional Act). This did not change even after the

²²⁶ For a fuller analysis of the consequences of the Erasure, see: Kogovšek Šalamon 2010: 83–143; 2016: 110–133.

adoption of the Housing Act in 1991.²²⁷ If they were able to rent an apartment in that intermediate period (from the day the Housing Act came into force until the day of the Erasure), the Erasure in effect ended their tenancy rights – without valid rental agreements, these individuals were exposed to evictions. Most of them became dependent for accommodation upon the good will of their friends and family, while the most unfortunate ones became homeless (see Kogovšek Šalamon 2016: 124–126).

(iii) Finally, the Erased suffered numerous other losses of rights on the account of having no regulated status: as far as their political and civil rights are concerned, they often found themselves exposed to arbitrary police stops and searches; having no identity documents, they were also often fined as well as detained and even expelled from the country and when that happened they were often unable to return; they could not vote or stand in elections, were unable to marry etc. (see Kogovšek Šalamon 2010: 86 – 121). As far as their other socio-economic rights are concerned, I should only mention their inability to pursue secondary and tertiary education, loss of all social security (pension, unemployment benefits etc.) and of basic health care protection (see Kogovšek Šalamon 2010: 121–132).

The above description regards rights and statuses that are in one way or another directly tied to or dependent upon the statuses of citizenship and permanent residency (at least in the Slovenian legal system). How the Erased ended up in such a position can perhaps most easily be understood if we imagine legal statuses as structured in a kind of pyramidal structure: we can assume that legal personhood, as the most basic of all legal statuses, can be found at the basis of this structure. (For the time being, I will not problematize the role of this status and its interaction with other statuses. I will address this issue below). Immediately above it, we may position citizenship and permanent residency, whereas the other rights and statuses that are dependent upon these latter two, have their place at the upper levels. From what we know of pyramids, these structures can be more or less solid (depending on the materials used, the quality of the design etc.); but regardless of its strength, elementary laws of physics tell us that if we were to destabilize any layer (entirely or partially), the layers above it would inevitably crumble. This very much simplified image should help us understand how it was possible that the Erased suffered so much more than just the loss of citizenship and permanent residency. Due to the high level of interconnection of legal statuses (and especially the dependence of numerous statuses and rights on citizenship and permanent residency), the

²²⁷ Official Gazette, n. 18/1991.

Erasure resulted in a wide-spread loss of rights on the part of the Erased individuals, a loss that effectively pushed them to the brinks of legality, into a kind of legal limbo. This idea of the pyramidal-like interconnection of legal statuses will be further explored in the next section.

As anticipated, I am here interested primarily in the consequences suffered by the erased in relation to their status as persons in law. One of the premises of this analysis is that legal personhood is the basic (primary) legal status and a necessary precondition for obtaining all other legal statuses (including citizenship). Being their precondition, legal personhood should therefore also be independent of citizenship, permanent residency or any other legal status. In other words: a reasonable presumption would be that any manipulation, diminution or even loss of citizenship, permanent residency or any other “derivative” legal status should have no effect on the underlying legal personhood. If the opposite were the case, it would be as if the collapse of a higher-level building block (say, of citizenship) on our pyramid caused the bottommost level (legal personhood) to collapse as well. Intuitively, there is something odd in this. Yet, the discussion of the plight of today’s (illegal) migrants in the previous Section has demonstrated that this might nevertheless be possible, i.e. that even today, deprivation, at least in some manner and to a certain degree, of legal personhood is indeed possible.

In my analysis, I conceive the status of personhood according to MacCormick’s account of legal capacities (see above, Ch. 2.6.). While not all persons in law possess all these capacities – for instance, infants have only passive capacities –, it can be assumed that an average adult human being of sound mind will likely be endowed with “the fullest degree of legal personality” (MacCormick 2007: 95). Herein, I will take the latter as the model of the erased and I will base my conclusions in reference to such an individual.²²⁸

Recently, Visa Kurki (2017) has employed MacCormick’s classification in the development of his theory of legal personhood. Kurki argues that legal personality consists of separate yet interconnected incidents, both passive and active in kind, and that paradigmatic legal persons are endowed with them, whereas paradigmatic nonpersons lack them (2017: 133).

The passive incidents legal persons are endowed with, he distinguished into:

²²⁸ This is especially relevant when we consider that among the Erased there were numerous children. Children’s legal capacities are quite different than adults’ and understanding how their legal personhood was affected would require a special analysis.

i) *substantive passive incidents*, i.e.(fundamental) protections of life, liberty and bodily integrity; the capacity to be the beneficiary of special rights; the capacity to own property; and insusceptibility to being owned; and

ii) *access to legal remedies*, i.e. standing; capacity to undergo legal harms which may lead to restitution or compensation; and victim status in criminal law (Kurki 2017: 104).

As far as passive legal personhood is concerned, Kurki holds, that it has to do primarily with “the conferral of benefits in the form of claim-rights” (Kurki 2017: 150), although it may also involve liabilities and liberties. Holding a claim-right means, very simply, that someone else (or everyone else) has a certain duty towards that individual.²²⁹ We should remember that on MacCormick’s view, passive legal personhood has to do with being the *beneficiary* of a legal protection either from some harm or aimed at advancing some personal interest (pure passive capacity) as well as being the beneficiary of (alternatively: liable for) some legal transaction. A typical example of an entity normally endowed only with passive legal personhood is a child: a child “holds various claim-rights ‘against the world’ that protect him or her primarily from physical and some psychological harm” (Kurki 2017: 152). The duties that either his parents (or some other responsible care-taker) or everyone else have against the child are meant to protect and further the child’s interests. He or she may likewise benefit from some legal transaction, say inherit the parents’ patrimony. For all active legal acts, the child requires, of course, legal representation of a fully competent legal person.

Let us now proceed with an examination of some of the incidences of passive personhood and the way they were affected by the Erasure.

(i) First, the protections of life, liberty and bodily integrity are among the most fundamental safeguards of individuals *qua* persons. They usually find their place in statutes or constitutional bills of rights, as well as in numerous (non-)binding supra-national treaties and conventions. Formally speaking, they function as prohibitions directed against the legislator from adopting measures that would unduly interfere with individuals’ life or liberty. Given

²²⁹ All these terms (claim-right, liability, liberty) belong to the Hohfeldian jargon (Kukri’s theory of legal personhood is fundamentally based on this type of analysis). We should remember that claim (right) in this parlance an individual X has a *claim* towards another individual Y to *p* if and only if Y has a duty towards X to *p*. *Liabilities* are correlated to powers: An individual X has a power if and only if X has the ability to alter her own or someone else’s Hohfeldian incidents. Finally, X has a *liberty* (or a privilege) to *q* if and only if X has no duty to *q*. See more on this in Hohfeld 1923; Wenar 2015; Kurki 2017: Ch. 3.

the legislator's inability to pass such measures, "that liberty is accompanied by a corresponding immunity *vis-à-vis* the parliament, rather than a liability" (2017: 106).²³⁰

In relation to the Erased, we find, first, that the residing illegally on the territory left the Erased exposed to arbitrary police stops and arrests which often led to prolonged interrogations where it was not uncommon that the police used violence against them; moreover, many of these individuals were detained in the Aliens Centre even for very long periods of time, without any proper judicial ruling; a significant number of the Erased were also deported whereby they often found themselves on the territory of countries where the war was already ravaging. Many of these individuals were then recruited into the armed forces of one or another country. With that, many suffered, at least indirectly, a violation of their right to life (cfr. Kogovšek Šalamon 2010: 87).

(ii) "Owning property," says Kurki, "is a very important hallmark of legal personhood" as it ties together various incidents of legal personality (Kurki 2017: 112).²³¹ Related to this incident is also that of not being oneself an object of ownership. Normally, those who can own property, i.e. legal persons, cannot themselves be objects of property. Nevertheless, Kurki notes that "X's legal personality and X's being an object of ownership are not inherently incompatible" – a typical example of that is the corporation (Kurki 2017: 113).

The Erased suffered an important limitation in their capacity to own property, in particular real estate. Art. 16, Par. 2 of the Constitutional Act determined that until the right of foreigners to own real estate was not regulated (by a special statute), they could not obtain ownership or any other real property rights on real estate in Slovenia – with the exception of real estate acquired on the basis of inheritance and on the condition of reciprocity. This, in and of itself, was not the problem. The problem was that while the Erased individuals could formally inherit real estate, they could not effectively exercise their right. Being, for the most part, without valid personal documents, they "could not register an inherited property in the

²³⁰ See more in Kurki 2017: 106–110. Kurki emphasizes that "[w]hether a claim-right is a fundamental protection is determined both by the interests safeguarded and by the hierarchically superior status of the claim-right". The interest protected must, naturally, be the holder's life, liberty or bodily integrity, whereas having a hierarchically superior status means that this interest will "normally prevail against competing considerations and interests, including property interests".

²³¹ It is also important in the ambit of MacCormick's passive transactional capacity. "Those who doubt its significance," says MacCormick, "may wish to reflect on the fact that a gift of property on trust for the benefit of a baby is valid, whereas one for the benefit of a pet dog is not" (MacCormick 2007: 87).

land register in their name”.²³² *De facto*, therefore, their formally acknowledged right was unexercisable, due directly to the Erasure. It should be added that in her analysis, Kogovšek Šalamon found no violation of the prohibition of slavery in the strict sense of the term, although she did wonder whether the miserable and rightless situation in which many of the Erased lived in does not constitute a kind of “modern type of slavery” which is marked by being unable to refuse work and receiving payment only sufficient for bare survival (cfr. Kogovšek Šalamon 2010: 88).²³³

(iii) Finally, Kurki lists access to legal remedies as an important incidence of passive legal personhood. Usually, only legal persons can be parties to a lawsuit.²³⁴ Christopher Stone has, in relation to the possible standing of trees or other natural object, argued that legal personhood is fundamentally related to the possibility of requiring an authoritative review of actions that threaten the essence of a purported right (cfr. Stone 2010: 4f). On Kurki’s view, two aspects of standing should be distinguished, namely the nominal aspect or “the articulated recognition that X has a ‘stake in the outcome’ which renders enforceable any of X’s claim-rights that are affected” and the competence-related aspect or “the competence of X to pursue the case in court” (Kurki 2017: 118). Another similar incidence of passive legal personhood is the capacity to count as a victim and to be legally harmed. Not all harms are recognized by law as worthy of redress – which kinds or harm will be legally appreciated will depend, in no small part, on whether the harmed party is a legal person or not (cfr. Kurki 2017: 121). Harm caused to animals, for instance, is usually not recognized as a legitimate basis for affording the harmed animal compensation. If compensation will be recognized in such a case, it will most likely be afforded to the owner of the animal.²³⁵

As far as the possibility of the Erased to seek judicial protection of their rights and compensation for the harms suffered is concerned, the available materials do not indicate any major problems with accessing the courts in the sense that their abstract capacity to bring a lawsuit before a court would be challenged. Neither, it seems, did the Erased, on the whole,

²³² Indeed, the same problem presented itself whenever an Erased would engage in any legal transaction that would require proof of personal identity. This question, however, regards the exercise of one’s active capacities with which I deal below.

²³³ Critical legal scholars, when discussing the Erasure, sometimes nevertheless use such terms as “objectivization” and “depersonalization” to emphasize the severity of the consequences of the Erasure. See, for example, Zorn 2003.

²³⁴ It is sometimes the case that national legislation permits standing to non-personal entities with particular interest in a given matter. An example of such an entity is a group of apartment owners in a residential building.

²³⁵ Matters are somewhat more complicated when it comes to harm to fetuses. Recall the discussion in Part I (3.3.).

suffer from the lack of available remedies. Kogovšek Šalamon notes that while many of the Erased never sought judicial protection or were too late in doing so, “many others made use of every legal remedy available to them at the time of their legal battle” (2010: 105). “These included”, says the same author, “lawsuits with administrative courts in the cases of rejected applications ... complaints when the administrative bodies failed to respond to their applications ... appeals to the Supreme Court ... lawsuits with the Labor and Social Court ...” (Ibid.). While access to the courts was not problematic, this initial period was, however, marked with an almost total lack of effectiveness of judicial remedies: Kogovšek Šalamon notes that of those few who initiated actions for compensation not one received a favourable final judgment. Indeed, the question of compensations is still today, even after the ECtHR’s final judgment, which ordered the establishment of a compensation scheme, a heavily disputed matter (cfr. Kogovšek Šalamon 2016: 268–271; 2017). In any case, it is a fact that “the most important judicial remedy that the erased people had at their disposal was the constitutional appeal” (Kogovšek Šalamon 2010: 105). The Slovenian Constitution offers individuals access to the Constitutional Court via constitutional complaints which an individual may file if she believes her human rights and fundamental freedoms had been violated by individual acts of public authorities (see Art. 160 of the Constitution). The constitutional complaint proved to be a very important tool for the Erased, since many such cases were resolved in their favour.²³⁶ This said, it should be noted that, as we discussed already before, the implementation of these and other Constitutional Court’s decisions regarding the Erasure was nevertheless less effective with the appropriate authorities reluctant to implement them.

In addition to passive incidences of legal personhood, “active legal persons” such as adults of sound mind are, also endowed with:

i) *legal competences*, which enable them to enter into contract and perform other legal acts; and

ii) “*onerous legal personality*”, i.e. the capacity for being held responsible for one’s own behaviour (Ibid.).

²³⁶ The constitutional complaint is an instrument that does not exist in every legal system, even in those with specialized constitutional courts. Notable cases include the German Verfassungsbeschwerde and the Spanish *recurso de amparo*.

Perhaps the most obvious distinction between infants and adults of sound mind is the capacity of the latter to actively, i.e. of their own volition and for their own account (or someone else's), perform different "acts-in-the-law" with valid legal effect as well as to be held responsible (liable) for their actions. Active incidents of legal personality are thus (i) the capacity to perform acts-in-the-law (legal competences) and (ii) legal responsibility (onerous legal personality).

(i) Human beings usually obtain more and more legal competences (and responsibilities) as they age. The justification behind this age-related limitation of legal competences lies in the fact that "[t]he capacity to perform acts-in-the-law presupposes a certain degree of understanding of the institutional reality and in particular of the way in which one can avail oneself of the institutions through the use of symbols" (Kurki 2017: 150).²³⁷ Individuals who are, by law, deemed incompetent to perform such acts (Kurki calls such persons *dependent* legal persons) must have some other, competent individual supervising her and, when needed, performing such acts in her (the principal's) name and for her account.²³⁸ Legal competences are numerous in kind, with the contractual capacity surely being the most prominent one.

In the specific case of the Erased, limitations of this capacity can be noted. Let us mention just a few examples. For one, the Erased could have had difficulties with even such banal transactions as buying alcohol or tobacco at a supermarket.²³⁹ That is because the purchase of such goods is age-restricted. The means of proving one's legal age is usually via a personal identification document. However, as we know, the Erased did not possess valid legal documents and so the only possible way to acquire such goods was either illegally or through other people. Secondly, Kogovšek Šalamon reports that the Erased were unable to get married in Slovenia. Marriage is, legally speaking of course, a private law contract between two individuals that hinges, among other things, on the presentation of a series of documents. Again, the Erased were unable to provide the appropriate documents in order to get married, be it a personal identity document or a birth certificate, passport or some other citizenship-

²³⁷ MacCormick argues that legal capacities "are by law made dependent on enduring (though not necessarily permanent) features of a person". These features may be legally determined but non-institutional, such as age, gender or mental competence or they can be institutional features, like citizenship, matrimonial status, solvency or some other. See MacCormick 2007: 90.

²³⁸ Kurki comments that the justification for such limitations is usually moral and not conceptual: there are no conceptual limitations "that would prevent most minors or mentally disabled individuals from being able to exercise competences wholly independently," he adds. Kurki 2017: 159.

²³⁹ I use the conditional tense here, because I am only suggesting this might have been a problem based on the "logic" of things. I have no material proof to support this claim. However, as a theoretical example, I do believe it is on solid grounds.

confirming document (cfr. Kogovšek Šalamon 2010: 112). As Kogovšek Šalamon further reports, some individuals resolved this problem by marrying their partners (Slovenian citizens) in a foreign country. The author finally claims that since the relevant law on the matter (Marriage and Family Relations Act) in Slovenia did not (does not) require one to have Slovenian citizenship in order to marry, the right to marry, enshrined both in international acts (e.g. Art. 12 of the ECHR or Art. 16 of the UDHR) as well as in the Slovenian Constitution, was violated (Kogovšek Šalamon 2010: 113). Finally, with regard to the ability to purchase real estate, you will remember that the Erased were prevented from acquiring it by Art. 16/2 of the Constitutional Act, that is *de jure* and not only *de facto* as was the case when they inherited real estate. In order to circumvent this limitation, the Erased often engaged the services of Slovenian citizens (be it their relatives or friends or some third person) who then acquired real estate (most often their previously socially-owned apartments in which they lives) for the account of the Erased individual. This, of course, put the latter in a highly precarious position having paid for the apartment but not being its official owner. The nominal owner could have easily sold the apartment to a third person without including its *de facto* owner into the transaction (cfr. Kogovšek Šalamon 2010: 116).

(ii) Finally, I should discuss the so-called onerous legal personhood. This element of personhood consists of legal responsibility (or capacity-responsibility as MacCormick calls it), both criminal and civil, and can be ascribed to those entities who can hold legal duties.²⁴⁰ The most uncontroversial type of entities which are endowed with legal responsibility, are adult human beings of sound mind (Kurki 2017: 158). But they are not conceptually the only ones who can hold legal duties: “the medieval animal trials serve as a reminder of the fact that contemporary limitations on the scope of criminal law which exclude, say, infants and animals from its purview, are not *conceptual* limitations but rather *moral* limitations” (Ibid.). Both children and animals can physically perform prohibited acts and they can be punished for them. Whether such responsibility-attribution is just, is of course a different matter, one which I have no intention of discussing here. Kurki also notes that onerous personality demonstrates “the interconnectedness of the incidents of legal personality”: for instance, tort liability is often only feasible if an individual can also own property. Yet, criminal responsibility does not always follow this principle. Indeed, slaves in the antebellum US were famously criminally responsible for their actions even though they were for the rest treated as

²⁴⁰ Cfr. Kurki 2017: 90 ff.

object of law (property).²⁴¹ Closer to our time, as I have already mentioned above, Hannah Arendt had argued that stateless individuals, utterly rightless otherwise, could have been held criminally responsible. Not only that – Arendt controversially argued that committing a criminal offence actually improved the legal position of a rightless individual (cfr. above; Arendt 1973: 286f).

What can be said in this regard about the onerous legal personhood of the Erased? Given the numerous recorded cases and statements made by the Erased themselves it is safe to say that the Erased had their criminal legal responsibility fully recognized. Due to their condition, they were held liable and often convicted for numerous administrative misdemeanours, such as not possessing personal identification documents, being employed without a contract, driving a car without a proper licence and without registration etc. *A fortiori*, the same goes for more serious criminal offences. But what is most striking about the Erased is that they were also often punished – arrested, fined, interrogated by the police, expelled from the country etc. – “without suspicion of a criminal offence. They were punished merely because they found themselves in a specific situation, and on top of that one that was created by the ruling power itself and over which they had no influence” (Zorn 2003: 123). In other words: “their very existence and residence in Slovenia were considered a violation of the law” (Zorn 2003: 118). For this reason, because they were often pushed to the brinks of legality, being utterly vulnerable and in a precarious legal position, Zorn has come to claim that

“[b]y committing a criminal offense, the erased individuals would have won for themselves the right to which persons prosecuted for crimes are entitled. They would have been handed an official document stating their alleged criminal offense against which they would have been able to complain. Such a person would know what he/she was accused of and what punishment is prescribed for such an offense. Instead of being an ‘anomaly’ not envisaged by law, he/she would be an ‘anomaly’ (a criminal) envisaged by law. But the erased people did not know for what offense they were being punished by the state, what could befall them during that time, how long the »punishment« was going to last, nor on which basis and to whom to complain” (Zorn 2003: 124-5).

Thus, we may conclude that in line with the past examples of US slaves and post-World War I stateless refugees, the Erased too maintained their criminal legal responsibility. This appears to be the one incidence of legal personhood that human beings never find themselves deprived of, regardless of how much their other legal capacities are limited.

²⁴¹ On the slaves’ criminal responsibility, see Fede 1992: especially 161f.

6.3. The interconnection of legal statuses: an inverted pyramid or a web?

Above, I invoked the image of a pyramidal structure as representative of the way legal statuses interact with each other. Seen in this way, legal personhood lies at the bottom of the status-structure: it is the basis for all other legal statuses and “covers” all further statuses of an individual. Relative to the case at hand, I argued that immediately above legal personhood, citizenship and permanent residency should be posited as two of the most important legal statuses any individual may come to hold within the Slovenian legal system. The choice of these second-level statuses is of course contingent: neither in the concrete case nor generally speaking is it necessary that a given individual will actually possess these two statuses. Their choice here is conditioned by the facts of the case at hand. Nevertheless, legal personhood is a necessary condition of acquisition of both these statuses. Citizenship and residency, in turn, are the condition for access to a series of legal statuses and rights that we should therefore position on the third level of our pyramid. For instance, health care rights, social security benefits and work-related rights are all for the most part dependent on residency status, whereas political rights such as the right to vote presuppose citizenship.

This utterly simplified representation of the relationships legal statuses form amongst each other appears to correspond to what we (think we) know about them: it shows, for one, that legal personhood stands at the basis of the status structure as the precondition every other legal status an individual in law holds. No legal status, right or duty can be obtained outside the cover of the all-embracing legal personhood. Moreover, the pyramidal structure also gives an reflects the perceived stability of this structure: legal personhood as the bottommost layer is firmly entrenched and even though the uppermost layers may falter (statuses may be lost or relinquished), the basis remains in its place – in other words, legal personhood may never be taken away.

However, as our investigation has shown (6.1. & 6.2.), this portrayal is problematic. Namely, we have seen that although legal personhood may not be formally taken away there are still numerous ways in which it can be diminished when other, dependent or “higher-level” legal statuses are either limited, hollowed, or themselves lost or taken away. It would appear, then, that we are in need of a better representation of the way our legal statuses are structured and interact with each other.

Why, one might ask, is all this worth discussing anyway? What difference does it make if we picture the way in which statuses function in the form of a pyramid, a tree-like structure or some other thing? If we know that despite our best normative efforts legal personhood is still a precarious legal status, shouldn't we rather focus on finding ways to better understand what exactly is wrong with our current model of legal statuses and what changes we could introduce to international human rights law in order to prevent such occurrences as we discussed above from happening?

Well, I believe it does matter whether we are able to and, if so, in what way we represent certain complex structures and connections. It matters because, if for no other reason, being able to represent such a complex matter in so simple terms shows that we have a good grasp of the problem, that we, in other terms, "see the whole picture". But it also matters for other, more important reasons. For one, abstract visual representations of complex structures facilitates our understanding of a given phenomenon – their simplified form helps to reveal the weaknesses and allows us to focus on the more important points of the phenomena. Moreover, such representations might also be useful from the normative point of view: while it may sometimes be difficult to pinpoint problematic instances in complex, multi-layered phenomena in order to promote changes, their simplified representations may enable easier identification of problem areas and in allow for improvements to be introduced to the underlying model. This is what I wish to do here.

What, then, would be a better way to represent the connection of legal statuses if we have to take into account the information about the influence "higher-level" statuses have – their loss or diminution – on the more basic ones, including on legal personhood? How can this more fragile and instable structure be symbolically represented? Seeing how the pyramidal representation was capable of symbolizing different salient features of legal statuses, can we somehow retain it and still be able to make sense of these new facts? Indeed, perhaps what we need to do is not change the symbol but look at it from another perspective. And what better way to do that than flipping things upside down. What we end up with is quite simply an inverted pyramid. If you think about it, an inverted pyramid indeed seems to be a better representation of our reality: on the bottom of the structure we still find legal personhood – in this image it is represented even more realistically as a single and unassuming building block; immediately above it we may again put, according to our needs, citizenship and (permanent) residency statuses. Laying above them, on their basis, we find all other legal statuses and rights attaching to individuals in virtue of these more fundamental legal statuses. The

advantage of this representation in relation to the former one is that it is much more capable of depicting the fragility of the whole status structure and especially of legal personhood. This single status carries on its shoulders the weight of all other legal statuses of an individual, becoming in this way itself highly fragile: removing just one of the two “second-level” statuses (citizenship and permanent residence), for instance, suffices to destabilize the whole structure; removing both would cause the entire upper structure to come crashing down on the bottom status. These, of course, are all just metaphors and should not be taken too literally. Yet, they nevertheless have the power to vividly represent what I have tried to demonstrate in the preceding parts of this thesis.

This representation, therefore, appears to me to be descriptively more appropriate than the former one. As we noted above, however, the condition in which legal personhood is such a precarious legal status is certainly not a normatively desirable one. What would wish that legal personhood is a more entrenched legal status, unsusceptible to manipulations, diminutions, deprivation etc. Indeed, legal personhood would ideally be constructed as a kind of natural, absolute, indefeasible right to have rights.²⁴² The idea of constructing the right to legal personhood (Art. 6 UDHR) as a modified Arendtian right to have rights appears to me a fascinating one. This not the appropriate place or moment for developing a comprehensive proposal along these lines as it would require too much space and time. I will therefore not pursue this issue beyond providing a short and simple proposal of a different manner of representing the problem at hand – one which could, so I hope, stimulate a discussion as to the necessary changes required for achieving the above-mentioned goal.

I propose that the image after which we should model the relationship between our legal statuses, and particularly with legal personhood, is that of a (spider’s) web.²⁴³ I submit that such a model would be both descriptively accurate and normatively favourable in comparison to the prior two. It would be descriptively accurate because it would still position legal personhood in the centre of the structure and show how all other statuses stem from it. It would also be normatively favourable because it would provide the idea of how a strong interconnection can exist between legal statuses without running the risk that damage to (loss of) one legal status, no matter how important it would be, does not have to end up causing damage to the centre of the web as well, i.e. to legal personhood. The central part of the

²⁴² For Arendt’s discussion of the right to have rights, see Arendt 1973: 296ff. For different contemporary interpretations of the notion, see Benhabib 2004; Birmingham 2006; Parekh 2008; Gündoğdu 2015.

²⁴³ In reference to the way our legal systems in general function, François Ost has similarly proposed three models: a pyramidal one, an inverted pyramidal one and a spider's web model. Cfr. Ost 2008.

spider's web remains intact even though there is damage to various other points on the web, because damage is, in this model, always localized. For instance, in real life this could translate into a regulation that would enable an individual not to lose the right to pension to which she was entitled because she would happen to lose permanent residence in that country (but would, let's say, still have temporary residence permit); or, in another example, it would make it possible for an EU citizen residing in the UK who is able to vote in local and EU parliament elections there, to retain this right despite the fact that the UK will have left the EU at a certain point.

If and how all of this can be translated into legal reality is, of course, a different matter.

CONCLUSION

The purpose of this part of the thesis was to address the problems related to the legal status of being a person in law in connection with the Erasure; in particular, to examine the influence the loss of citizenship and the deprivation of permanent residency status had on the legal personhood of the affected individuals. Doing so required understanding how legal personhood interacts with other legal statuses, derivative thereof; in relation to the Erasure, it was particularly important to understand its interaction with citizenship and permanent residency status, respectively.

In the Introduction to this segment of the thesis, I alluded to the fact that, historically, legal personhood has been tightly connected with citizenship status. This connection, however, gave rise to a paradox noted by Hannah Arendt when discussing the condition of individuals who after the First World War were left without any country of their own. The paradox is seen in that the loss of citizenship (the condition of statelessness) had caused these stateless individuals to be left without the protection of fundamental human rights wherever they found themselves. Rights that ought to appertain to an individual in virtue of being human were inaccessible to those who were not citizens of any nation. Human rights, then, proved themselves actually being the rights of citizens. Consequently, the loss of citizenship had meant the loss of human rights as well (the condition of rightlessness).

The “statelessness-as-rightlessness” paradox is troubling because it contradicts what could be called “the normal” understanding of the way legal statuses (of any given individual) operate and interact with each other. This understanding, which can symbolically be represented by a pyramid, puts legal personhood at the basis of this structure and all other statuses onto progressively higher levels, their position depending on their relative importance and conditions of acquisition. Thus, citizenship (as well as permanent residence in our example) will most likely be positioned immediately above legal personhood, whereas other statuses, such as those of being married, owning a real estate or being the President of Slovenia, will find their place in the higher strata of the pyramid. On this view of things, should an individual lose a given status, the loss ought not to influence her statuses on the lower strata: if, for instance, one loses the status of being the owner of a real estate, this fact should have no consequence for her status as a citizen. Equally, the loss of citizenship should have no bearing on her underlying legal personhood.

The explanation for how the rights paradox comes to be was already explored by Arendt herself and many others after her and regards the fact that when human rights were being declared as positive rights for the first time (with the 1789 Declaration of the Rights of Man and of the Citizen), this was being done within the context of the emergent nation-States, which in so doing guaranteed themselves legitimacy for their nation-building projects. Simply put, human rights became in this context conflated with the rights of citizens and so citizenship, very inconspicuously, substituted personhood as the basis of rights recognition.

Today, we believe that rightlessness is a phenomenon that is no longer plausible: human rights mechanisms, developed in the aftermath of World War II, are based on the presupposition that each human being, regardless of her personal circumstances, including citizenship or lack thereof, is equally worthy and so equally entitled to the same human rights as everyone else. Human rights are, the supposition goes, equally guaranteed to all individuals in every part of the globe. As rights are independent of any individual government and inalienable, rightlessness is a contradiction in terms. In consequence, the problem whereby the loss of one's citizenship would negatively affect one's personhood, should no longer be possible.

Yet, this presupposition is challenged by numerous counter-examples: be it the quasi-slave workers in the fields of Sicily or the construction sites in Qatar who are forced to perform manual labour all day long in blistering heat for miserable (if any) payment, deprived of their passports, forced to live in squalid conditions and exposed to arrests and deportations due to their precarious status; the Guantanamo Bay prisoners, who have for years been incarcerated in inhuman conditions without having been charged, yet alone convicted of any crime; or the millions forced to flee their homes in Syria because of the devastating war, who find themselves on the borders of Europe, crammed into "identification" facilities, where they are in effect deprived of their personal freedom and subjected to a system of abuse and coercion, all the while being constantly at risk of expulsion. The list could go on, but these few examples should do – they provide sufficient evidence for us to be able to claim that day we still face essentially the same predicaments as Arendt noted. Albeit it may be impossible in this day and age to formally deprive someone of her legal personhood as such, numerous mechanisms exist for depriving, limiting, distorting the various active and passive incidents of one's legal personhood. How can we make sense, legally speaking, of these phenomena in our time?

In order to answer this puzzle, I endeavoured to examine one particular case, which I believe demonstrates many of the “exclusionary qualities” seen in the above cases, i.e. the Erasure. Examining the legal basis for the perpetration of the Erasure, I established that the new Slovenian authorities chose to establish a nationalistic, ethnicity-based citizenship policy which caused one segment of the population – the ethnic non-Slovene permanent residents who were citizens of other SFRY republics – to be treated differently and less favourably than their ethnic Slovenian counterparts, despite the fact that just prior to the secession these same individuals were granted the right to participate in the independence plebiscite – thus being considered co-equal founders of the new State. While these individuals were given the opportunity to obtain the new Slovenian citizenship under favourable circumstances, not all of them decided to take advantage of this opportunity as they were under no legal obligation to do so. The consequences of this decision, logically ascertainable from the valid legislation, were clear to them: refusal to obtain the citizenship will result in them becoming foreigners – with, we should emphasize, permanent residence. Thus, the “disenfranchisement” of the said individuals in this case cannot be deemed illegal (although the legitimacy of the reasons for not extending citizenship to these individuals automatically or *ex lege*, as it was to ethnic Slovenes, is a different and much more disputable matter). This moment nevertheless represents a crucial phase in the Erasure story, as it was in this way that the set of individuals who were later to be erased – i.e. deprived of their residency status – was determined. For their decision, these individuals came to be represented publicly as enemies of the State, anti-Slovenes, speculators, the cultural Others. Social stigmatization and marginalization was an important facilitating factor in the eventual legal exclusion of these people. In consequence of the analysis, I have come to hold that the Erasure can be explained, at least in part, as a particular kind of punishment for the decision not to accept (apply for) the offer for obtaining Slovenian citizenship and becoming, in this symbolic way, members of new Slovenian body politic.

The analysis of the consequences the Erasure had on the affected individuals has shown that the loss of the permanent residency status resulted in the loss of numerous social and legal rights that are (in)directly tied to the said status. These losses appear consistent with our proposed pyramidal model of statuses: the removal of an underlying building block upon which others are based will inevitably cause them to fall as well. However, the analysis also demonstrated that the deprivation of the residency status, jointly with the lack of citizenship status (in some cases even statelessness), resulted in various kinds of limitations of both

passive and active incidents of legal personhood. Their inability to effectively exercise legally acquired real estate, get married or even buy age-restricted products in the supermarket, is evidence of the fact that even the deprivation of “derivative” legal statuses, such as citizenship and residency, may have adverse effects on the “original” status of personhood. In consequence, we may confirm that legal statuses do not, in fact, function as we have come to believe, as neatly stacked up in a perfect pyramidal structure whereby the bottommost layer (here being the legal personhood) would be untouchable. Clearly, a different understanding of the status’ structure is needed.

Drawing from the findings of the preceding analysis, as well as from the studies of the adversities refugees all over the world face every day in their struggle to be accorded at least some minimal legal recognition, I have come to claim that legal statuses do not, in fact, function as a traditional pyramid, but rather as an inverted (upside down) pyramid. The symbolic representation of statuses as structuring themselves in this manner, gives us a much better understanding of the fragility of the underlying legal personhood in relation to its supervening statuses, such as citizenship and residency. Looking at things from this perspective, it is not difficult to understand how it is possible that the deprivation of a given (relevant) status results in limitations or, more generally, modifications of even the most basic and fundamental status as is the legal personhood of a given individual.

One final piece of the puzzle remains missing: we have come to understand what means were used in the Erasure and to what effect; we have seen that the deprivation of the permanent residency status, ordered by the Government, using internal decrees (instructions) which were based on the law regulating the position of foreigners in Slovenia, and executed by administrative government officials, has proven that legal personhood is indeed a much more precarious legal status as it is normally believed to be. But knowledge of the mechanisms of the Erasure does not, of itself, explain how these precise consequences (above all the limitation of legal personhood) were possible. What we still have to understand is what exactly was it about these mechanisms that enabled such results to occur. What was it about the Aliens Act that enabled the Government to order the deprivation of residency status of nearly 1% of the population? What made the government officials follow the orders and not question neither their legality nor the possible consequences of their actions? What enabled the Erasure to remain a legal (as opposed to illegal) manoeuvre, confirmed as such by the Supreme Court, for more than seven years? These and other questions are confronted in the last Part of this thesis.

PART III.

THE ERASURE & THE RULE OF LAW

INTRODUCTION

The analysis in Part II led us to conclude that Slovenia was established as a state of the Slovenian nation first and foremost – an ethno-democracy with in-built nationality-based discriminatory mechanisms. While upon independence the majority of ethnic non-Slovenian residents were able to obtain Slovenian citizenship and were thus afforded the same fundamental and civil rights as their ethnic Slovenian counterparts, those (c. 25,000) who did not acquire the citizenship, found themselves erased from the registry of permanent residents and, in consequence, their status on the territory changed into that of illegal aliens.

While the previous Part was dedicated to examining the mechanisms of the Erasure, here we must find the answer as to what exactly it was about these mechanisms that enabled such results to occur.

In his book *Nationalism and the Rule of Law*, Iavor Rangelov analyses the particular relationship that runs between nationalism and the Rule of Law. He argues that the most important common characteristic of these two fundamental political theoretical concepts is that they both “elaborate a set of attributes that can be understood as principles underpinning the legitimacy of political order” (Rangelov 2014: 7). In other words, both nationalism and the RoL are important sources of political legitimacy. Depending on the context, nationalism and RoL may function harmoniously: thus far, nation-States have provided the most favourable environment for the development of the RoL (Rangelov 2014: 8). However, most of the time, their relationship is characterized by tensions and contradictions. In systems that institutionalize ethnic citizenship and taint other fundamental legal institutes with nationalistic content, requirements of formal legality, such as generality and prospectivity of laws are often compromised; equally, such legal regimes can’t easily be reconciled with the demand for the primacy of human rights and equality before the law (Rangelov 2014: 32). When nationalism is institutionalized and brought within the constitutional system in the form of “ethnic citizenship” and nationalist-laden institutes that are democratic only on the face of things, then law becomes but an instrument promoting subjugation, inequality and exclusion.

Our analysis of the Erasure has also demonstrated the existence of such of tensions embedded in the Slovenian legal and political system. On the one hand, the original citizenship-granting policy which established a differentiated regime for ethnic non-Slovenes is seems a clear example of the tendency to discriminate on the basis of nationality. Numerous references to the constitutive character of the Slovene nation corroborate the judgment about the quality of the newly-established Slovenian state. I have even argued that at one point a much broader, comprehensive disenfranchisement of all ethnic non-Slovenes (citizens of other SFRY republics) was contemplated. This result, however, was prevented by the functioning mechanisms of the RoL and a series of other institutional barriers and external and internal political pressures, reflecting and promoting the requirements of legality. Hence, the erasure of a much smaller number of individuals, yet conducted in a much more intense manner, can be seen as a result of these two opposing powers clashing.

In order to understand how the consequences of the Erasure could come about, I propose to submit the legal mechanisms employed in the Erasure – and analysed above in Part II – to an investigation informed by the principle of the Rule of Law. For reasons to be stated, the proposed analysis will be based on the requirements of a formal conception of the RoL.

There are several reasons why I believe such an investigation is worthwhile. The concrete circumstances of the case provide one important reason. Among key reasons for Slovenia's secession from SFRY, the Basic Constitutional Charter stated that the SFRY no longer functioned as a state governed by law and where human rights and the rights of nations were violated. Indeed, non-democratic regimes are often seen as violating the requirements of legality: laws that citizens are expected to abide by may not all be public, but rather published in secret gazettes; owing to ideological reasons, legal provisions may be lengthy, impossibly complicated and vague as to impede normal comprehension of what is required or prohibited; in such regimes, it is not uncommon that activities permitted one day suddenly become retroactively prohibited and sanctioned the next day. Thus, if violations of the basic requirements of legality represented a key argument for secession, it seems important to examine whether and how Slovenia integrated at least the minimal conditions of formal legality within its newly established democratic institutions, especially in such important area as is citizenship legislation.

The second reason is likewise related to the concrete characteristics of the studied case. Given the specific qualities of the Slovenian constitutional system that we have identified as an

ethnic democracy, it would be easy to cast aprioristic judgments about its inherent illegitimacy and violations of fundamental legal principles such as equality before the law. But doing so would blind us to the fact that these contradictions are not as clear cut and the supposed illegalities not as obvious as it might seem: they do not manifest themselves in all matters in the jurisdiction of the State and they are not everywhere and always present with the same intensity. An “ethno-democratic” system cannot so easily be deemed illegitimate *tout court*. The complexities involved in such cases are too great for such sweeping conclusions. What an analysis from the formal conditions of RoL ought to enable is that this – or any other – case is confronted without any *a priori* value judgments. That is because the instrument is content-independent and politically neutral (cfr. Summers 1993: 135-136). This means that the formal RoL is compatible with almost all kinds of political systems and thus allows for their unbiased analysis. The notion of the formal RoL only proposes elements that any legal system (any legal rule) ought to possess of necessity. It follows that the conclusions of such an analysis can be expected to gather more legitimacy among the different stakeholders, since the analysis does not second guess the foundations of any political system but only furnishes criteria for establishing whether the law is able to effectively guide human behaviour. Possible criticisms based on such analyses are therefore also more likely to fall to fertile grounds.

Finally, with one eye on the larger project on legal exclusionism indicated in the introductory chapter of this dissertation, the formal RoL concept appears well suited for the task: as an instrument of analysis and critique it enables not only the analysis of diverse legal systems at a given moment in time (i.e. diachronically) but also through time, i.e. synchronically. If what is at stake are the most fundamental qualities that any system of law is to possess if it is to effectively guide human behaviour, comparative analyses of as diverse systems of law as were the US Antebellum slavery law, the German Nazi Anti-Semitic system and the newly-established Slovenian constitutional order are rendered possible.

One possible objection against the kind of analysis I propose here could be raised on the basis of the fact that the Erasure, as we have seen in the last Part (5.3.), had been declared a violation of both the Slovenian Constitution and the European Convention on Human Rights. Why then, some might ask, should we bother with an analysis of the violations of the RoL criteria when we know definitively that the Erasure – different aspects of it – was an illegal act of Slovenian authorities?

The reasons for the reasonableness and usefulness of this analysis are, I believe, independent of whether or how this case was ultimately decided by judicial authorities. Beyond these broader reasons, the “illegality objection” can also be replied to *in concreto*: first of all, strictly speaking, most of the activities related to the Erasure in the wider sense, including the Erasure in the narrow sense itself, were concluded before the day the ECHR became a binding human rights mechanism for Slovenia. Indeed, as you remember, the ECtHR never decided on the Erasure *stricto sensu* – which is the central object of this investigation. Thus, as far as the Erasure in the narrow sense is concerned, the argument of illegality is irrelevant. But we could also imagine a reply along more theoretical, speculative lines: what if the ECHR was not at all binding on Slovenia? What if Slovenia was not its signatory? In practical terms this idea might seem impossible for a series of reasons – yet it is not at all theoretically impossible to fathom. Since we are here interested in a broader, theoretical argument about mechanisms of legal exclusion, this consideration should not be easily dismissed. If Slovenia was not a European country and a member of the Council of Europe, the entire argument regarding the violations of fundamental Convention rights in this case would be utterly senseless.

What about the violations established by the Slovenian Constitutional Court? Surely the above reasons do not apply for the domestic level? They do not, of course; however, it would not be absurd to imagine that the unconstitutionality of the Erasure would have never been established by the Constitutional Court. Indeed, this could have occurred for different reasons: for one, cases brought by the Erased before the Court could have been declared inadmissible for some reason or another – today, for instance, the level of constitutional complaints and other cases brought before the Court that are dismissed outright is due to the Court’s overburdening extremely high; even if considered by the Court, it could still have decided in a way that would not so clearly determine the Erasure’s unconstitutionality – do not forget that for over seven years before the first Constitutional Court decision, the Supreme Court did not find fault with the Erasure; moreover, the Court could have allowed any one of the different referendums proposed on the issue – and if they would have passed, it is very likely that constitutional amendments would have been adopted effectively legalizing the Erasure at the Constitutional level.

This Part has two chapters. In the first (Chapter 7), I present the basic elements of a formal conception of the RoL. After resolving some conceptual matters in the introductory paragraph (7.1.), in the next two subsections (7.2. & 7.3.), I analyse each of the eight criteria of formal legality that virtually every formal conception of RoL accepts. Particular emphasis is given on

the criterion of congruence (7.3.); in the context of this subsection several fundamental characteristics of the formal structure and inner working mechanisms of bureaucratic institutions are also presented and discussed. The same chapter structure is repeated in the next chapter (Chapter 8). The conceptual framework developed in abstract in the previous chapter is here applied to the specific case of the Erasure.

CHAPTER 7.

THE RULE OF LAW

7.1. Introduction

The Rule of Law (RoL) is one of the major juridico-political ideals of contemporary political morality (Waldron 2016).²⁴⁴ As such – and on par with concepts such as democracy, human rights, economic freedom etc. – it is a widely discussed and controversial notion.²⁴⁵ The purpose of this chapter is not to engage in some general discussion of the RoL: heaps of academic writings on the subject prevent this from being possible. But neither is this the intention here. Rather, the aim of this chapter is to present and discuss the elements of a formal conception of the RoL. In the next chapter, I will then apply these criteria to the example of the Erasure.

In this introductory paragraph, I wish to provide a general framework of the topic at hand as well as to discuss certain conceptual difficulties regarding the formal conception of the RoL. The latter parts of this chapter, on the other hand, will be devoted to providing a more detailed understanding of the mentioned conception of the RoL and its elements.

As a first approximation of the meaning of the term RoL, the first idea that comes to mind is that in a given political community we should have “the rule of laws, not of men”.²⁴⁶ The meaning of this familiar slogan should not be taken at face value: laws as such cannot rule by themselves – they need men to create and implement them. Rather, the idea behind this catchphrase is that public power should not be exercised “in an arbitrary, *ad hoc*, or purely discretionary manner” (Waldron 2016), on the basis of personal preferences of the people wielding it. Rather, such power should be exercised “within a constraining framework of well-established public norms” (Ibid.; cfr. Raz 1979: 212f). Thus, the basic idea is not that men should not have anything to do with governing; rather, it is that law as a particular form of governance, regardless of its content, is to be preferred over other means of social control (Marmor 2004: 4).

²⁴⁴ Among the foremost authors who have dealt with the Rule of Law from the 19th century onwards are Dicey (1915), Hayek (2006 & 2011), Fuller (1969) etc. I should note that the present is not intended to be an historical analysis of the concept. For that, see Tamanaha 2004. Rather, I will only refer to those works that serve the immediate purpose of this thesis.

²⁴⁵ In this regard, see Waldron 2002.

²⁴⁶ The idea is associated with Aristotle’s *Politics*.

This first approximation does not, of course, exhaust the meaning of the RoL. Presumably, we all agree that governments should rule by way of laws and not by fiat and arbitrary uses of physical force. But is this all? If all we mean by the RoL is that “all government action must have foundation in law, must be authorized by law” (Raz 1979: 212), we have said very little – this is a mere tautology (Ibid.). If the notion of RoL is to have any sense, it ought to be related to one or both of these dimensions: it ought to be related either to the question of what content the law should have in order to be seen as (morally) good law or, alternatively, it ought to provide meaningful criteria for the identification of the necessary formal qualities of law. These alternatives are the basis for the distinction between substantive and formal conceptions of the RoL.

The fundamental characteristics of formal theories of RoL are succinctly presented by Craig – he argues that, generally speaking,

[f]ormal conceptions of the rule of law address *the manner* in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); *the clarity* of the ensuing norm (was it sufficiently clear to guide an individual’s conduct so as to enable a person to plan his or her life, etc.); and *the temporal dimension* of the enacted norm (was it prospective or retrospective, etc.) (Craig 1997: 467; emphases mine).

On the other hand, substantive conceptions of the RoL build upon the former but propose that besides such formal attributes – which form but one element of the concept – there are also some substantive standards that properly characterize a legal system. Such essential criteria are often held to be either respect for (protection of) private property, equality, fundamental human rights etc. (see Waldron 2016; Tamanaha 2004: Ch.8).

Both approaches have their inherent and context-specific strengths and weaknesses and which will be espoused will ultimately depend on the specific context and goals of one’s project. It seems, for one, that the thicker (substantive) versions of RoL are more representative of the “common understanding” of the notion RoL, at least as the notion is used in liberal Western societies. On this view, the formal requirements of legality are but one part of the whole meaning, which normally also includes at least the requirements of democracy and fundamental rights. As Allan notes, the RoL, on this view, “is an amalgam of standards, expectations, and aspirations: it encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relation between the government and governed”; but the notion also encapsulates certain

institutional concepts: “The fundamental notion of equality, which lies close to the heart of our convictions about justice and fairness, demands an equal voice for all adult citizens in the legislative process: universal suffrage may today be taken to be a central strand of the rule of law” (Allan 1993: 21f).

The downside of these substantive theories is that they are much more disputable than the thinner (formal) ones. As Waldron puts it: “Once we open up the possibility of the Rule of Law’s having a substantive dimension, we inaugurate a sort of competition in which everyone clamors to have their favorite political ideal incorporated as a substantive dimension of the Rule of Law ... The result is likely to be a general decline in political articulacy as people struggle to use the same term to express disparate ideals” (Waldron 2016). Moreover, it is not true that the common Western conception of RoL needs to be universally applied and that its three components (formal legality, democracy, human rights) are necessary elements of the concept (cfr. Tamanaha 2004: 112).

As said, formal conceptions of the RoL are spared many controversies that plague the substantive accounts. That is because they do not “seek to pass judgment upon the actual content of the law itself” (Craig 1997: 467). Moreover, they do not tell us by whom the laws should be made (by democratically elected parliaments or tyrants). Rather, they regard only the essential formal features of law, i.e. the essential characteristics that ought to always be present if we are to speak of law. Indeed, “[n]o legal system can operate without those essential attributes, regardless of the time or the place” (Kramer 2007: 101). These qualities render the formal conceptions of RoL more politically acceptable across the ideological spectrum. According to Summers, “far more people from all segments of the political spectrum can be enlisted to support the rule of law and to criticize departures from it” (Summers 1993: 136-7).

Let us then focus on the formal conception of the RoL. What does it involve? According to Summers, a formal theory of the RoL has three (or two) basic components: the conceptual-institutional one and the axiological one (Summers 1993: 129). The author puts the idea of this theory in the following terms:

The ideal of the rule of law consists of the authorized governance of at least basic social relations between citizens and between citizens and their government so far as feasible through published formal rules congruently interpreted and applied, with the officialdom itself subject to rules defining the manner and limits of their activity, and with sanctions or other redress against citizens and officials for departures from rules being imposed only by impartial and

independent courts or by similar tribunals, after due notice and opportunity for hearing (Summers 1993: 129).

The idea of the RoL is, on this view, institutionalized through formal rules which are then interpreted and applied by certain fundamental institutions of legal system (courts and administrative agencies, for instance). In this chapter, I will focus on the necessary formal characteristics of legal rules as well as on certain characteristics of the State administrative apparatus – one of the two most important State institutions (besides the judiciary) charged with enforcing the State’s body of law.

Which, then, are the characteristics that rules of a legal system (the law as such) have to possess if they are to be considered law proper? Craig’s quote (above) indicates that these criteria regard the manner of norm-production, the clarity of these norms as well as their temporal dimension. Different lists of essential formal elements of the RoL have been proposed;²⁴⁷ most of them, however, are some version of the famous “eight demands of law’s inner morality” put forth by Lon Fuller (1969: Ch. 2; see also Finnis 1980: 270; Raz 1979: 214–218). For the purposes of this dissertation, I will adopt Fuller’s list of conditions of legality.²⁴⁸ The conditions that I will hereafter discuss are: i) generality (7.2.1.); ii) publicity (7.2.2.); iii) prospectivity or non-retroactivity (7.2.3.); iv) intelligibility or clarity (7.2.4.); v) consistency or non-contradictoriness (7.2.5.); vi) practicability or non-impossibility (7.2.6.); vii) stability or constancy (7.2.7); and viii) congruence (7.3.).

While these characteristics are jointly necessary for the existence of a legal system, the extent to which they are present in a particular instance thereof can vary: norms of a legal system can be, on the whole, more or less public; most can be future-looking with some others retroactive; some are directed to an undefined number of addressees (e.g. traffic rules), while others regulate the position of a specific individual (e.g. the President of the country). In any case, while total absence of one or more of these qualities indicates a failure of the legal system as a whole, it is not the necessarily case that the more these elements are present in a given legal system, the better the system will be for it. This is not so for two reasons: first, because the more one of these qualities is present in a given law, the more likely it is – for this

²⁴⁷ While I will not discuss them in detail, I nevertheless agree with Waldron that certain *procedural and institutional* elements are a necessary part of how we should understand the concept of law. For his list of these essential elements, see Waldron 2011: 6. Cfr. also Raz’s list (1979: 216–218).

²⁴⁸ This does not mean, however, that I necessarily espouse all of his views on their content or his understanding of their value for law in general.

reason – to come into conflict with one, or more, of the other qualities. For instance, the more a norm is general in character, the more abstract it is. Inevitably, the more a norm is abstract, the less it is clear. Hence, the criteria of generality and clarity conflict (see Kramer 2007: 108f.). The second reason is that some of these criteria are intended not as exact quantifiable benchmarks, but rather as rough standards to be generally satisfied (Marmor 2004: 9). The typical example of such an approximate standard is the criterion of temporal stability (see below, 7.2.7.).

These latter realisations lead me – as they did Fuller – to accept that the fulfilment of each criterion of legality, and hence of the RoL as such, is necessarily “a matter of degree” (Fuller 1969: 43; cfr. Raz 1979: 222). This, of course, does not mean that any minimal compliance with these criteria will do. Rather, each criterion has to be fulfilled at least to a certain, relatively high, threshold level.²⁴⁹ “Above that level,” however, “any further compliance with each principle will enhance the clarity and robustness of the status of a legal system as such but will not be indispensable for the very applicability of that status” (Kramer 2007: 109). Then again, it is also the case that not every minor defect of the law in complying with the legality criteria is already a reason to deny it the character of law. While a total failure in any or more criteria is a sufficient reason for denying something the quality of law, minor failures in one or more criteria do not justify the same conclusion.

Summers argues that the “[i]nstitutionalization of the rule of law is one thing, the values it serves, another” (1993: 131). In general, the values the RoL serves can be distinguished into functional ones and non-functional ones. In principle, the criteria of the RoL serve to determine whether a given legal system is capable guiding the behaviour of its subjects through its rules (see Raz 1979: 214). Therefore, a part of the answer about the value of the formal criteria of legality is already at hand. If a feature *x* (where *x* is any of the listed criteria of formal legality) is necessary for law to fulfil its function *y* (in this case to effectively guide human behaviour), then having *x* is *functionally good* for law (see Marmor 2004: 7). Hence: “To the extent that certain features are functionally necessary for law to guide human conduct, and to the extent that the law purports to guide human conduct, these features of the rule of law make the law good, that is, good in guiding human conduct” (Marmor 2004: 7). Insofar as the elements of the RoL are necessary for law to perform its function, and a given system of norms is shown to have them, they can be said to be a functional good for the law itself.

²⁴⁹ Of course, as you might expect, what this level is cannot be precisely specified (see Kramer 2007: 105).

Apart from being functionally valuable, the RoL is also said to further or promote other values as well. What kind? Summers (1993: 131), for one, proposes a list of values that a formal theory of RoL serves, which includes: i) legitimate government); ii) certainty and predictability of governmental action and of the legal effects of private law-making; iii) private autonomy; iv) facilitation of free choice and planning; vi) respect for the dignity of the individual; vi) freedom from arbitrariness of official action.

Fuller and Raz, for their part, emphasize that observing the RoL is, in the final instance, “necessary if the law is to respect human dignity” (Raz 1979: 221). Respect for human dignity is understood by Raz as “treating humans as persons capable of planning and plotting their future” (Ibid.).²⁵⁰ Thus, if law is, among other things, public and prospective, individuals subject to its directives will be in a position to plan their activities around and in conformity with the law (cfr. Murphy 2005: 241). Fuller similarly argued that subjecting human beings and their conduct to the requirements of law “involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults” (Fuller 1969: 162). That is why he believed that any “departure from the principles of law’s inner morality is an affront to man’s dignity as a responsible agent” (Ibid.).

These considerations raise an important question: namely, is there a necessary connection between the RoL and morality? In other words: is a legal system that conforms to the requirements of the RoL necessarily a morally good legal system? On the other hand, is a legal system that is defective with regard to the formal quality of its laws necessarily a morally corrupt system?

Fuller certainly believed that there is such a necessary connection between the form of the law and its claim to morality.²⁵¹ For one, Fuller believed that “[a] total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all” (Fuller 1969: 39). If, for example, rules are secret, then we cannot reasonably expect individual to abide by them. Thus, the answer to the second question is that a formally defective system of rules does not (on Fuller’s view) even have the character of law, so the question of its moral quality does not even present itself. On the other hand, Fuller believed that there is an inherent connection between respecting the criteria and

²⁵⁰ In this regard, see also Tamanaha 2004: 94; Marmor 2004: 8; Waldron 2011: 15-16.

²⁵¹ In the following, I briefly touch upon one of the question that determined the so-called *Hart – Fuller debate*. For the entire debate, see Hart 1958 & 1983 (Essay 16), 1994; Fuller 1958 & 1969.

substantive goodness. He argued that “respect for the internal morality of law will incline the legislator toward the making of laws that are just in their substantive aims” (Fuller 1965: 661; cfr. Fuller 1958: 636). The idea is that the respect for the RoL opens government actions to public scrutiny. In such conditions, it is presumed that the legislator and government officials will be much less inclined to pass obviously unjust laws as such laws are much harder, if not impossible, to defend in the public arena.

Fuller’s critics, on the other hand, have argued against him by saying that he had confused efficacy and morality (see Fuller 1969: 200). Raz’s critique is perhaps the most representative in this respect. For Raz the essential feature of law is its claim to offer (authoritative) reasons for action. For obedience to be possible, laws must be capable of guiding human behaviour. In this Raz accepts Fuller’s claims regarding the necessary characteristics of law as an action-guiding phenomenon. But he offers an analogy to demonstrate his point. He parallels the property of sharpness of knives with the realization of the RoL. A sharp knife is a good knife, says Raz. Being sharp “is an inherent good-making characteristic of knives” (Raz 1979: 225) – but this does not mean that there is anything morally good in this fact. A sharp knife can be used to do good – cut food, open an envelope etc., but it can also be used to kill someone. And so it is with law. As Raz noted, observing the RoL is necessary for respecting human dignity, but it does not guarantee it (Raz 1979: 221). Conformity with the demands of the RoL is completely compatible with even the most atrocious violations of human rights (see Raz 1979: 211 and 220f). However, just as there is an inherent relation between the sharpness of the knife and the nature of being a knife, so it is with the RoL and law itself. “Conformity to the rule of law is essential for securing whatever purposes the law is designed to achieve” (Raz 1979: 224). These purposes, we have seen, can be either good (like ending racial discrimination in employment) or bad (establishing slavery). Law’s direct purposes are achieved if individuals act according to the adopted law – by “guiding human behaviour” we mean exactly the fact that law, through its rules, guides individuals towards certain goals. Hence, we understand that if the pursued purposes are to be achieved, the law must be able to effectively guide human behaviour. “[T]he more it conforms to the principles of the rule of law the better it can do so,” says Raz (1979: 225). This essential link between the law and the RoL is, however, in no way a moral one: conformity to the RoL is equally essential for achieving good purposes as it is for achieving bad ones (Ibid.). “[T]he rule of law is an inherent virtue of the law, but not a moral virtue as such” (Raz 1979: 226).

In his objection, Raz proposes that there is no inherent non-instrumental value in the RoL; and even if we were to accept that it has some non-instrumental moral value, “the goodness of the rule of law [would be] extremely thin, because respecting the rule of law is consistent with all kinds of terrible behavior” (Murphy 2005: 250). However, Murphy believes that it would be mistaken to take this Raz’s objection “as showing that the rule of law is merely and only instrumentally valuable”; rather, what his reply shows is that the non-instrumental value of the RoL is conditional in nature (Murphy 2005: 252). Raz shows that there are cases in which the respect for human dignity (and reciprocity) that the RoL expresses fails to be realized at all. Moreover, Murphy notes that Raz’s answer also shows that “the rule of law, and its constitutive values, can be realized to a greater or lesser degree in different contexts” (Ibid.). However, she points out that Raz’s argument draws its force from a “disputable claim”, namely “that conceivability entails (real practical) possibility” (Ibid.). Her point is that the pursuance of unjust ends may conceptually or logically be possible within the framework of rules that fully comply with the requirements of formal legality – but the practical possibilities of that happening are very slim. Following Fuller, she too argues that it is unlikely that governments will pursue unjust ends while fully complying with the requirements of the RoL for that would expose them to numerous problems. In general, then, it can be said that respect for the RoL necessarily limits the possibilities of a government for acting unjustly. That doesn’t mean, says Murphy, that individual unjust laws that fully respect the RoL may not be adopted – that is of course possible. There may even be cases “where racism and prejudice against a particular group in society makes it likely that actions viewed as impermissible against the dominant group seem justifiable against a minority group” (Murphy 2005: 260). But what Murphy stresses is that that respect for RoL is incompatible with “the pursuit of *systematic* injustice” and that even in cases as the above ones, “the rule of law can play a role in limiting injustice” (Ibid.).

This view seems to be corroborated by Fuller himself: he did not believe that following the RoL requirements predetermines which goals can or should be followed by a legal system. Instead, he believed that the internal morality is “over a wide range of issues, indifferent toward the substantive aims of law and is ready to serve a variety of such aims with equal efficacy” (Fuller 1969: 153). But he also believed that not all aims can be equally accommodated – especially not systemically evil aims (cfr. Krygier 2010: 117).²⁵²

²⁵² In this, Fuller seems to follow Gustav Radbruch, who held that in a conflict between justice and positive law (legal certainty as he put it), generally speaking, positive law should take precedence even if the content of the

The above considerations, while fragmented and tentative, should nevertheless offer a sufficient conceptual frame of the central problems underlying the theoretical discussion on the formal conception of the RoL. Not all problems touched upon in this introduction will, however, be directly relevant in the upcoming presentation and the subsequent analysis of the Erasure. In the next paragraph (7.2.1.–7.2.7.), I present the first seven criteria of the formal conception of the RoL. In the last one (7.3.), I focus on the criterion of congruence.

7.2. The requirements of the Rule of Law

7.2.1. Generality

If law is to guide behaviour of its subjects through the dictates of its rules, it is trivially the case that there must be rules (laws) of some kind in the first place (Fuller 1969: 46). This is the first element of the principle of generality. Beyond that, the principle of generality has two aspects: on the one hand, it refers (i) to the *type of conduct* regulated and, on the other hand, (ii) to *the subjects* of its rules. In the first case (generality of application) general norms are opposed to “situation-specific directives”, whereas in the second case (generality of addressees) to norms directed at particular individuals (Marmor 2004: 9–15; cfr. Hart 1958: 623).

(i) *The generality of application* requirement is crucial for law’s conduct-guiding function. Take, for example, the unlawful act of taking another man’s life. It would be absurd, and indeed impossible, for law to spell out in advance all manners in which it is prohibited to take another man’s life (by shooting him, poisoning him, splicing his head with an axe and so on). To avoid such a muddle, the law-maker instead adopts a general norm prohibiting murder which, in the most general sense possible, groups together in one disposition an *ex ante* unspecified number of acts by way of which another man’s life may be (unlawfully) taken.²⁵³ It is only through a system of norms that “relate cognate situations to one another”

law is unjust and does not benefit individuals. That is, argues Radbruch, “unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice” (Radbruch 2006: 7). Cfr. also Hart 1958: 617.

²⁵³ It is then up to the appropriate judicial body to determine whether the concrete action fits the general standard.

(Kramer 2007: 111), that legal authorities in a given system can effectively coordinate the activities of ordinary individuals as well as their own functioning.

The level of the prescribed act-type's abstraction (generality) is a matter of degree.²⁵⁴ While generality of application is a fundamental RoL desiderata, a norm that is too general may not be able to provide actual guidance (cfr. Marmor 2004: 12). If too great a level of generality becomes a systemic phenomenon, law's principal function of guiding behaviour may become jeopardized.²⁵⁵ Thus, a certain level of content-specific directives is both desirable and necessary. However, it is not necessarily the best idea to expect of the legislator to provide such specific directives. Indeed, "there are good reasons ... why the legislatures are often justified in leaving the specification of their statutes to agencies and the courts" (Marmor 2004: 14). Such reasons may have to do with the greater expertise of administrative agencies in dealing with highly specific issues or the assessment that courts are more equipped for dealing with rapid changes in a particular area of law or some other reason. Yet, seeing how content-specific (particular) norms "run counter to the basic idea of the rule of law" (Raz 1979: 216), two conditions must be observed in such cases: first, the particular rules themselves should, to the greatest possible extent, follow the other Rule of Law desiderata; second, "particular laws of an ephemeral status [should be] enacted only within a framework set by general laws which are more durable and which impose limits on the unpredictability introduced by the particular orders" (Ibid.).

(ii) *Generality of addressees* is likewise essential for law. Norms that are general in this sense address a certain *ex ante* undetermined set of individuals who share a particular pertinent feature.²⁵⁶ Any given legal system will surely contain both such general norms as well as norms that address particular individuals. However, in order to have a well-functioning legal system, most norms will have to be of the former, general kind. As Kramer points out, in large societies, attempting to address different sets of norms to every individual would be utterly impossible: "To gauge the permissibility or impermissibility of each person's conduct, the officials responsible for policing would have to know the identity of everyone and the contents of the individualized set of norms to which each person is subject" (Kramer 2007: 112).

²⁵⁴ Often times, a distinction is made between rules and principles (or standards) in this regard. On the difference between rules and principles see, of course, Dworkin 1977.

²⁵⁵ The problem of leaving legal prescriptions too vague undermines its action-guiding function. See Marmor 2004: 13f. I talk about the problem of vagueness in the context of the principle of congruence (below, 7.3).

²⁵⁶ Such a norm would have the following structure: "All *X*'s with feature *F* [norm-subjects] ought to ϕ ." (Marmor 2004: 9).

In this regard, a problem may emerge whether a given norm addresses the “right” subjects. From this perspective, norms can either be over- or under-inclusive.²⁵⁷ Over- or under-inclusiveness of a given norm with respect to its addressees can be

determined by the substantive relevance of the feature *F*, by which the norm-subjects are identified, to the norm-act, ϕ , that the rule prescribes. The reasons for identifying the norm-subjects by feature *F* must be derived from the reasons for prescribing the norm-act ϕ (Marmor 2004: 10).

Generality as a RoL virtue is, on Marmor’s view, precisely this “essential connection between the reasons for prescribing the norm and the appropriate characterization of its norm-subjects” (Ibid). In what he calls the “generality-relevance principle”, Marmor holds that whatever the purpose of a given legal norm, it will be defeated if the relevant subjects are not addressed by the norm (see Marmor 2004: 10-11). Thus, for example, if a law is designed to regulate the speed of vehicles on a highway, its purpose would be defeated if the text of the law would be used only with respect to automobiles (their drivers) and not to motorcycles as well – the norm, in such a case, would be under-inclusive.

Marmor argues that the generality-relevance principle is valuable beyond its pure action-guiding function, for it also “serves as a safeguard against favoritism or partiality” (Marmor 2004: 11). It does so by demanding that “the norm’s subjects be those who qualify as such only on the basis of the reasons for enacting the norm in the first place” (Ibid.). Therefore, the law should act on the basis of general (and not particular) reasons and should promote legal equality and fairness; it should evade too many individualised directives or any other kind of “generality-forsaking devices” (see Kramer 2007: 148).

All this, however, does not mean that individual norms or differentiating (more or less favourable) treatment of individuals is never permitted. Individual(ized) norms are the (necessary) final step in the implementation of general laws by courts or administrative bodies: as Kelsen argues “the application of a general norm to a concrete case consists in the creation of an individual norm – in the ‘individualization’ or ‘concretization’ of a general norm” (Kelsen 2005: 230). As far as favoritism is concerned, Marmor notes that the generality principle, of itself, cannot prevent law from being biased or unjust towards certain categories of people. In the Apartheid South Africa, for instance, the law respected the generality-relevance principle, distinguishing groups of people on the basis of what was then and there considered pertinent reasons. On Marmor's view, the generality-relevance principle

²⁵⁷ Cfr. Schauer 2002: 31–34.

requires only that “uneven results [be] justified by the right reasons which apply to the case” (Marmor 2004: 11).

7.2.2. Publicity

Law purports to guide human behaviour by providing its addressees with *reasons* for action.²⁵⁸ If it is to do so, one of the basic conditions is that its subjects are made aware of the norms – and consider their commands as reasons for action (cfr. Marmor 2004: 16). Hence, for law, as an *action-guiding* phenomenon, it is imperative that its prescriptions be made known to its addressees.

With regard to the principle of publicity, three questions appear pertinent: (i) What exactly do we mean, when we say that legal prescriptions need to be *made known* to the addressees? (ii) *To whom* precisely must particular legal directives be made known? (iii) *In what manner* must these directives (laws) be communicated to their addressees?

(i) As to the first question, I should first point that, like other RoL criteria, publicity is also a criterion whose fulfilment is “a matter of degree”. This means that it is not always the case that the more the prescriptions will be public (in the widest sense of the word), the better the legal system will be off. There may be good reasons why in a given context other interests or values, like for example national security, will outbalance the value of publicity of laws.²⁵⁹ In any case, the principle of publicity certainly does not require that we should “try to educate every citizen into the full meaning of every law that might be conceivably applied to him” (Fuller 1969: 49).

Moving on to the merits of the first question, a first (perhaps trivial) response would be that publicity means the opposite of secrecy.²⁶⁰ Secret laws violate the requirement of publicity in an obvious way: if individuals are unaware of the existence of norms or of their content, they

²⁵⁸ See Raz 1999: Ch. 1.

²⁵⁹ Cfr. Kutz 2009: 204–206; see also Kramer 2007: 153.

²⁶⁰ See Kutz 2009 who distinguishes between various types of secrecy in laws. First, he distinguishes between “secrecy as such” and “low-salience secrecy”. Whereas the former term denotes what we usually mean by secrecy, i.e. some information about the law that is kept unknown to us, the latter idea can be represented by the example of the habit emperor Caligula had in publishing his laws in very small print and hanging them so high up that no man could possibly have been able to read them. Thus, low-salience secrecy basically means that laws, while formally not secret, are promulgated in such a manner as to make their content practically unattainable.

cannot be guided in their actions by these norms – the norms, in other terms, do not provide reasons for action of these individuals.²⁶¹ While the question of secret laws is very much an important issue, there is more involved in the publicity requirement than just the prohibition of secret laws. Clearly, laws must be public and made known to their addressees. But is it enough that each of the law’s addressees knows the law? Is, for example, this requirement met if a given regime sends each of its citizens a sealed envelope containing all the laws of the country? Or at least all the laws that refer to each of them personally? Celano, who invites us to think about such a possibility, argues that mere knowledge by each addressee of the laws does not fulfil the publicity requirement (see Celano 2013a: 123). Rather, he holds that the principle of publicity should be understood in terms of the relevant norms being a matter of *common (or mutual) knowledge* among its addressees. Something can be considered common knowledge among the members of a given group when each of them not only knows a particular piece of information, but also knows that each of the other members knows it as well.²⁶²

Celano provides several reasons for why the requirement of publicity should be understood in these terms. Two of them seem particularly relevant for our purposes.²⁶³ The first has to do with law’s instrumental value in guiding human behaviour. Common knowledge of the law is necessary both in cases when the law requires the performance of joint actions by its addressees,²⁶⁴ as well as when no coordination is required in the performance. Even in the latter type of cases the effective performance of the prescribed action by the addressees will, in part, depend on their expectation that everyone else will also comply: “everybody complies, in part, because each has this set of expectations about the others’ expectations and conduct” (Celano 2013a: 132). Such expectations may be a matter of some subjective motivation or of objectively good reasons for compliance. Requirements such as paying taxes

²⁶¹ Kutz also distinguishes between mere secrecy, whereby “the fact of the secrecy is itself known, if not the content of the secret” (Kutz 2009: 206) and meta-secrecy, whereby “the fact of the secret is itself unknown” (Ibid.). In reference to these two types of secrecy, the author argues that the latter (meta-secrecy) represents a much graver danger to the Rule of Law. With regard to examples of mere secrets, i.e. covert operations, prosecutorial guidelines or secret budget items, he finds reasons that legitimize such lack of transparency. Given that their existence is not a matter of secret, but only their content, they nevertheless “provide a target of accountability for other political actors” (Kutz 2009: 206).

²⁶² Or, to be more precise: p is common knowledge among the members of group G if and only if each one of the members of G (1) knows that p; (2) knows that each one of the members of G knows that p; (3) knows that each one of the members of G knows that each one of the members of G knows that p; and so on, *ad infinitum*. Celano 2013a: 130.

²⁶³ For the other two see Celano 2013a: sects. 7 & 8.

²⁶⁴ By “joint act” Celano (2013a: 131) intends “an act by two or more people who must, in general, intentionally co-ordinate their separate actions in order to succeed” (the definition is taken from H.H. Clark & T.B. Carlson, 1982: Speech Acts and Hearers’ Beliefs, in: *Mutual Knowledge*. Ed. N.V. Smith. London: Academic Press.)

or traffic regulations are, Celano notes, “such that it would make no sense to comply with them unless one expected most of the others to comply as well” (Celano 2013a: 132f).

Beyond being instrumentally valuable, publicity also furthers other values, such as human dignity. If individuals are to act as autonomous agents, they need to be able to predict the responses of the system to their actions; but they must also be able to predict how the system will react to the actions of other addressees. Thus, “[c]ertainty of the relations between the law and its subjects requires that an individual can form reliable expectations about the behaviour of government’s officials and of the other citizens (and of government’s officials in relation to other citizens, and vice versa), in respect of existing legal standards” (Celano 2013a: 134).²⁶⁵

(ii) As to the second question: we have established at the outset that the principle of publicity does not require that all law be made public to all individuals within a given jurisdiction at all times.²⁶⁶ What, then, is required in terms of the extent of the individuals who need to be informed about the law and its specific commands?

The simple answer would be that the law must be made known to those individuals “whose behavior it purports to regulate” (Marmor 2007: 17). That seems about right – but what does it actually mean? There are, I believe, two possible answers to this question. The first holds that the norm-addressees are the individuals who are covered by the norm’s antecedent. Take, for instance, the norms “No one ought to take another’s life” and “All university professors are required to wear a neck-tie in the classroom”. In both these cases the norm-addressees are all those individuals that fall within the conditions established by the norm’s antecedent: in the first case this is every person that falls under the jurisdiction of that particular legal order; and in the second case all those (presumably male) individuals who hold professorships at some university. According to this interpretation, then, it is the individuals that are determined by the norm itself as its subjects that need to be made aware of the relevant norms pertaining to their legal position.

²⁶⁵ We should not forget that in this context it is equally important that individuals get to know both substantive as well as procedural rules that guide decision-making in their cases. Cfr. Waldron 2011.

²⁶⁶ On this, there seems to be wide agreement. Cfr. Fuller, Marmor, Kramer etc.

On the other hand, it is argued that all legal norms are, in the final instance, addressed to the law-applying organs – and so it is only them that should by necessity know the laws. According to Kelsen, “[o]nly the organ can, strictly speaking, ‘obey’ or ‘disobey’ the legal norm, by executing or not executing the stipulated sanction” (Kelsen 2006: 61).²⁶⁷ Note that if this is so, then, in principle, law’s secrecy in relation to common individuals, is compatible with the RoL.²⁶⁸

This latter position seems untenable to me, and I argue that it is the first answer that should be accepted. I offer two short arguments in favour of this position. The first is of a purely practical nature: if law purports to be an effective system of conduct-guidance it makes no sense to reduce the knowledge of its directives to the limited class of officials charged with applying sanctions when the prescriptions are not obeyed by the relevant subjects. While in such a scenario a subject may even come to obey the law, such a result would necessarily be purely contingent. Keeping the citizens in the dark regarding their obligations (or at least allowing them to be) drastically reduces, if not nullifies, law’s capacity for being an efficient system of guiding human behaviour.

The second argument goes beyond law’s instrumental value and holds that there is something (intrinsically) unjust in withholding knowledge of legal rules its addressees. As Celano puts it: “*ceteris paribus*, it is unjust to judge an agent blameworthy, and to punish them, for having violated a norm that has not been made known to them” (Celano 2013a: 127). Celano argues that this holds under the condition (*provisio*) that the relevant norm “be a norm that an agent can gain no knowledge of unless it is made known to them – i.e. a norm with which an agent cannot become acquainted with unless it is somehow communicated to them” (Ibid.). Positive law provisions are such norms. The reason for this, argues Celano (via Raz), is that punishing individuals for violations of law that was not made known to them represents a violation of their dignity – of their capacity for making autonomous, informed choices regarding their lives.²⁶⁹

I would add that in virtue of protecting and promoting the dignity of its subjects, the obligation of the State to make laws known is proportional to the impact those laws have on the existing legal situation (*status quo*) of these individuals. If, for instance, a new law, or a

²⁶⁷ Only if we introduce the notion of secondary norm can the subject of the norm obey or disobey it (see Kelsen 2006: 61).

²⁶⁸ See also Kutz 2009:210.

²⁶⁹ See more in Raz 1979; cfr. also Kramer 2007; Waldron 2011.

change of an existing one, severely encroaches upon the existing rights of individuals, the State has a positive obligation to ensure the affected individuals are made aware of the relevant norms.²⁷⁰

(iii) Finally, as to the manner of publication, this will inevitably vary from system to system and their recognized authoritative sources of law. Such differences, however, should not represent deviations from the fundamental requirement that law be presented in “authoritative *written* formulations” (see Kramer 2007: 116).²⁷¹ Indeed, such written publications of laws are crucial for the functioning of any given legal system, for they allow “each person to acquire knowledge of law’s general demands and permissions and authorizations” (Ibid.). It is in this way that law can affect the practical reasoning of individuals.

7.2.3. Prospectivity

Prospectivity (non-retroactivity) is yet another essential quality that the law must possess if it is to effectively guide the actions of its addressees. Law’s directives, if they are to have any effect, should refer to the subjects’ future actions, not their past, concluded ones. A law that regulates such past actions is said to be retroactive. “[A] law is retroactive with respect to an act if and only if the law was created at a given time, the act was done before that time, and the law altered the legal status of that act” (Munzer 1977: 381).²⁷²

The fundamental problem with retroactivity is that if the subjects in a particular legal system are uncertain as to the future legal status of their concluded actions, their capacity to decide in the present with regard to the future is, in an important way, limited. If a legal system is to fulfil its functions (both instrumental and ethical), laws should consist of mostly prospective rules.²⁷³ Mostly, I say, because in certain circumstances retroactive laws may not only be tolerated, but “may actually be essential to advance the cause of legality” (Fuller 1969: 53).

²⁷⁰ In a similar manner, Fuller argued that the extent of publication of particular laws depends “upon how far the requirements of law depart from generally shared views of right and wrong” (Fuller 1969: 50).

²⁷¹ Cfr. Celano 2013a: 143, who argues that an official public record of legislation should be available and its existence should be a matter of common knowledge among the citizens.

²⁷² Munzer (1977: 383) in relation to the impact a retroactive law has on earlier acts in the period prior to its creation distinguishes between *weak* and *strong retroactivity*: while in the former case, “retroactive law changes the legal status of an earlier act only prospectively”, in the latter case “it also does so retroactively”.

²⁷³ This requirement holds both for rules governing the behaviour of ordinary individuals as well as the rules that authorize some to act as legal officials. See Kramer 2007: 119.

For one, it is beneficial to introduce retroactive laws in order to correct a previously made mistake.²⁷⁴ The typical example of such retroactive legislation found in the literature is when a series of marriage ceremonies, conducted without meeting certain technical requirements due to some technical flaw, are nevertheless *ex post* declared legally valid by way of a statute adopted at some later moment (see Fuller 1969: 53-4; Munzer 1977: 381). In such cases, says Fuller, though taken by itself, such a statute violates the principle of legality, given the circumstances, retroactivity “alleviates the effect of a previous failure to realize two other desiderata of legality: that the laws should be made known to those affected by them and that they should be capable of being obeyed” (Fuller 1969: 54).²⁷⁵

Sometimes retroactivity is unavoidable in the context of judicial decision-making. Whenever judges *overrule* their decision in a previous similar case, they, in effect, argue that the law at the moment of their previous decision was not as they argued then, but as it is held to be now (Fuller 1969: 57).²⁷⁶ This, however, regards only civil cases. Retroactivity in criminal cases is an altogether different matter. The maxim *Nullum crimen, nulla poena sine lege praevia* is a standard of legality in practically any normal modern legal system. Accordingly, no law may be adopted creating a new type of criminal offense with retroactive effect. Such a law would be an utter failure from a functional perspective, for it could not possibly guide (future) conduct; but it would also fail from an ethical point of view, for it would represent “an affront to human dignity and freedom” (Marmor 2004: 20). “People”, argues Marmor, “deserve to be treated in a rational and dignified way, whereby the law must set its standards of conduct in advance, standards with which we can either choose to comply or willingly disobey” (Ibid.).²⁷⁷ The maxim also applies to cases of judicial interpretation of criminal statutes. If a court is faced with a relatively undetermined criminal norm, it should interpret it strictly so that “no one is to incur criminal penalties for conduct that was not determinately unlawful at the time of its occurrence” (Kramer 2007: 120).²⁷⁸

²⁷⁴ Munzer argues that in such cases retroactive laws do not perform their general normative (action-guiding) function, but rather some other (social) function. See Munzer 1977: 392f.

²⁷⁵ See criteria of publicity (9.1.2.), above, and practicability (9.1.6.), below.

²⁷⁶ *Distinguishing* is another similar, though less direct manner of causing retroactive effects of the law. See Marmor 2004: 22.

²⁷⁷ In this point, the effects of retroactive rules come close to the effects of unpublished rules (see above, 7.2.2.). Here, again, we may invoke Celano (2013a: 126) who argues that it be unjust for an agent to be punished “for having acted against a standard of conduct ... that was unknown to them”. He calls this the *ignorantia legis excusat* principle.

²⁷⁸ Fuller nevertheless warns that complete determinacy even in criminal statutes is not always possible. It may happen, argues Fuller, “that a criminal statute may be so drawn that, though its meaning is reasonably plain in

Retroactive laws upset our understanding of how law should treat human beings. Such laws are not only unable to guide future behaviour of their subjects – more importantly, they “deprive a person of the opportunity to decide what to do with knowledge of the law that will be applied to him” (Munzer 1997: 391). In other words, retroactive laws *frustrate legitimate expectations* individuals have regarding the legal character and consequences of their acts (Ibid.; cfr. Raz 1979: 222).

Like the other RoL desiderata, prospectivity of law is also only a threshold condition for having law in the first place, and as such does not require full realization. As argues Marmor (2004: 23): “People ought to have a certain range of legitimate expectations about the future normative environment, but they are not entitled to assume that nothing will change in the future.” Indeed, given the rapidly changing circumstances in our environment, a certain level of flexibility of law is legitimately permissible under this RoL criterion.

7.2.4. Intelligibility

If individuals are to accommodate their behaviour to the dictates of law, the latter should be such that that their addressees are able to understand them. For instance, if the national tax code is so vast and complex that most citizens need to hire professionals just to be able to turn in their mandatory tax return – then there is something obviously problematic with that law.²⁷⁹ Likewise, if an administrative decision denying social welfare benefits is written in a highly technical legal language, incomprehensible to the addressee who is not a legal expert on the matter – how, then, if she cannot grasp the arguments offered in the decision, can she be expected to protect her right before the courts?

It is often remarked that the language in which the law is expressed is excessively complex – some even speak of a special legal language, the so-called legalese. The legal language is said to be too technical, archaic and formal; that it uses too many impersonal and passive constructions; that it contains long and complex sentences, redundancies and so forth (Tiersma 2006). Such assessments are difficult to deny, and the consequences of law’s

nine cases out of ten, in the tenth case, where some special situation of facts arises, it may be so unclear as to give the particular defendant no real warning that what he was doing was criminal” (Fuller 1969: 58).

²⁷⁹ See, for instance, the US National Taxpayer Advocate’s annual report to Congress in which the problem of incomprehensible rules is listed as the number one problem of the US tax legislation: <https://taxpayeradvocate.irs.gov/reports/2016-annual-report-to-congress>.

relative unintelligibility are seen both in its reduced efficiency as well as in the higher costs of legal transactions. Yet, here we are not interested in discussing the characteristics of law's language as such nor in the consequences its complexity produces in everyday life. What I am interested in, however, is establishing whether these characteristics may – and if so, under what conditions – represent a violation of the clarity requirement.

The answer to this question will, at least in part, depend on our answer to a prior question: namely, *to whom* should the law be made understandable in the first place. If this question sounds familiar, it is because it is essentially of the same kind as the one regarding the publicity of law (see above 7.2.2.). As you will see, the structure of the response will be analogue to the one offered there.

Two answers appear possible. The first is offered by Kramer (2007). He argues that given the complexity of legal language, its clarity should not be measured “by reference to an ordinary person's understanding and knowledge”, for that would “significantly overestimate the unclarity of the law in virtually every society” (Kramer 2007: 123). Kramer proposes that the true measure of law's clarity should rather be “the competent legal expert's comprehension” (Ibid). Given the abundance of technical expressions in the language of any system's law, lawyers play a central role in its operation. It should therefore be their understanding of legal directives that matters: if they “would regard the wording of some statute or regulation as clear and precis, then the statute or regulation is squarely in compliance with Fuller's fourth principle of legality” (Ibid).

Kramer's claims are based on an argument that I find unconvincing. Namely, he believes that because the legal language is necessarily highly complicated and because, as a consequence, trained lawyers are necessary if the law is to operate effectively, then it is imperative that individuals have widespread access to the services of legal experts (presumably attorneys). Rightly so, Kramer also believes that without such assistance, many legal directives could not provide proper guidance to its subjects. What is striking to my mind is, however, that Kramer believes such assistance by legal experts is readily available to citizens (see Kramer 2007: 123).²⁸⁰

²⁸⁰ Beyond this, I also do not agree that the legal language is necessarily so technical and complex. Sweden has arguably been the world's leader in efforts to create legal regulation that is as clear and simple as possible. See, for instance, Ehrenberg-Sundin 2008.

To my mind this supposition is unsustainable both practically and conceptually. With the exception of criminal cases and such cases in which individuals are too impoverished to be able to afford an attorney, legal assistance by attorney is not a right effectively guaranteed to all. Most of the time, whenever individuals find themselves perplexed and unsure as to what the law requires of them, they will either have to pay high attorney fees or be left to their own devices. With the increasing pervasiveness of law into all spheres of individuals' lives, it is practically impossible that individuals, whenever troubled as to what exactly are their legal obligations, would seek expert help. This is true even in cases that most profoundly impact one's legal position. Thus, while widespread access to legal experts is certainly a desirable goal, it is certainly not the reality.

From a conceptual point of view, I believe Marmor (2004) provides a more sustainable argument. Marmor's proposal is simple: law's directives should be understandable to those "who need to understand what the law is" (Marmor 2004: 26). As I see it, this basically means that if a particular law (legal directive) is addressed directly to legal experts (legal officials), then it is acceptable if the language in which these directives are expressed is imbued with a higher level of legalese. If, however, the law directly addresses and affects common individuals, it is only right that they be able to understand by themselves what it is that is required of them. Moreover, I would add a further requirement that the more a legal directive encroaches upon an individual's existing legal condition (especially her acquired rights), the more it is important that the norm be made intelligible to that person.²⁸¹ If what is at stake is a general norm, then the level of intelligibility should be set by reference to a standard like "comprehensible to an average person" (whatever average is supposed to mean); if, however, the norm in question is an individual one, then, the law-making body should in formulating such a norm take into consideration all of the personal conditions of the norm-addressees (including her age, level of education, medical condition, mastery of the language etc.).

Clarity of law is also a "matter of degree": a certain level of unclarity is inevitable – indeed, to a certain extent it is even necessary. A typical example of useful and necessarily unclear norms are legal standards, such as "in good faith" or "with due care" (cfr. Fuller 1969: 64). By employing such broad standards, the legislator allows the law-applying organs sufficient

²⁸¹ The "plain language movement" in law proposes that legal text should be presented in plain language where this means a "language and design that presents information to its intended readers in a way that allows them, with as little effort as the complexity of the subject permits, to understand the writer's meaning and use the document" (Adler 2012: 68). Numerous benefits derive from such a use of plain language in law, namely it is more precise, contains fewer errors, is more persuasive and even more democratic. On the benefits of the use of plain language in law see Adler 2012: 71f.

flexibility to adapt the law to changing circumstances. What matters is that the general level of clarity of laws does not fall below a certain – necessarily difficult to specify – threshold. Laws that are so vague as to make their interpretation and application impossible can be said to constitute no law at all.²⁸²

7.2.5. Consistency

A further requirement of the RoL is that there be no inconsistencies in law.

Usually, when we speak of inconsistencies between legal prescriptions, we refer to *logical inconsistencies*. By that, three things can be understood (Celano 2013b: 137): i) conflicts proper, where “one and the same action A is both obligatory and forbidden”; ii) contradictions, whereby “it is both obligatory that A and permitted that not A; or, A is both forbidden and permitted”; iii) “cases where two conditional directives, referring, respectively, to the condition that *p* and the condition that *q*, reconnect to these conditions either conflicting or contradictory deontic consequences ... and, further *p* and *q* jointly occur.”

Prohibition of inconsistency is only a normative requirement, not a factual claim. Given the great diversity of agents that at different times create and modify the law, it would be illusionary to expect that the whole body of law at any given moment will, as a matter of fact, represent a coherent set (cfr. Marmor 2004: 27). It might even be that inconsistent prescriptions are purposefully placed in a legal system (cfr. Celano 2013b). Whatever the reason for their presence, logical inconsistencies are, as a matter of fact, found in legal systems (cfr. Guastini 2014: 225). But the RoL does not require that there be no such inconsistencies: what is required is only that “for the most part” they be avoided. The fulfilment of this desiderata, in other words, is also a matter of degree.

When such antinomies do actually occur – or better, when they are discovered,²⁸³ different techniques exist for resolving them. The specific constellation of these techniques will depend on each particular legal system. Nevertheless, our legal culture has developed some typical

²⁸² It is not impossible to argue that a law that is so vague that it makes impossible to derive from it any kind of directive constitutes a secret law. This problem can be seen, for instance, in Art. 81/2 of the Aliens Act. See more below, 8.2.2.

²⁸³ Antinomies are, we should be mindful, the result of interpretative processes. More on the relationship between antinomies and interpretation, see Guastini 2014: 287-290.

instruments that are common to most contemporary legal systems. Thus, for example, if an antinomy occurs between norms from different sources of the same level (two different statutes, for example), the norm which was adopted at a later moment will defeat the norm that was adopted earlier in accordance with the principle *lex posterior derogat legi priori*. On the other hand, if the contradictory norms belong to different levels of normative sources (a constitutional and a statutory norm, for example), then the norm belonging to the superior source will be applied based on the principle *lex superior derogat legi inferiori*.²⁸⁴

Not only logical inconsistencies can be found in legal systems. According to Marmor, there may also exist *pragmatic* and *moral contradictions*.²⁸⁵ As to the first, Marmor argues that “[t]he law is pragmatically incoherent when it actually promotes aims, policies, or patterns of conduct which practically conflict” (Marmor 2004: 28). This might be the case when one legal provision (or a statute) provides for a certain tax exemption, attempting in this way to encourage individuals to save their money whereas another part of the law provides for very low interest rates, dissuading in this way those same individuals from saving and rather encouraging them to spend their money (Ibid.). In such cases, the law, as a matter of fact, creates opposing incentives regarding human behaviour.²⁸⁶

Finally, the law is morally incoherent when its “various prescriptions and their underlying justifications cannot be subsumed under one coherent moral theory” (Marmor 2004: 29). An example of such a theory is Dworkin’s thesis of “law as integrity”.²⁸⁷ Such theses are, however, both untenable and undesirable. They are untenable given the fact that each legal system is the result of a wide variety of different political and legal doctrines applied over time and conflicting among each other (Guastini 2014: 225). They are also undesirable because any such requirement would presuppose a “winner takes all” approach to the matter in what is otherwise an essentially liberal and pluralistic society (see Marmor 2004: 31).

²⁸⁴ More on these techniques, Guastini 2014: 290–298

²⁸⁵ Here I use the terms inconsistency, contradiction and incoherence as mutually interchangeable.

²⁸⁶ Marmor (2004: 29) argues that, in fact, “whether a pragmatic incoherence actually exists or not” is a controversial matter and will “largely depend on economic, social, or psychological theories which are notoriously inconclusive.”

²⁸⁷ Make a reference to an explanation of this thesis.

7.2.6. Practicability

Law's action-guiding capacity is also fundamentally dependent on whether the prescriptions it furnishes can be complied with at all: in other words, if law is to succeed in its purpose, the performance of the required acts must be *possible*.²⁸⁸

This requirement can be understood in two ways (Celano 2013b: 141): first, as a logical or conceptual possibility; second, as being "humanly possible". In this second sense – the sense in which in my opinion the RoL's requirement should be understood – the prescribed acts, "in addition to being logically or conceptually possible, and physically possible," need to be such that their "performance is generally within the scope of the abilities and capacities of normal (whatever that may mean) human beings" (Ibid.).

Note that here two different standards are proposed: that something be "physically" or "humanly" possible and, alternatively, that something be within the capacities of a "normal" human being. In line with my train of reasoning thus far, I would argue that yet another standard could be proposed: namely, that the required actions can be complied with by, or be possible for, their addressees specifically.

This addressee-relative standard has, in my opinion, the quality of escaping problems that plague the other two proposed standards: on the one hand, it avoids the problem of defining what is at any given moment, humanly possible. While this standard is apparently universal, what is humanly possible is in fact "subject to historical change", as Fuller himself acknowledged (Fuller 1969: 79). On the other hand, it also avoids the indeterminacy of the standard of a "normal" person: normality is highly context-dependent and thus varies in time and space as well as in relation to different subject-matters. The addressee-relative standard that I propose does not escape these problems altogether, but it is significantly more resistant to them.

Regardless of the standard we adopt, we do find, in our legal systems, examples of norms that require the impossible. In such cases we must necessarily distinguish between impossibilities that are, in some way, legitimate and those that are not. A classic example of legitimate norms

²⁸⁸ As Fuller (1969: 70, fn. 29) already noted, in a way, most of the Rule of Law desiderata have to do with the possibility of obedience. Cfr. Kramer 2007: 130.

requiring the impossible are the so-called “strict liability” clauses (in Civil Law context this form of liability is usually known as objective responsibility) which determine an individual’s responsibility for damages caused by his actions or omissions regardless of fault or intent.²⁸⁹ The responsibility regarding the demolishing of an apartment building is one such example of strict liability by the operator in charge of the activity. The usual justification for the imposition of strict liability is that certain activities, as such, represent a greater risk for society and so, according to the economic principle, “the foreseeable social costs of an enterprise ought to be reflected in the private costs of conducting that enterprise” (Fuller 1969: 75).

On the other hand, illegitimate uses of impossible prescriptions can also be identified. Such is the case, for instance, when the legislator prescribes as obligatory a course of action that he well knows to be impossible. He does so in order to invoke in the subjects a feeling of guilt for failing to do that which was required (cfr. Celano 2013b: 142 ff.).

Thus, while rare and justified deviations from the principle of compliability are tolerable and even necessary, such cases must remain exceptional if the law is to maintain its character as a legitimate action-guiding phenomenon.

7.2.7. Constancy

That law does not change too frequently in time is also a necessary condition for having a functional legal system.

This standard is perhaps the most flexible of all the desiderata on our list. One cannot, with any precision, determine just how much change is still within the permissible limits. Basically, the only thing that this standard points out is that “gross deviations from it, in both directions, constitute a deficiency” (Marmor 2004: 34). If change is too rapid, the results will be very similar to those stemming from retroactivity: faced with constantly changing laws, individuals will be unable to adapt their behaviour to their requirements.²⁹⁰ Law will therefore lose its behaviour-guiding function. It will also reduce the individuals’ capacity for long-term planning and, consequently, encroach upon their character as autonomous agents (see Raz

²⁸⁹ Provide a relevant source to quote!

²⁹⁰ Fuller says that they both follow from legislative inconstancy (see Fuller 1969: 80). See also above, 7.2.3.

1979: 214f.). On the other hand, if changes are too few, it might happen that the legal practice (the decisions of administrative agencies and judges) gradually alienates itself from the demands of written laws – thus bringing the legal system to violate the last of the eight Rule of Law desiderata (the requirement for congruence between prescribed rules and officials' actions).

7.3. Congruence

The formal characteristics of adopted law are but one part of the story. Whether or not law will succeed in its primary function and whether or not it will succeed in promoting further, non-functional values will ultimately depend on the way it is implemented in the legal practice by the officials of the system. The last criterion on Fuller's list is the only one that regards not the manner in which laws should be made but rather the manner in which they should be *applied*. Unlike the other criteria, it looks at law not as a static phenomenon (the law on the books), but rather as a dynamic one (the law in action). And while it is not a purely formal criterion of legality, it is neither a clearly procedural one (cfr. Waldron 2011) – rather, it is a “bridge” criterion, connecting the two types. Regardless of how we categorize it, congruence is a crucial RoL criterion for it reminds us that if the law (on the books) is to successfully guide human behaviour, “its promulgated rules must be the rules which are actually applied to specific cases by the various law enforcement agencies” (Marmor 2004: 34).

There is also a very practical and immediate reason for a somewhat more extensive treatment of this criterion. It is true – as we will see in the next chapter – that the relevant legal acts in our example suffered many deficiencies from the perspective of the formal criteria of RoL. However, the key moment of the Erasure (in the narrow sense) regards specifically the acts of administrative officials in the application of the pertinent legislation and other rules. If we are fully to understand the Erasure, it is therefore imperative to grasp the mechanisms that rendered their actions possible.

Before proceeding with the specific analysis of the ways in which the Erasure in the narrow sense was actually perpetrated (see below, 8.3.), it is crucial that we first obtain some basic

understanding on how administrative (bureaucratic) agencies function, i.e. how they are positioned in the system of a State's separation of powers system; what is the nature of their procedures for implementing the law; what is the nature of their internal organization and the position of the individual official within them etc.

In any modern legal system based on the system of separation of powers,²⁹¹ the *application* of law is principally entrusted with the judiciary and the executive (public administration), whereas its *creation* is in the domain of the legislator.²⁹² Notwithstanding the fact that they are both principally law-applying bodies, the judiciary and the public administration widely differ in many aspects: these include their relationship with the legislator, particularly the level of autonomy with respect to the latter; their organizational structure and internal rules and procedures; the type of legal acts they produce and so on. While the role of judges in our contemporary (constitutional) democracies, especially their law-making powers (or lack thereof) and the related questions on their democratic legitimacy, have been widely discussed in legal-philosophical literature, the same cannot be said of the State's administrative officials and the nature of their work.

The present discussion is not intended to fill this gap in any important way. Nevertheless, the role of administrative officials in applying the law and the system in which they operate is of central interest for the present work. In it, therefore, necessary that I pursue these questions further. I will, in particular, concentrate on two sets of questions: first, I will enquire into the relationship between the public administration and the legislator. Here, I shall presuppose that the administration's primary goal is *governance*, i.e. the effective implementation of governmental policies and laws. To effectively pursue this goal, administrative bodies are often afforded broad discretionary powers. In pursuing the goals of governance, the public administration may come into conflict with the requirements of *legality*. It is therefore necessary to attempt to bring these two fundamental principles in balance. Secondly, the institutional design of administrative agencies and the principles informing it are in great part responsible for the particular way in which bureaucracies work. I will inquire into some of these particularities that greatly contribute to the stereotypical image of bureaucracy we have, such as the strict hierarchical structure and the meticulous division of labour, and relate these formal characteristics with their consequences on the psychological mind frame characteristic of bureaucrats.

²⁹¹ Introductory on the notion of separation of powers, see, for instance, Guastini 2014: Part Five, Ch. III.

²⁹² Guastini 2014: 332.

To begin with, I should clarify what I mean by terms such as “administrative bodies”, “public administration”, “State bureaucracy” etc. I use these terms more or less interchangeably to refer to all those bodies (organs, agencies) of the executive branch of the government whose primary function is neither law-making nor dispute-resolution (see Guastini 2014: 330f). I say not primarily because administrative bodies often also perform both of these functions. Within these limits, the functions administrative bodies actually perform are extremely broad and include the use of public force (policing), the collection of taxes and spending of public money (for a variety of reasons), inspection of compliance with legislation by other public and private bodies and so forth (Guastini 2014: 331). The bodies charged with executing these functions go about different names, depending on the particular system of government, but they usually include governmental ministries and their subordinate organs, independent regulatory agencies, local administrative offices, the police and other law-enforcement agencies etc. When I use these notions, I do not, however, refer to the executive or the government *stricto sensu*, i.e. the political leadership of the executive branch of government.²⁹³

Clearly, the exact role and position of the public administration within a particular system of government will depend on the contingencies thereof. We may expect, for instance, important differences in the position of administrative agencies within parliamentary and presidential systems of power.²⁹⁴ Generally speaking, however, the traditional doctrine of the separation of powers provides for the administration’s (the executive’s) specialized and more or less independent position in respect to the other two branches. In relation to the legislator, it is specialized in the sense that the latter does not (again, in general) have the power to adopt individual and concrete legal acts; and it is independent from the legislator in that it is not nominated or elected by it.²⁹⁵ On the other hand, administrative bodies are both logically and legally subordinated to the legislator. They are logically subordinated to the legislator because the exercise of their functions – indeed, their existence as such – presupposes the existence of laws that are to be implemented and thus presupposes the existence of the legislator.²⁹⁶ Their subordination is also legal as dictated by the principle of legality understood in the strict

²⁹³ See Vile (1998: 399-400) who argues that the “administrative state”, i.e. the State bureaucracy has increasingly become autonomous and detached from the political leadership, which is, however, nominally responsible for the government’s conduct to the legislature.

²⁹⁴ See, for instance, Krotoszynski, Jr. 2011.

²⁹⁵ Guastini 2014: 337f.

²⁹⁶ Guastini 2014: 331. Cfr. Endicott (2011: 14) sees things differently. On his view, “[i]n every constitution, the executive is the primary branch of government.”

sense.²⁹⁷ In virtue of this principle, the administrative bodies are prohibited from doing anything they are not explicitly authorized to do by the law (cfr. Corso 2014: 17). In other words, any authoritative act of administrative bodies presents two conditions of validity: first, it must be based upon a power-conferring norm and second, it must conform to norms regulating its form and content (Guastini 2014: 140f). The law may regulate the content of an (sub-statutory) act in at least two ways – or at two different levels of intensity. It can, on the one hand, (positively) bind it, prescribing the proper way of its creation and implementation; on the other hand, it can (negatively) limit it to certain confines. In the former case, the act authorized by the law can only take a certain, predetermined content. Such an approach is used by the legislator to bind the judicial bodies. In the latter case, however, the act authorized by the law can have different contents – the law-applying body has a certain margin of choice, i.e. a certain discretion as to how it will decide cases. Such an approach to regulation is used in respect to administrative bodies (Guastini 2016: 148f).

With the growing complexities of everyday modern life brought about by technological advancement and the related expansion of their powers, especially in the fields of economy and welfare, States have increased their administrative apparatuses both in scope and in intensity. Not only has the normative production of statutory law increased manifold in the last century or so, but it now also regards ever more complex issues. Seeing how abstract and general legislation has of itself become an insufficient instrument of regulating social life, States have become increasingly reliant upon administrative bodies not only for the implementation of the vast body of law – they have also begun to delegate more and more law-making powers to them.²⁹⁸ The legislator is increasingly limited to furnishing principle guidelines and policy-aims (the framework), whereas the specialized and expert-laden agencies are charged with designing more specific rules in areas of their competence. Some have come to call this phenomenon “the rise of the administrative state” (cfr. Vile 1998: 399; Rosenbloom 1983: 225; Jacoby 1973).²⁹⁹ In effect, the seizure of law-making and dispute-

²⁹⁷ Understood in the broader sense, comprising all law and not only law in the formal, strict sense of the word, the principle of legality extends to the legislator as well and signifies the subjection of all three branches of government to constitutional-level norms. Cfr. Guastini 2014: 137f.

²⁹⁸ Cfr. Richardson (1999: 311): “If administrative agencies simply put into effect the laws passed by the legislature, without altering or amplifying them in any way, they would not have much power. They would be mere instruments of the legislature, doing its bidding. What constitutes the power of contemporary government agencies is that they are not limited to such a mechanical role.”

²⁹⁹ The powers of the administration are largely discretionary. D’Alberti says that “[d]iscretionary administrative power is the power to adopt an administrative decision based on a comparative evaluation of the public, private and collective interests emerging from the procedure before the deciding official” (D’Alberti 2010: 68). D’Alberti argues that with the growth of competences of the State in the first half of the 20th century this power of the administration has been extended most significantly.

resolution powers by the administrative apparatus – the collapse of the government function into the administrative branch – has led many to speak of the development of a fourth branch of government (see Vile 1998: 400; Rosenbloom 1983: 225; cfr. Rodriguez 2008: 3).

Such developments have naturally put a strain on the classic conception of power-separation as well as on the principle of legality. Yet, the above-described phenomenon is not the only way in which the administrative agencies have obtained (can obtain) greater substantive powers. Apart from *explicit delegation* in the sense just described, the legislator may also *implicitly* delegate law-making powers to the administrative bodies. It may do so by adopting legislation that is “vague and inconclusive, leaving the [agencies] little choice but to settle broad policy questions” (Richardson 1999: 311). There are many reasons why legislation is made vague:³⁰⁰ due to a genuine mistake of the legislator or as a result of a compromise between opposing forces in the process of adopting the law (see Richardson 1999: 312); but it can also be a technique of (deliberate) power-delegation. Whichever is the case, vague legislation contradicts the requirements of the RoL because it gives rise to possibilities of *arbitrary government* (Endicott 1999: 3-4).

Whether it be due to an error or a deliberate decision on the part of the legislator, vagueness is an unavoidable element of law. Can we ever hope to appease this inherent vagueness in the language of law with the requirement for legality in the works of administrative agencies? Richardson, for one, argues that statutory vagueness, by itself, is not a threat to the RoL in this context. “The reason” for this, he says, “is that the administrative agencies of modern states have evolved ways of making policy that themselves satisfy the requirements of the rule of law” (1999: 314). Policy decisions in individual cases are made on the basis of administrative rules they themselves adopt. While some vagueness and ambiguity will inevitably remain even in such cases, Richardson nevertheless holds that such administrative rules comply with the RoL, especially when taken together with the general rules they are supposed to specify and interpret (Richardson 1999: 314-5).³⁰¹

³⁰⁰ “An expression is vague if there are borderline cases for its application” (Endicott 2000: 31). Following Grice, he holds that this means that there are cases for which one does not know whether they apply to the expression or not – and this is not due to ignorance of fact.

³⁰¹ Similarly, Raz argues that the “doctrine of the rule of law does not deny that every legal system should consist of both general, open, and stable rules ... and particular laws” (1979: 213). Rather, argues Raz, “what the doctrine requires is the subjection of particular laws to general, open, and stable ones” (Ibid.). Indeed, Raz concludes, “[i]t is one of the most important principles of the doctrine that *the making of particular laws should be guided by open and relatively stable general rules*” (Ibid.).

Administrative agencies therefore needn't necessarily be seen to function in opposition to the requirements of legality. Properly understood and regulated, their work may be seen as consistent with the legislative aims and as furthering the public interest. If administrative bodies stay within more or less broadly defined parameters in their implementation of laws in specific cases, they respect the principle of legality. It is only when – and if – the administration runs amok and the law they implement has little or nothing to do with the law adopted by the legislator, that we can say that “a weirdly bifurcated system of governance has supplanted any genuine legal system that may have existed” (Kramer 2007: 136). Such a system, then, is no longer compatible with the principle of congruence in particular and the principle of legality in general.

Before I turn to the questions regarding the inner structure and workings of bureaucratic organizations, I should point that the above discussion is based on an important presupposition. Namely, that congruence between official action and formal rule is of (moral) value only insofar as we are working with a “benign” legal regime – that is, a regime that, on the whole, functions according to the principles of legality and respects the fundamental constitutional principles and rights of individuals. Kramer notes as much when he says that the principle of congruence only holds when “a liberal-democratic regime of law is flourishingly in existence” (Kramer 2007: 175). This might seem like an obvious point to make. Not so, if we consider that the exact same compliant attitude on the part of legal officials in a “wicked legal system” does not represent these officials’ allegiance to the rule of law – quite the opposite: it assist in promoting and perpetuating the evil planted in the law by the regime. Indeed, officials (both judges and administrative officials) in such legal systems play a key role in realizing the wicked goals of such regimes. A paradigmatic example confirming this claim is no doubt that of Nazi Germany.³⁰²

Let us now turn to the second issue of interest in this segment: namely, the particulars of the institutional design of the modern administrative apparatus and some of the typical psychological mind-patterns of administrative officials that develop as a result of operating daily in such an environment. While any serious study of the bureaucratic phenomenon requires skills in different fields of study such as sociology and psychology – skill which I do not possess –, I will here only present some of its key features. This should suffice for our discussion of the Erasure below (8.3.).

³⁰² On this issue see, for instance, Arendt 2006; Bauman 1989; Fraenkel 2010; Rütters 2016.

Although nearly a century has passed since its publication, Max Weber's *Economy and Society* (1978) remains today the most authoritative source on the matter. While the scientific study of bureaucracy has since developed greatly, Weber's ideal type of the bureaucratic institution still serves as the model and the basis for most investigations on the matter.

According to Weber (1978: 956–958), several characteristics define a modern bureaucratic institution (system):

- i) the work of officials in a given organization – their official duties – is clearly devised into a system of “jurisdictional areas”, on the basis of fixed (and thus stable) rules;
- ii) there is in place a clear hierarchal system of super- and sub-ordination. Such a system, among others, allows for appeals against the decisions of lower officials – who conduct their decision-making duties individually (as monocratic organs);
- iii) the management of the work is based on a precise system of written documents and registers;
- iv) employment of officials presupposes specialized training in the area of their expertise; moreover, officials are employed exclusively based on merit;
- v) an official's work is conducted on a full-time basis (as “a vocation”);
- vi) the internal management (organization) is guided by stable, more or less exhaustive and clear general rules.

An administrative (bureaucratic) apparatus is, above all, a *formalized* and *rationaly organized* social structure. Such a structure “involves clearly defined patterns of activity in which, ideally, every series of actions is functionally related to the purposes of the organization” (Merton 1940: 560). Any given bureaucratic institution is also composed of a series of hierarchically organized “offices” with clearly determined competences and responsibilities. Officials working in such offices act only “within the framework of preexisting rules of the organization” (Ibid.). Strict formal relations are prescribed both for the officials' internal and external relations (the relations with their “clients”).

Such an organization, it is claimed, has certain *technical* advantages over any other form of organization (Weber 1978: 973; also Jacoby 1973: 148). Among them are greater speed and precision of work, continuity, reduction of costs and so forth (Weber 1978: 973). But above all, according to Weber, bureaucratization – the expansion of the above-described model of organizing work – offers “the optimum possibility for carrying through the principle of specializing administrative functions according to purely objective considerations” (Weber

1978: 975). An increasingly complicated and specialized world requires an equally growing number of specialized law-applying administrative agencies. These, in turn, require an increasing number of experts working within the administrative system.³⁰³

As a formal and rationally organized system, the bureaucratic organization is itself *a rule-based system*. Rules determine all aspects of the organization's workings, from its internal structure and functional division of labour (jurisdiction), to the system of salaries and promotion of officials, the manner of communication within and without the organization and so forth. Such dependence on rules facilitates the officials' work, for it "preclude[s] the necessity for the issuance of specific instructions for each specific case" (Merton 1940: 561); in consequence, efficiency as well as the predictability of administrative decision-making greatly increases. Predictability is particularly important for the efficiency of economic and other activities which require stability and predictability of law for their functioning.³⁰⁴ It is also particularly apt for the modern democratic State, which has, as was already mentioned, greatly expanded the scope of its influence. Indeed, the bureaucratic organization with its reliance on (general) rules is a perfect means of organizing social activities on a large scale.

A corollary of rule-reliance is "categorization": the arrangement (the tendency to) of individual cases and problems to specific categories on the basis of determined criteria (see Merton 1940: 561). Categorization is an important rationalizing process through which the whole set of possible differences between individuals (individual cases) are reduced to only those that are (on the basis of rules and established practices) considered relevant for the resolution of the case. Individuals and their problems are therefore not seen in their entirety, but are rather abstracted to only legally relevant (pre-determined) characteristics. This process is, in part, what Weber had in mind when he argued that officials should discharge their duties "without regard to persons". Reliance on general and abstract rules is intensely connected with and facilitates the respect of the principle of formal equality (equality before the law) (cfr. Weber 1978: 983). On this principle, officials must be blind to the particularities of individual cases, to specific circumstances of individuals they are confronted with: no personal characteristic of the individual that is not strictly relevant for the case at hand should have any bearing on the official decision. This is the positive side of rule-reliance.

³⁰³ These experts have become a key figure of the bureaucratic regime and political leaderships find themselves ever more dependent on them. More on the position of the official within a bureaucratic structure, see Weber 1978: 958–963.

³⁰⁴ Cfr. Weber 1978: 974, regarding the importance of such a system for the capitalist market economy.

Such heavy reliance on rules, however, and the related de-personalization of the officials' work, also has certain negative effects. This pre-established impersonal approach extends to both the clients of administrative agencies as well as to their employees, the officials themselves. The clients, for their part, are not treated as individuals "of flesh and blood", with particular identities and stories of their own. They are, rather, turned into "cases" (cfr. Rosenbloom 1983: 220) – a typical bureaucratic category whereby "the peculiarities of individual cases are often ignored" (Merton 1940: 566).³⁰⁵ Such categorization, however, does not bode well with individuals convinced that the particularities of their problem demand exceptional treatment (Ibid.). In such cases, the otherwise welcomed impersonal and formalistic approach of the officials which, in theory, guarantees formal equality, clashes with cries for individualized, substantive justice (cfr. Weber 1978: 980).

On the other hand, officials themselves are not spared the de-personalization process. Indeed, the whole of the organization of the work within an bureaucratic agency tends to eliminate any kind of personalized or individualized treatment of employees. Officials are usually employed on the basis of de-personalized standardized examinations to fill specific posts with a predetermined jurisdiction. Their working area is but a fraction of the entirety of the agency's. Each individual official represents, as Weber put it vividly, "only a small cog in a ceaselessly moving mechanism which prescribes to him an essentially fixed route of march. The official is entrusted with specialized tasks, and normally the mechanism cannot be put into motion or arrested by him" (Weber 1978: 988). Strict division of labour, thus, inevitably results in the individual official's inability – especially of those in the lower rungs of the administrative hierarchy – to "see the whole picture", that is, to fully comprehend the entire work process from the initial contact with the client to the final decision. This "fragmentation of knowledge" (Luban, Strudler & Wasserman 1992)³⁰⁶ leads to a kind of alienation – the creating of a physical and emotional distance between the individual official and the destiny of each particular client/case which, in turn, results in de-responsabilization on the part of the official: the official, limited in understanding and in his powers, perceives himself as unable to affect the final decision, regardless of how he personally feels about the issue in general.³⁰⁷

³⁰⁵ As Hummel explains, "[a] case is never a real person. A case is a series of characteristics abstracted from persons; it is a model of those characteristics that a potential client must display in order to qualify for the attention of a bureaucracy" (Hummel 2008: 28).

³⁰⁶ The typical excuse of bureaucrats regarding the effects of their work, "I didn't know!" can be named "the epistemological excuse". See Luban, Strudler & Wasserman 1992: 2352.

³⁰⁷ Cfr. Arendt (1970: 38-39), who argues that bureaucracy is the "rule of an intricate system of bureaus in which no men, neither one nor the best, neither few nor the many, can be held responsible" and is best called "rule by

With de-responsabilization comes the substitution of the feeling of moral responsibility (for the final outcome) with so-called “technical responsibility”.³⁰⁸ Technical responsibility is characterized by a “displacement of goals” (Merton 1940: 563) – virtues that otherwise would be seen as instrumental now become end values. “Technical responsibility”, says Bauman (1989: 101), “differs from moral responsibility in that it forgets that the action is a means to something other than itself”. Discipline and strict rule-following thus become ultimate ends. This displacement of goals may become so extreme as to represent a perversion of the original idea. In such cases it becomes “exaggerated to the point where primary concern with conformity to the rules interferes with the achievement of the purposes of the organization” (Merton 1940: 563).

Finally, I should like to highlight one other important, indeed fundamental consequence of this shift in focus. Individuals working in large bureaucratic systems tend towards “total identification with the organization” (Bauman 1989: 21). Such identification involves the “readiness to obliterate one’s own separate identity and sacrifice one’s own interests” (Ibid.). In this regard, Weber noted that “[t]he honor of the civil servant is vested in his ability to execute conscientiously the order of the superior authorities, exactly as if the order agreed with his own conviction. This holds even if the order appears wrong to him and if, despite the civil servant’s remonstrances, the authority insists on the order” (Weber in: Gerth & Wright Mills 1946: 95). Thus, this particular context within which the single official is thrust causes him to lose her “moral compass” and eventually allows for prudential considerations to suppress moral ones. Eventually, the official’s mindset submits to and blends with the organization’s policies. In such a context, the commands of the immediately superior officers become the primary, if not the only relevant source of the official’s actions. The constitution, statutes and other formally superior legal acts become of secondary relevance – the internal, oftentimes secret instructions, circulars, and other directions from the superior officials become the real basis of decision-making in the public administration. This phenomenon could be described as “an inversion in the sources of law” and is particularly relevant for explaining the Erasure.

Nobody”. According to Arendt, the “rule by Nobody” is the most tyrannical form of government “since there is no one left who could even be asked to answer for what is being done”.

³⁰⁸ As the famous Milgram experiments show, lack of information of the overall undertaking greatly facilitates misconduct by the officials. “The less individuals appreciate the consequences of their acts, the need to decide, and the available alternatives, the easier it will be for them to engage in destructive obedience. Milgram’s experiments suggest that the fragmentation of knowledge promotes organizational wrongdoing by blunting the edge of moral conflict” (Luban, Strudler & Wasserman 1992: 2362f).

CHAPTER 8.

ERASURE AS AN AFFRONT TO THE RULE OF LAW

8.1. Introduction

The preceding chapter offered a detailed analysis of eight criteria of formal legality, understood as necessary qualities of law. Here, I apply these criteria to the case of Erasure, that is to the acts and activities of the Slovenian public authorities analysed in Part II.

This chapter is divided in two sections: in the next one (8.2.), I analyse the first seven criteria, whereas in the final one (8.3.), I focus the criterion of congruence.

8.2. Erasure & the Rule of Law requirements

8.2.1. Generality

In its transitional provisions, the Aliens Act distinguished between two types of foreigners with permanent residence: (i) those who already had alien status under Yugoslav law (the so-called “old foreigners” and (ii) those citizens of SFRY republics who did not obtain Slovenian citizenship. With regard to the former group, the law (Art. 82/3) provided that their residency permits remain valid *ex lege* in Slovenia, that is, even after the enforcement of this law (principle of continuity). On the other hand, with regard to the latter group, the same Act (Art. 81/2) determined only that two months after the expiry of the deadline for applying for citizenship, the provisions of the Aliens Act will become applicable for this group of individuals. It said nothing as to the continued validity (or not) of their residence permits.

The differentiated treatment of these “new” foreigners in relation to the “old” ones raises doubts as to its justification. Was such treatment in accordance with the above-presented principle of generality of addressees? Of course, we already know what the final consequences of this differentiation were: this latter group of individuals was ultimately erased.

I take as the basis of my answer the regulation regarding the legal position of “old foreigners” upon the enforcement of the Aliens Act. As said, the Act determined that permanent residency permits issued under the corresponding Yugoslav legislation continue to be valid after the adoption of the Aliens Act. The legislator’s decision to provide for the continued validity of these foreigners’ residency permits seems reasonable. I can find no compelling reason for a change in the legal status of these individuals in light of Slovenia’s independence. Things being so, and following our model of legal statuses, I argue that the access criteria determined for the acquisition (maintaining) of the permanent residency status according to this norm were: (i) being a foreigner (F) and (ii) having, at the time of the enactment of the Aliens Act, permanent residence in Slovenia (G).

Assuming that the premises of my argument are correct, it would then be reasonable to expect that the same consequences would analogically apply also to this new group of foreigners, given that they also possessed both relevant characteristics, F and G, respectively.³⁰⁹ This, however, was not the case. The same legal consequences regarding the validity of their existing residency permits did not apply for the “new foreigners”. The differentiated treatment of this latter group with respect to the former can be put in the following terms: citizens of former SFRY republics with permanent residency in Slovenia at the time of its secession did possess the two relevant characteristics, F and G, but they were also marked by another, in the eyes of the legislator, crucial characteristic that warranted exceptional treatment. Namely, these individuals did not obtain the new Slovenian citizenship when given the opportunity. In more technical terms let us call this latter characteristic H. Hence, whereas the relevant norm regarding the legal situation of the “old foreigners” was something like “If *F & G*, then *q*” – where *q* stands for the *ex lege* prolongation of residency permits, then in the case of the Erased the norm applicable to them was actually “If *F & G & H*, then *z*” – where *z* stands for the altogether unclear normative consequence of “applicability of the Aliens Act”.³¹⁰

On my view, this further characteristic *H* did not represent a justifiable ground for introducing an exception to the former norm. The differentiated treatment of the two groups of foreigners based on this additional feature had no rational basis and thus violated the principle of (formal) equal. Consequently, the generality of addressees principle was likewise violated.

³⁰⁹ On the argument of analogy, in general, see Guastini 2011: 276ff and the bibliography cited there.

³¹⁰ See more on the problems of incomprehensiveness of this consequence below in 8.2.4.

In its first systemic decisions on the Erasure (U-I-284/94; see above, 5.3.), the Slovenian Constitutional Court considered the same question. It premised its decision on the constitutional principle of equality which is, according to the Court, “complied with only if in a statute identical actual states or identical legal positions are also regulated equally” (Par. 17 of the decision). That means that whenever different regulation of identical (similar?) legal positions is provided for, the legislator needs to provide “real and sound reasons” for it – i.e. it must not act arbitrarily (Par. 17).

The Court compared the legal position of individuals that were foreigners already prior to independence and of the citizens of other Yugoslav republics who did not opt for Slovenian citizenship (or whose applications were rejected). The Court noted how “all foreigners who had a permanent residence permit were allowed without any additional conditions to continue to reside in our country” (Par. 18), while the same statute did not regulate the legal position of the “new” foreigners, causing in this way “their legal position to be less favourable than that of foreigners who had that status already before gaining of independence of the Republic of Slovenia” (Par. 18).

The Court established that “[a]s for the described differentiation no real and justified reason can be found which would justify that transitional legal position of citizens of other republics who had registered their permanent residence in the Republic of Slovenia and who legally resided in its territory should be essentially different from the legal position of those persons who had the status of foreigner with permanent residence already before the gaining of independence by Slovenia, the omission to regulate the position of the said persons also constitutes a violation of the principle of equality” (Par 18).³¹¹

8.2.2. Publicity

Violations of the publicity principle in the case of the Erasure can be loosely divided into two groups: (i) violations regarding the requirement of cognizability of legal directives; (ii) violations regarding the manner in which such directives ought to be published. Let us look at both in turn.

³¹¹ See also the ECtHR’s decision with regard above in Part II, 5.3.

The first (i) group of violations is quite heterogeneous and regards different phases of the Erasure in the wider sense. We should begin by noting that even prior to the break-up of the SFRY, Yugoslav citizens in general were not well informed about the meaning (content, importance) of the various legal statuses, such as the republic citizenship, the personal ID number etc., nor did they know what their exact legal situation was in respect (see above, 4.1.). Given the relatively quick pace of changes in the relevant legislation and its high complexity,³¹² it is safe to argue that the government failed in its duty to educate the people about these questions of fundamental importance for their legal position.³¹³

After gaining independence, the Slovenian authorities did notify the public-at-large and its non-Slovenian residents about the conditions for obtaining the new Slovenian citizenship. Besides publishing the relevant legislation (the Citizenship Act) in the State Official Gazette, the information was also disseminated via public media (newspapers, TV programmes etc.). Kogovšek Šalamon notes that this information “reached quite a large number of people, given that the majority of those who were entitled to apply for citizenship under Article 40 submitted applications” (Kogovšek Šalamon 2016: 117).

While it may be argued that the State did fulfil its duty to inform the relevant group of the possibilities of obtaining the new Slovenian citizenship, we should not forget that these individuals were under no obligation to acquire it – or at least this obligation was nowhere stated. This is especially important, since at no point in time were these individuals informed of the possible consequences their legal positions may suffer should they forego this possibility. If we take seriously the idea that the State’s obligation to inform the affected individuals of the impending changes for their legal position should be proportional to their impact, then it can be said that the State in this particular instance failed in its task. Given the gravity of the changes that followed, the State should actually have gone out of its way to inform the soon-to-be Erased of the consequences they will incur should they choose not to apply for citizenship.

In its defence, the State argued that it actually had informed individuals of the necessity to “fix their status” by sending them personal invitations to appear before the local administrative office to sort the problems out. These letters, however, were sent only after 26

³¹² See above, Chapter 4.1.

³¹³ Cfr Kogovšek Šalamon 2016: 42-44. Kogovšek Šalamon notes that this lack of information had particularly dire consequences on the situation of lower working class immigrants from other republics of the former Yugoslavia.

February 1992, that is after the Erasure (in the narrow sense) had already taken place. As Kogovšek Šalamon shows, these invitations “were a decoy, a deceitful tactic used by administrative employees to attract people to the local office, ostensibly to ‘resolve their status’” (2016: 118). Those who actually responded, suffered the exact opposite consequences of what they could have expected: when they presented their (valid) personal documents to the public officials they took them and had them destroyed. Others, who either did not receive an invitation or refused to answer it, found out that they were erased often by chance or when for some other reason they to face the same public administrative officials.³¹⁴

All things considered, the manner in which the Erasure was executed, particularly the lack of communication by the authorities, clearly strikes at the core of the publicity requirement. In particular, the manner in which the authorities acted influenced certain aspects of the common knowledge requirement. The issue is best described by Zorn (Zorn 2003: 98):

First and foremost, the erasure affected people *individually*. It tossed them into an unbearable and vulnerable situation: they were not informed that they were erased from the RPR [Registry of Permanent Residence]; in other words, they did not receive any official notification of this radical move. They learned about it by accident of when suddenly faced with the repercussions of this measure ... Thanks to such a method of ‘informing,’ *every particular case became an individual matter*. They were thrust into *isolation* and the responsibility for what happened was placed on them.”

The opaque manner in which the authorities acted and “processed” cases, created in the affected individuals a feeling that somehow their cases were particular, accidental. The lack of understanding (common knowledge) that the matter was actually a systemic and massive occurrence, deprived the affected individuals from acting as a group, rather than as scattered, powerless individuals, and consequently made collective action impossible. In this, their capacity to act as autonomous agents on the basis of sufficient information for making fundamental life decisions (i.e. their dignity) was profoundly violated. As Zorn notes, it was only after some of them were able to obtain some kind of residency permit and were able to set up an informal social network that the affected individuals could “appear in the public *as a group* (The Erased) and as such begin to fight for their rights” (Zorn 2003: 99).

The second (ii) group of violations refers particularly to the manner in which the relevant norms were published. Here, what interests us is not the Citizenship Act as before but rather the Aliens Act – the statute, as you will remember, that was the basis for the Erasure. In this regard, the publicity principle was twice violated.

³¹⁴ See Srečka’s story in the Prologue.

First, in a somewhat broader sense, the principle was violated by the language of the Aliens Act insofar as the critical provision (Art. 81, Par. 2) was so indeterminate that it can be argued – albeit, I will admit, somewhat stretched – that this indeterminacy constituted a type of secrecy of the law. A total inability of knowing the consequences attached to a particular legal situation indeed closely approaches secrecy.

However, the key problem from the point of view of the publicity principle was the fact that the Ministry's "in-house" instructions on how to enforce the Aliens Act and other newly adopted legislation were not published in any official publication – that, in other words, they were secret. Their existence and content was made known only to the public officials who were charged with implementing them.³¹⁵ We needn't waste too much time arguing how official actions against citizens that are not based on publicly accessible acts is a clear violation of the principle of legality. This violation was only exacerbated in the case of the Erasure by the magnitude and the intensity of the violation. Indeed, as Rangelov notes (2014: 106), "the fact that the measure was implemented by executive decision and shrouded in secrecy ... exacerbated the vulnerability of the 'erased,' exposing them to arbitrariness and abuse of power by agents of the state". Preventing the Erased from exercising any autonomy of action with respect to the activities of the State in their confront, the State, it can be argued, also violated their dignity *qua* capacity to make important life decisions of their own free will.

8.2.3. Prospectivity

The Erasure in the wider sense manifests two types of problems regarding retroactivity. One (i) is seen in the use of retroactivity for the redress of past wrongs, while the other (ii) in the use of "quasi" retroactivity applied in the prescription of citizenship-acquisition criteria. Let us begin with the latter (ii) aspect, which is arguably the more problematic of the two.

The original text of the Citizenship Act set up a six-month deadline for acquiring citizenship on the basis of Art. 40 (for citizens of other SFRY republics residing in Slovenia, that is). Just days prior to the expiration of this deadline, the same Article was amended with the addition of two new paragraphs: both provided for exceptions regarding the citizenship acquisition conditions by determining that an individual who otherwise fulfilled the prescribed conditions

³¹⁵ In Kutz's terminology they represented a meta-secret. See Kutz 2009: 206.

but was, after 26 June 1991 convicted of particular criminal acts relative to public order, security or defence of the country, could not obtain the Slovenian citizenship.

The underlying reasons for the adoption of these amendments needn't concern us too much.³¹⁶ Suffice it to say that these amendments provided the basis for rejecting several hundred applications – which meant that these individuals would consequently be erased.³¹⁷ What is, however, of interest here, is the retroactive effect of these amendments.

The problematic situations can be represented in the following manner:

Assume that T_0 is the time at which the relevant Act came into force. Thus, at T_0 the acquisition criteria were, let's say, Z_1 . Assume that T_x is the time at which the six-month application period came to an end. Assume, moreover, that T_1 marks the moment the amendments of the Act were enforced – thus, the valid law from then on was no longer Z_1 but Z_2 . The problem we are concerned with here regards all those applications that were filed between T_0 and T_1 – that is, at the time when Z_1 was valid law – but were not resolved before T_1 , that is, not before Z_2 became valid law.³¹⁸ In these cases, individuals that filed their applications under one set of rules found their applications being evaluated by another – under conditions they had no way of predicting at the time they filed their application.

At this time, we should introduce a distinction between what could be called “true retroactivity” and “quasi-retroactivity”. The former can be defined in terms provided for in the previous chapter (see 7.2.3): a law is retroactive with respect to an act if and only if the law was created at a given time, the act was done before that time, and the law altered the legal status of that act. Quasi retroactivity, on the other hand, “occurs when a new rule of law is applied to an act or transaction in the process of completion” (Hartley 2014: 162-3).

Only the latter type of retroactivity is relevant for the case at hand. The underlying problem in this matter is that citizenship is not (yet) recognized as an enforceable right, neither in domestic nor in international law (cfr. Kogovšek Šalamon 2016: 71). Hence, in Slovenia, citizenship-rights are only bestowed upon an individual on the day the citizenship certificate

³¹⁶ Jelka Zorn has argued that the introduction of these two paragraphs allowed “the executive authority to arbitrarily rule on cases, thus deepening the ethnic and moralistic dimension of Slovene citizenship”. In this way, she goes on, “[t]hey created formal inequality between ‘Slovenes’ and ‘non-Slovenes’ on the basis of moral reference” (Zorn 2007: 62). Cfr. Kogovšek Šalamon 2016: 67–77.

³¹⁷ It is said that 449 individuals’ applications for citizenship were denied on this basis. Cfr. Kogovšek Šalamon 2016: 77.

³¹⁸ The problem, of course, did not regard every applicant that fell within the relevant timeframe. Rather, it regarded only those who meet the additional criteria set in the amendments.

is issued to her – and not already on the date when she filed her application. “Theoretically”, says Kogovšek Šalamon (2016: 72), “the requirements for obtaining citizenship rights could therefore change countless times during the period between the application date and the date of issuing a citizenship certificate”. On the other hand, it is undeniable that an individual who had filed an application for citizenship at the time (T_1) when one set of criteria was prescribed (Z_1) had reasonable (justified) expectations that her application will be evaluated on the basis of precisely those criteria. Should she be able to predict that some other set of criteria will be applied later on, she might have decided otherwise. Thus, we may conclude that the quasi-retroactive provisions of the Citizenship Act violated the (prohibition of) retroactivity criterion in that they encroached upon the individuals’ capacity to decide for themselves a course of action based on their knowledge of the applicable law. In doing so, the authorities also infringed these individuals’ respective dignity.

The second (ii) point regarding the retroactivity in the case is a more positive one. Having declared the Erasure unconstitutional for the second time, the Constitutional Court in 2003 (see above, 5.3.), on its own established that the permanent residence status of the erased individuals is *ex tunc* restored to them. On this basis it further ordered the Ministry of the Interior to issue, by official duty, these individuals with supplementary decisions on the establishment of their permanent residence in the Republic of Slovenia from 26 February 1992 onwards – in other words, *ex tunc* or retroactively.

8.2.4. Intelligibility

In relation to the Erasure, three instances in which poor intelligibility of legal prescriptions played an important role can be identified.

(i) First of all, the relevant rules regarding citizenship, residency and other personal conditions in the old SFRY were not at all clear and known to affected individuals. They were thus often unaware of their legal statuses in relation to particular republics and did not know whether and where such information might even be available. Public records of different republics containing information on (republic) citizenship, permanent or temporary residence, personal ID numbers etc. were not synchronized amongst each other, nor were the information they contained always correct (cfr. Kogovšek Šalamon 2016: 40–46). Given the great relevance of

such information for each individual in general, and especially in times of transition (dissolution of one State and creation of new ones in its stead), I conclude that the States (both the SFRY and later Slovenia) did not do enough for making these information known to their citizens; equally so, the available information were often false, unintelligible, contradictory etc. Hence, the requirement of intelligibility can be said to have been violated.

(ii) The second problem regards the Citizenship Act and more precisely, the conditions for the acquisition of citizenship for citizens of former SFRY republics. Art. 40 of the Citizenship Act determined that citizens of other SFRY republics who on the day of the plebiscite had their permanent residence in Slovenia and actually lived there, could obtain Slovenian citizenship should they submit their application within the determined period of time. In order to prove their citizenship status, applicants were required to provide as proof their birth certificates. This requirement, however, was nowhere indicated in Art. 40 – it was prescribed subsequently (and we could argue arbitrarily) by the administrative authorities.³¹⁹ By laying down this requirement, the officials imposed undue burden upon the applicants, for the relevant information should have been available to the authorities from public records. If for some reason the applicant was unable to provide her birth certificate – and thus provide proof of citizenship –, her application was denied and she was later erased (Kogovšek Šalamon 2016: 58).

(iii) Finally, the gravest violation of the clarity condition can be witnessed on the example of the Aliens Act. Here, what has already been said on the matter in reference to the publicity condition (8.2.2.) likewise holds. Namely, the norm-consequent of Art. 81/2 was such that it made it impossible for the affected individuals to understand its content. It was, therefore, as such in violation of the clarity condition. However, I have also argued that whenever a norm has a particularly strong effect upon its addressees, that is, whenever it profoundly affects their existing legal position (especially by depriving them of obtained rights), the law-maker should do whatever is in its powers to make the norm intelligible to its specific addressees. The specific addressees of these norms were, you will remember, *grosso modo* poorly educated individuals, with poor command of the Slovenian language (cfr. Kogovšek Šalamon 2016: 82). The legislator, well aware of these facts, ought to have done more to spell out the relevant norms in terms understandable to these particular individuals. Its failure to do so constituted a violation of the condition of clarity.

³¹⁹ This requirement was later confirmed as legitimate by the Supreme Court. See Kogovšek Šalamon 2016: 58.

8.2.5. Consistency

Little can be said regarding the questions of *logical* and *moral inconsistencies* in the case of the Erased. There is no evidence that the relevant norms of the case would be either conflicting or contradictory.

Something, however, can be said on *pragmatic inconsistencies*. Indeed, a stark contrast can be identified between the “spirit” of the pre-Independence acts, such as the Statement on Good Intentions, and the various activities (political and legal in nature) of the Slovenian authorities in the same period. With the Statement on Good Intentions, the Slovenian authorities *in statu nascendi* proclaimed that they would guarantee to all permanent residents the right to obtain Slovenian citizenship, should they so desire. The authorities later made good on the promise by establishing a six-month period in which these individuals were able to obtain the citizenship under relatively undemanding conditions. All this would suggest that the authorities favoured the inclusion of non-Slovene residents into the newly-established Slovenian body politic.³²⁰

On the other hand, however, there is ample evidence to suggest that all along the authorities held hostile feelings towards the group of people in question; I have even claimed that there was an intention to disenfranchise the entire population that ethnically originated from the other SFRY republics (see above, 5.1). You will remember that I have described the Slovenian state as an ethno-democracy. As Kogovšek Šalamon argues: “formal and legal preparations to establish the nation-state rested on the nationalist ideology which pervaded the entire political apparatus of the time. It was the main driving force behind the ethnic homogenisation, foundation, and later the existence of a new state” (Kogovšek Šalamon 2016: 138). Rangelov describes the resulting tension well. He says:

The contradictory character of Slovenia’s citizenship policy in the wake of independence is as apparent as it is puzzling. On the one hand, the vast majority of permanent residents who were ethnic non-Slovenes were able to acquire Slovenian citizenship on the basis of the publicly adopted legislation and the procedures put in place for its implementation. On the other hand, the same body of law opened up the possibility for serious abuses and discriminatory policies adopted by executive decision and pursued covertly by the agents of the state. These contradictions can be

³²⁰ The incorporation of a large part of the ethnic non-Slovenes into the Slovenian body politic was in large part a consequence of several different pressures, both from within the state and from the international community. See more above in 5.1.

comprehended as expressing a foundational tension between the rule of law and ethnic citizenship, each associated with powerful pressures that were set in motion at the time of gaining independence, and continued to pull in opposite directions throughout the period of transition (2014: 112).

Pragmatic inconsistencies were therefore embedded into the Slovenian legal system. Its laws, on the one hand, promoted integration of the ethnic non-Slovenes into its body politic while, on the other hand, they were design to allow for wide-scale exclusion of these same individuals.

8.2.6. Practicability

Those applying for Slovenian citizenship often found it impossible to fulfil the requirements set out in the Citizenship Act. Some of its specific requirements, for instance, the need to present a birth certificate in order to prove one's citizenship of another SFRY republic, often proved practically impossible to respect, either because of the drastically changed conditions in those republics caused by the war (cfr. Kogovšek Šalamon 2016: 112) or the inadequately maintained official records in those republics.

In its first systemic decision on the Erasure (decision U-I-284/94), the Constitutional Court decided that the Aliens Act was unconstitutional “for failing to determine the conditions for the acquisition of permanent residence permit[s] by persons referred to in paragraph 2 of article 81 upon the expiry of the time period during which they had the possibility to apply for citizenship of the Republic of Slovenia, if they did not do so, or after the date of finality of the decision on refusal to grant citizenship”. The legislator was ordered to eliminate this unconstitutionality within six months of the publication of that decision.

The decision was implemented by the adoption of the Legal Status Act that same year (see above, 5.3). One of the requirements for the “legalization” of the status of the erased individuals (for obtaining a retroactively valid permanent residence permit) was that of *actual* or *continuous residence* in Slovenia from the date of the referendum until present time. Besides the question of the reasonableness and legitimacy of introducing this requirement (again, see above, 5.3), what is relevant for us in this respect, is not so much the fact that this condition was, in a way, enforced only retroactively (the Erased had to prove that they

actually lived in Slovenia over a long period of time without being able beforehand to foresee that such a requirement will be made at a later date); rather it is that the requirement itself was, for many of the Erased, practically impossible to fulfil since the Erasure caused many of them to leave the country (either voluntarily or not). Thus, for many of the affected, fulfilling this particular requirement proved impossible to achieve and, indeed, the failure to fulfil it was one of the most common reasons for the rejection of applications (see Kogovšek Šalamon 2016: 230).

Moreover, the same statute provided for a three-month period for submitting the application. Given the circumstances in which the erased individuals found themselves in, we may reasonably argue that the provided timeframe was too short. Indeed, the Constitutional Court (decision U-I-246/02, from 3 April 2003) was of the same opinion when it held that

the legislature should also have considered personal and other circumstances that could impede the timely filing of an application by entitled persons ... It should have considered that due to the fact that their legal position was unregulated for a long period of time, citizens of other Republics could not have expected that such a short time limit would be prescribed for the regulation of their status. In particular, they could not have envisaged that not applying within such a short period would result in a loss of the right to acquire a permit for permanent residence (Par. 34).

8.2.7. Constancy

Given the relatively short amount of time that the authorities had in order to establish a functioning legal system, the Constitutional Act (Art. 4/1) established that until the adoption of new Slovenian legislation, federal SFRY laws that had been valid in Slovenia until independence continue to be valid, insofar as they do not contradict the new Slovenian legal order. Hence, continuity was the primary principle in this respect.

Nevertheless, numerous new fundamental laws were adopted in a short period of time. While one might consider this to be in contradiction of the constancy requirement, I would not be willing to support such a claim. Given the radical systemic changes, large legislative changes were to be expected well in advance. Hence, I do not believe that the principle of constancy was violated in this case.

8.3. Congruence

The Erasure got its name from the physical act of the cancellation of more than 25,000 individuals from the registries of permanent residents, committed by the local administrative officials working for the Slovenian government. The Erasure, then, is at its core a phenomenon that regards the workings of the State's bureaucratic machinery.

The theoretical discussion in the previous chapter provided us with the foundations for understanding how it was possible that the Erasure in the narrow sense occurred – how, in other words, it was possible for the numerous State public officials to act the way they did in this concrete case.

Above, I had argued that congruence between the laws adopted by the legislator and the law that is eventually enforced by the public officials is of moral value only if we are dealing with a legal system that is on the whole a just one.

Here, two different situations should immediately be distinguished. It is one thing if we are dealing with a “wicked legal system” – a regime in which the law is on the whole morally corrupt³²¹ and in the service of deplorable political (ideological) aims. In such a context, full compliance of legal officials with the government authorities and faithful implementation of the law will, in all probability, have disastrous results. The experience of the Nazi legal system which relied heavily on the judiciary and administrative apparatus for the implementation of its anti-Semitic policies is sufficiently telling (cfr. Arendt 2006; Dyzenhaus 1991; Fraenkl 2010; Rütters 2016). In such cases, protection of “true” legality and fundamental human rights seem to require the exact opposite course of action from the officials: namely, one of defiance and violation of the principle of congruence. Indeed, Kramer argues in this regard that “promptings that divert officials from the strict enforcement of those laws – even if they are ignoble promptings – may be morally better than a posture of steadfast dedication to such enforcement” (Kramer 2007: 174; cfr. also Murphy 2005: 251). Kramer's argument is basically that in an unjust legal system, the officials' lack of subordination and unwillingness to implement the corrupt law is actually the morally correct way to proceed, since in this way the morally wicked intentions present in the law may, at least to some extent, be deflected in practice.

³²¹ Let us leave aside the difficult discussion of what exactly that means and satisfy ourselves with a very vague and intuitive idea of justice.

It is quite another thing, however, if we faced with a legal system whose overall wickedness (moral corruption) we are not so easily ready to admit. I am thinking about a legal system which arguably to a certain extent violates one or more conditions of formal legality but whose legitimacy as a system of law as such cannot, for this reason alone, be rejected.

This, I submit, was the situation we encountered in Slovenia in 1992. Let us quickly recall some key facts about the Erasure that will allow us to develop our discussion. The reason for an accentuated role of the administration in the Erasure story can be found in the nature of Article 81/2 of the Aliens Act – the legal provision that made the Erasure possible. A purposefully created legal gap that made it impossible for the administrative organs to base their actions directly on the Aliens Act effectively enabled the transfer of the power to mend this gap, i.e. to provide substance to the aforementioned provision, to the executive branch of government.

On this basis, the Ministry of the Interior prepared a series of “in-house” or internal Instructions, directed at all local administrative units around the country, on how to interpret and implement the said provision – as well as instructions regarding the implementation of other relevant legislation (see above, 5.2.). In these Instructions, the administrative officials were given explicit orders on what they are to do with the (residency) records in reference to the individuals covered by Art. 81/2.

My wish here is to understand how it was possible that the administrative officials so rigorously followed and executed the Ministry’s directives; how did they not raise any doubts as to the appropriateness or, for that matter, legality of the interpretation offered by the Ministry? In the following, I will base my reflections on the theoretical basis introduced in the previous chapter. The gist of those arguments can be found in Zygmund Bauman’s analysis of the conditions that allowed for the Holocaust to be perpetrated. Seeing how other analyses of the Erasure have in the past been based on Bauman’s discussion, I will here follow suit (e.g. Zorn 2003 & 2005; Kogovšek Šalamon 2016).

Bauman, speaking more generally about the perpetrators of mass killings in the Second World War, argued that these atrocities committed by the Nazi regime were only possible on three conditions:³²² (i) that the violence had to be authorized by superior officials; (ii) that the work (bureaucratic and other activities) had to be routinized by rule-based practices that also

³²² Actually, in presenting these conditions, Bauman follows the work of Herbert C. Kelman, Violence without Moral Restraint, in. *Journal of Social Issues* 29 (1973): 29–61.

specify the role of each individual in the process; finally, (iii) that the victims of violence had to be dehumanized (Bauman 1989: 21). Even a rapid overview suffices to see that all three conditions were indeed met in the Erasure.

As to the first (i) condition, we have seen that the Erasure was authorized by the Ministry of the Interior, with a tacit agreement of the Government and the legislator. It was ordered, moreover, via internal (i.e. secret) Instructions. You will remember that in highly hierarchical bureaucratic organizations such internal, sub-statutory acts often assume the role of supreme normative authority: in exceptional circumstances superior law (statutes, the constitution etc.), especially when so vague as in this case, is disregarded and executive decrees take their place.³²³ Such decrees are also more fitted for the administrative actions: they are much more clear and precise as general and abstract laws and thus allow for a more efficient implementation.

Several points should be made as far as the second (ii) condition is concerned. Routinization, as Bauman reminds us, is achieved through a precise division of labour and attribution to each individual involved in the process of as precise competences as possible. Apart from the pre-established internal division of labour within the administrative units and clearly specified orders that we already discussed, it should be stressed that the Erasure in the wider sense was effectuated by an efficient (though not always and not necessarily directly coordinated) division of labour. Kogovšek Šalamon describes this process in the case of the Erasure. She succinctly says: “employees dealing directly with foreigners invalidated their personal documents, the courts issued rulings on expulsions, the employees working for the Ministry of Defence confiscated Yugoslav People’s Army-owned apartments, and the police stopped people on the streets and transported them to the detention centre or the state border” (2016: 147).

In our prior theoretical discussion of the bureaucratic organization it was established that a strict division of labour, both internal and external, has the effect of distancing the individuals involved in the process from the end result of the activity they participate in. Being a mere “cog” in the complex machinery of the State government apparatus makes one unable to see “the whole picture” (cfr. Bauman 1989: 98ff). This loss includes the deprivation of information on the full set of means employed in the operation, its extent and overall aims, as

³²³ In this, the situation resembles a state of exception whereby on the account of some extra-judicial, unforeseen exceptional situation the “normal” legal order is suspended and the emergency management which rules by decrees is instituted. See, for instance, Agamben 2005.

well as of the final consequences of the whole enterprise. Being unaware of all these aspects makes it easy for the individual to perceive herself, and her actions, as largely insignificant in the grand scheme of things. As a result, the individual loses the sense of responsibility for her actions. In such circumstances, it is not uncommon that individual officials come to argue that they were only doing their job or that they couldn't have done anything about the situation – they had only obeyed the law.³²⁴

The same was the case with the Erasure. Moral considerations regarding the legality of one's undertaking or the sense of responsibility for the effects one's actions might have on other individuals are in this way easily substituted for purely technical considerations. As a public official, one's duty is to be as efficient as possible in the task at hand. Hence one tends to focus on the technicalities of the work, regardless of its legality or reasonableness. In this sense, the example presented by Zorn (2003: 113) is illustrative. When the Erased individuals tried to (re)obtain a residence permit in Slovenia, they had to provide an address of their residence abroad – otherwise they could not have been considered foreigners and, consequently, could not be eligible to apply for residency. But many, if not most, of the Erased did not have any kind residence outside of Slovenia. Thus, they often had to make up false addresses abroad in order to apply. As Zorn notes, the administrative officials were not at all concerned whether the furnished addresses were real or false. Their main goal was to satisfy the prescribed rule.

(iii) A feeling of de-humanization – of being treated as “just another case” – is very common among individuals who come into contact with any bureaucratic body and especially the State's large network of administrative organs. If such organs are to effectively exercise their function of implementing the law on a large scale, they must ignore the countless facts that the individuals believe might matter in their specific case and rather focus on the facts relevant for the present task as determined by the legal regulations they are supposed to follow. This inevitably means abstracting the individual person and transforming her into “a case”. Besides this process of de-humanization, which is common to all bureaucratic institutions, in the case of the Erasure a further (or rather, a prior) type of de-humanization

³²⁴ Although, interestingly, when confronted with their clients, the officials usually assume a position of authority, as though they personify the “power and prestige of the entire structure”. In this the “discrepancy between his position within the hierarchy and his position with reference to the public” is often greatly exaggerated. See Merton 1940: 566. Cfr. Kogovšek Šalamon (2016: 172) who talks about how individuals were often confronted with unhelpful and misleading officials.

also took place. While this process was not originally legal in nature, it did fundamentally contribute to the (legal) Erasure and thus I find it important to at least shortly mention it.

The process I have in mind began prior to the Erasure and is inherently connected to the independence efforts (see above, 5.1.) and the “necessity” to distinguish, at first symbolically, the ethnic Slovenes from ethnic non-Slovenes. This social process of distinguishing the two groups and of the consequent exclusion of the latter group (the so-called creation of the social Other) was a crucial element that facilitated the Erasure.³²⁵ By publicly portraying the ethnic non-Slovenes as barbaric, profiteers, aggressors and traitors, the Slovene authorities were able to create an atmosphere of hostility towards these individuals, making the public much less sensitive for the treatment these individuals were receiving and, in the final instance, if not supportive of the Erasure, at least indifferent to it.

In conclusion, I should note that the “perpetrators” of the Erasure, the administrative officials themselves, were not spared a similar process of de-humanization as their clients underwent. Indeed, as we have noted above, the double dehumanization of both the victims as well as of the culprits is a typical characteristic of bureaucratic systems. The described influence of the bureaucratic system will not be repeated here. Suffice it to say that the system in which the administrative officials perpetrating the Erasure were working imbued them with a kind of “thoughtlessness”, a kind of “inability and unwillingness ... to make a moral/value judgment regarding their own conduct” (Kogovšek Šalamon 2016: 145).³²⁶ Interestingly, Kogovšek Šalamon notes that most of the administrative employees did not hold and nationalistic or other negative feelings towards their “victims” – rather, they were neutral in executing their duties. As we might suspect by now, their reason for acting the way they did was that they were only following the law and fulfilling their tasks.

³²⁵ See more in Bajt 2010. Cfr. also Kogovšek Šalamon 2016: 137–143.

³²⁶ Vlasta Jalušič has dedicated an entire monograph to the study of the phenomenon of thoughtlessness. See Jalušič 2009.

CONCLUSION.

THE PERSON IN LIMBO: LEGAL EXCLUSIONISM, ERASURE & THE RULE OF LAW

The purpose of this dissertation, as stated in the introductory chapter (Chapter 1), was to explore the world of legal statuses – particular kinds of “legal clothes” that human beings (and certain non-human entities) are vested with throughout their lives. In this context, I endeavoured to understand what legal statuses are, to whom are they usually attributed and why, and what their effects are on those ascribed with them. As the title of the dissertation already indicates, I was particularly interested in legal personhood as the originary and arguably the most important legal status. However, law’s creative or status-giving power, though of fundamental importance, was not my principal focus; rather, the central subject of this investigation was law’s destructive or status-depriving power, particularly in relation to legal personhood. Put simply, my aim was to understand how legal personhood may be taken away from its holders and what the consequences of such deprivation may be.

In Part I of the thesis, I analysed the notions of legal status (Chapter 2) and legal personhood (Chapter 3), respectively. I rejected the historically prevalent conception of status as a condition of the legally “ab-normal” individuals, such as married women, infants, prisoners etc., which imposed limitations on these persons’ capacities in law (e.g. the inability to manage their own property). Instead, I adopted the view that a legal status is, for one part, an intermediary legal term (a *tû-tû*) – a stand-in for a set of rights and duties ascribable to an individual in virtue of her meeting the status’s access conditions; for the other part, the existence and the content of a legal status, I claimed, are conditioned by its underlying purpose (a societal interest or a need). The so-informed content of the status, in turn, partially determines the status’s access conditions.

I then applied this understanding of status to the notion of legal personhood. “The person” is a history-filled and substance-rich notion, which has been extensively discussed in virtually every field of humanities and social sciences. As far as a comprehensive treatment of personhood from these different perspectives goes, this thesis leaves much room for further investigation. I have left non-legal conceptualizations of personhood aside in order to focus exclusively on how personhood is debated and conceptualized in the legal domain.

Comparing law to games, as it is often done by legal philosophers, I came to argue that personhood is constitutive of the concept of law (the legal game) itself. Just as there are, for instance, fundamental, game-constituting rules of basketball that determine, among other things, who are the players of the game and which the objects of their game, so too we have in law (explicit or customary) rules that determine which entities are the subjects of law (persons) and which the objects of law (things). This subject-defining function makes legal personhood one of law's fundamental concepts. Additional, more specialized legal statuses can only be determined on the precondition of one's possessing the status of a person. An individual cannot be considered an infant or a university professor, if she is not first also a person in the eyes of the law. Hence, legal personhood precedes and is a precondition of any other legal status an individual may come to hold. In this sense it is the originary legal status and it is also why it is, in my view, the most important legal status.

Just as all games have some particular purpose (usually to be won, but also to satisfy some more profound human desires), the legal game is no exception – although there is most likely not one, but many different underlying purposes of law. While these purposes might be quite complex, the manner in which law goes about satisfying them is less so: simply put, the law satisfies its subjects' needs and interests by allowing them to enter into specific legal relations amongst each other, whereby they come to hold (voluntarily or not) different rights and duties with respect to one another. Becoming entitled to receive another man's property after his death, making a contract in order to sell one's house, being sued by another because of creating damage to her reputation, or being incarcerated because of taking another man's life, are all legal relations and acts-in-the-law which require that whoever partakes in them (be it actively or passively) is legally capable of so doing. Legal personhood is the legal status that determines which fundamental capacities any given person in law possesses (which acts-in-the-law and legal relations it may perform or be party of).

This goes to show that legal personhood is not a static and an uniform status – not all who are persons in law have the same legal capacities; rather, depending on both empiric (e.g. cognitive capacities) and institutional reasons (e.g. the extent to which the law-maker values an entity's interests), persons in law may possess a greater or a lesser degree of legal capacities. Accordingly, I distinguished between passive incidents of legal personhood (e.g. entitlement to fundamental rights, the capacity to own property, legal standing etc.) and active ones (e.g. legal competences and the capacity for being held responsible for one's own

actions). Persons in law are not all the same: some are endowed with a “thicker” legal personhood, while others are “thinner” persons.

Conformant with our proposed model of legal statuses, these capacities are partly determining of personhood’s access conditions. Having extensively analysed different theories of legal personhood, which can simply be distinguished into formal and substantive ones, I came to the conclusion that while passive personhood can be ascribed to almost any entity, as long as the law-maker conceives it of sufficient value to merit some legal protection for its own sake, the exercise of active incidents of legal personhood requires possession of certain physical (cognitive) capacities – in particular, the entity in question should be sufficiently intellectually evolved to be able to formulate and express its own will freely and be able to comprehend the consequences of its actions. This being the case, it is virtually universally agreed that the paradigmatic example of a full or thick person is the adult human being of sound mind.

The basis of my further investigation was a widely (universally) accepted presupposition that live-born human beings are automatically and unconditionally ascribed legal personhood at the moment of their birth and maintain this status until their deaths. It is probably for this reason (and the lack of further scrutiny) that legal personhood has become widely perceived as a (quasi)natural quality of human beings and, in consequence, being a human is equated with being a person in law. My position opposes these presumptions. On my view, legal personhood is an artificial legal construct (just as every other legal status), which is granted to different entities on the basis of specific access conditions. From this follows the fact that we should clearly distinguish between human beings and persons in law, as these are entities altogether different, belonging to two different ontologies; while it is true that personhood is mostly ascribed to human beings, there are in any legal system also numerous non-human persons (e.g. corporations). I am also of the opinion that legal personhood is not an inalienable legal status, which leads me to conclude that human non-persons, i.e. individuals who are not considered persons in law, are at least a conceptual possibility.

Another important element of the model of legal statuses that I have worked with in this thesis is the fundamental distinction between persons and things in law. This ancient dualism, dating back to Roman law, is an exhaustive one: every entity in law is either a person or a thing. Today, however, due to significant scientific and technological developments an increasing number of already existing and newly-created entities are seeking their “more just place” in the law as they seem to escape the traditional persons-things dualism. The problem is usually

tackled either with proposals for ascribing these entities, or at least some of them, personhood status (as in the case of activists and scholars arguing for personhood status of the Great Apes) or by developing new, intermediary legal categories (e.g. Pietrzykowski's non-personal subjects of law). Although I touch upon this topic in the thesis, I leave it largely unexamined as it does not directly pertain to the pursued objectives. Nevertheless, I hold that this line of research is a highly important one and worth exploring further, since it shows us that legal personhood (and other related categories) is not something static but, quite the opposite, a concept that can and must adapt to changing conditions – be it scientific discoveries and/or developing social conceptions of individual worth. The extension of legal personhood in any particular point in time and space reflects the underlying knowledge and values of that particular society on who it is that matters and ought, for that reason, be appropriately legally recognized. Luckily, research dealing with the extension of legal personhood to new, non-human entities (reasons *pro* and *contra*, development of a justificatory basis, construction of new conceptual categories etc.) is today the most prosperous area of scholarly work related to the wider area of legal personhood-related research. Unfortunately, much less attention is being given to the problem of the deprivation (limitation) of legal personhood from human beings. The focus of my thesis is precisely on this latter issue and I hope to at least partially fill the knowledge gap in this area.

Not only a conceptual possibility, human non-person are also a historical fact: the institution of slavery is arguably the most well-known, though not the only example of human beings being legally considered as objects (things), as pieces of property that can be bought and sold. This example demonstrates that the supposition of legal personhood being a natural and inalienable status of every human being is historically false. Another example is discussed by Hannah Arendt in *The Origins of Totalitarianism*, where individuals, who after WWI had lost their citizenship status, are shown to have been left rightless (i.e. having their legal personhood nullified). What is most interesting in Arendt's account (and, at least for me, most surprising) is that the condition of rightlessness is shown to have been brought about precisely by the loss of citizenship. This could be called the paradox of legal personhood: if we imagine legal statuses composed in a pyramidal structure, legal personhood would be positioned on the bottom as it is a precondition of every other legal status; citizenship could then be placed on the level immediately above it, as it is, on the one hand, dependent on personhood status and, on the other hand, itself a highly important status and a precondition for the acquisition of many other statuses (rights); finally, all other statuses would be positioned on the

subsequent levels of the pyramid. On this view, it can be expected that the loss of a lower-lying, more fundamental status, would cause the above-lying, dependent, statuses to be lost as well. Loss of citizenship, for example, will cause the loss of access to public sector jobs, reserved for citizens only. What Arendt's example shows, however, is that the opposite appears also to be possible: namely, that the loss of a dependent status, such as citizenship, may also cause the loss of the conditioning status – in this case legal personhood. This is perplexing and defies our intuitions.

The answer Arendt puts forward in order to explain how the “statelessness as rightlessness” phenomenon emerges is that with the first declarations of the Rights of Man (particularly with the 1789 French Declaration), promulgated in the context of emerging nation-States, erected on the ideal of national sovereignty, the basis of rights recognition and protection was not – as it was presumed – personhood, but rather citizenship – the status manifesting one's belonging to a particular nation and its State. Following the horrors of World War II, the new, purportedly universal human rights declarations and national Bills of Rights explicitly affirmed both the right of every individual to be recognized as a person before the law (Art. 6 of the UDHR), as well as the fact that rights belonged by nature to each human being, regardless of her nationality and even to those who have no nation (the stateless). While these affirmations may lead us to believe that in our time rightlessness-producing phenomena are no longer possible, history once again puts our suppositions to the test: whether it be the “enemy combatants” locked up in Guantanamo Bay without any formal charges and deprived of the most fundamental procedural rights or the countless document-less refugees from war-torn countries who instead of being offered asylum protection are put into “identification facilities” which function more like prisons than humanitarian facilities, the fact is that numerous individuals today find themselves in conditions that correspond to the rightlessness described by Arendt.

Such examples, which both defy one's sense of fundamental justice and excite theoretical perplexities, have provided the stimulus for and are the focal point of this dissertation. Understanding the phenomenon of rightless human beings – the creation of human non-persons – and, in particular, the legal mechanisms involved in depriving people of their personhood status, have been at the centre of my interest throughout this work. In pursuing this goal, I could have examined any number of examples that *prima facie* manifest the above-described characteristics; rather, due to spatial and temporal constraints, I decided to focus and examine only one such case. While an analysis of the kind has its limits, this thesis

should rather be read as one part of (and the first step in) a larger project dealing with the phenomenon I proposed to call “legal exclusionism” – which should roughly be understood to indicate all those legal practices where legal instruments (e.g. laws, sub-statutory acts, judicial decisions etc.) are employed in order to, directly or indirectly, limit, disfigure, hollow out or take away the legal personhood of an individual. The examination of other cases, such as slavery, (the legal aspects of) the Nazi extermination of the Jews and the more recent examples of migrants and “enemy combatants”, are all potential study cases of any future investigations into this topic. I believe that a comparison of the legal mechanisms employed in the exclusionary practices of the past and present will reveal numerous similarities in the way law is used for exclusionary purposes and will enrich our understanding of the exclusionary phenomenon. This task remains to be completed.

The chosen case-study has popularly been called the Erasure. The administrative cancellation of some 25,000 individuals – citizens of former SFRY republics with permanent residence in Slovenia at the time of its secession, who did not obtain the new Slovenian citizenship – from the registry of permanent residents on the territory of a newly independent Republic of Slovenia in 1992, left the affected individuals in a complex legal situation, a kind of legal limbo, very much resembling a state of rightlessness. Besides the in itself curious and research-appealing legal condition of the Erased, the case has also proven useful and informative for other reasons. The examination of the technical-legal aspects of the Erasure has demonstrated, among other things: how exclusion from such fundamental legal statuses as citizenship (remember Arendt!) and permanent residence can have disastrous effects for the affected individuals as these losses may cause the further loss of all kinds of life-determining rights (housing rights, access to health care and employment, social security benefits, educational opportunities etc.); how different types of legal acts that can be employed in exclusionary practices (statutes, executive decrees, judicial verdicts etc.); how effective such practices can be when different branches of Government cooperate; and how crucial for the end result are accompanying practices of social exclusion that facilitate the legal efforts. Especially with regard to the latter, this thesis proves wanting. History shows that practically all major legal exclusionist projects (slavery, the genocide, the Apartheid etc.) were accompanied and facilitated by social stigmatization and marginalization of the targeted groups. Further inquiries into the Erasure and other exclusionary practices ought to take into consideration this important aspect as well.

My analysis of the Erasure (see Part II) has confirmed that it is indeed possible – with the appropriate means and in the right social circumstances – that an individual’s exclusion from certain (important) legal statuses negatively impacts the same individual’s legal personhood. It should be stressed that these secondary effects of exclusionary practices upon legal personhood needn’t necessarily be desired or expected – they may very well be accidental. While it may be that outright deprivation of legal personhood is today no longer a viable possibility, this investigation demonstrates that limitations of the various incidents of legal personhood, both active and passive, are very much a reality.

This has led me to conclude that legal personhood is in fact not a well-entrenched, natural and inalienable status as many believe it to be; indeed, legal personhood has been demonstrated as a fairly precarious status that is susceptible to different influences, including those aiming at its degradation or elimination. Legal personhood is not some independent basis for the acquisition of every other legal status; while it is a fundamental status that enables any kind of acting in law, it is not entirely independent of the statuses whose basis it represents. Thus, returning to our pyramidal representation of statuses, these new findings compel us to modify the way we represent how statuses function as a whole. I argue that while the pyramidal structure can be maintained in this new perspective, it should be turned upside down – our statutes should be seen as an inverted pyramid. In this manner, the general idea of the way statuses are compiled one atop another is maintained, whereas the new orientation of the pyramid shows how legal personhood – which can still be found at the basis of the structure – is actually fragile and dependent upon the other, derivative, legal statuses. While this representation is a more satisfactory one, the state of affairs it represents is not a very desirable one: given its overarching importance, legal personhood ought to be constructed in much more solid terms so that its alterations would be prevented as much as possible. A theorization of legal personhood along these lines is undoubtedly one of the major future tasks of legal theory in this field – and perhaps in general. It is, however, too complicated a matter to be dealt with adequately in this thesis. For this reason, I have limited myself to proposing only a rough sketch of a more desirable model for legal personhood. On this view, legal personhood ought to be theoretically constructed in a way that would be reflective of the way a spider’s web is structured. One particular advantage of such a model is in the fact that the centrality of legal personhood is not lost, all the while any limitation or loss of legal statuses derivative thereof does not, for that reason alone, signify any distress for the personhood

status as well. I believe that the spider's web model should serve as a starting point for any further theoretical work on legal personhood.

While the technical mechanisms with which the Erasure was carried out are vital for understanding how exclusionary legal practices may be implemented, the key question confronted in this context regarded the nature of these acts and actions. What was it about these exact acts and actions that enabled the type of results witnessed? The mere analysis of the formal measures employed in the Erasure could not have given us the desired answers. What was needed was a look into the "guts" of these actions: we needed to comprehend the specific quality of the statutes that provided the basis for Erasure and of the executive decrees that effectively ordered it.

In Part III of the thesis, I endeavoured to understand what precisely it was about the acts and actions of the Government institutions that made the Erasure possible in the way it transpired and brought about the described consequences for personhood status. In order to do so, I wished to employ an instrument whose usefulness would not be limited to this specific case only or to this particular legal environment. I endeavoured to use an instrument that could be – or so I believe – applied to all the (supposed) cases of legal exclusionism that I mention throughout the thesis and in this conclusion. The concept of the formal Rule of Law appeared as a perfect fit. The main reason for this is that the criteria of evaluation promoted by this instrument regard only the formal characteristics of law – and not its content; according to the formal conception of the Rule of Law (principle of formal legality), any law (as a system and any individual act) ought to possess certain qualities if it is to be effective in guiding human behaviour through its commands (rules). The ideal of formal legality regards, above all, the manner in which laws are promulgated, the clarity in which law's commands are expressed and their temporal quality. Several lists of such necessary qualities are in circulation in theoretical debates, though most of them are based on the one presented by the American scholar Lon Fuller – which is also the one I follow in this thesis. Beyond enabling efficient action guiding, respect for formal legality is also a condition (necessary, but not sufficient) for the respect of the dignity of legal addressees – understood as the person's capacity to plan her own future. It is important to remember that these formal characteristics are not the all-or-nothing kind, but rather of the more-or-less kind: their fulfilment, in other words, is a matter of degree.

One important premise, relevant for the understanding of the working of the formal legality criteria in this particular case, is the specific “quality” of the Slovenian constitutional system which, on my analysis, stems from the most important state-founding constitutional documents and which I have come to call (following established terminology) “ethno-democracy”. An ethnic democracy is, simply put, a democratic system that contains the non-democratic institutionalization of one ethnic group’s dominance over the other(s). The examination of the relevant Slovenian legal sources and scholarly literature has demonstrated that all levels of the constitutional system are permeated with principles and legal mechanisms that privilege the members of the Slovenian ethnicity over other residents, particularly those originating from other former SFRY republics (that applies to the constitutional provisions, the relevant citizenship legislation and all the way down to the executive decrees with which the Erasure was ordered). This circumstance is very important for our analysis of the way Rule of Law criteria had been respected, because nationalism and the Rule of Law, as two mechanisms of political legitimation, often find themselves in contradiction, creating institutional tensions. If nationalistic tendencies prevail and ethnic citizenship and other nationalist policies are institutionalized, law becomes an instrument promoting subjugation, inequality and exclusion. This, I argue, was at least partly the case in our example.

How, then, do the mechanisms of the Erasure (the acts and actions of public authorities) fair when tested against the conditions of formal legality? While a detailed analysis is provided in Chapter 8, I will here look at just a select few criteria and try to demonstrate their individual and collective contribution to the end result. The principle of generality, for its part, requires that “the rights” subjects be addressed by a given norm (following the principle of formal equality which demands that like cases should be treated alike) and that the prescribed behaviour be determined with a degree of generality (specificity) that enables the norms to effectively guide the behaviour of their addressees. The Slovenian authorities established a differentiated treatment of the “new foreigners” (i.e. the permanent residents with citizenship of other SFRY republics who did not obtain Slovenian citizenship) with respect to the “old foreigners”: the latter’s residency permits were automatically prolonged, whereas with regard to the former’s the relevant legislation was silent on the matter – it neither determined that their residency permits cease to be valid, that their validity is automatically prolonged nor any other thing. This silence of the law regarding the consequences following these individuals’ not obtaining the Slovenian citizenship amounted to a legal gap. In this way, they were put in a highly precarious legal condition.

This legal gap can also be seen as a violation of the publicity principle. The latter requires that legal acts, in general, be made public and known to those individuals whose behaviour it purports to regulate. Banally, an act that does not determine the legal consequences following from a particular course of action can be seen as a violation of the publicity requirement. Moreover, the publicity requirement was also violated as affected individuals were not in any way notified – neither individually nor collectively, neither publicly nor privately – of the consequences that they will incur if they do not accept the Slovenian citizenship in the provided timeframe. In this way the precariousness of their legal condition was only exacerbated.

Finally, the intelligibility criterion requires that law's prescription be such that their addressees are able to understand them. Here, again, the problems related to the Aliens Act and its indeterminacy are crucial. What this criterion especially emphasizes is that the prescriptions ought to be as much as possible understandable to their specific addressees – not to some fictional standard individual. In our case, this means that the legislator, especially given the gravity of the consequences that were to follow, ought to have taken particular care to make sure the affected individuals – who were, you will remember, mostly uneducated foreigners with poor command of the language – would be aware of the consequences following from their choice not to take up citizenship. Clearly, the legislator failed in this task.

Whether or not the prescribed law respects the criteria of rule-making, the impact of this law on its addressees ultimately depends on the way it is implemented by the legal officials of the system. Hence, I would argue that the congruence (of official action with prescribed law) is in a way the most relevant RoL criteria. It should be noted that congruence between official action and formal rules is of particular value only insofar as the entire system is, on the whole, a benign one – meaning that it respects the principles of RoL and individual rights. Nazism and the South African Apartheid, on the other hand, are good examples of what happens when public officials (blindly) follow corrupt law. This principle is also worth highlighting, because it puts due emphasis on the workings of the executive, law-applying organs, which too often are unjustly overlooked in scholarly literature, regardless of their massively important role in any legal community. I would even go so far as to argue that the mechanisms of law-application by the State bureaucratic bodies is one of the most important under-examined topics in contemporary legal theory. As the Erasure was basically an act performed by the

State's bureaucracy implementing the relevant legal acts, the importance of understanding what is involved in law-applying seems that more important in the given case.

Our analysis of the Erasure has shown that the pertinent legal provisions were in many respects faulty, i.e. they violated, at least to some extent, several criteria of formal legality. Thus, the competent administrative officials that were trusted with implementing the new citizenship legislation were dealing with purposefully formally defective law. While I would not go as far as to claim that this particular set of laws and instructions was illegitimate – and so that the officials of the system were under some moral obligation to reject its application, we can nevertheless ask, how was it possible that these officials were so willing to implement the instructions of their superiors which at the very least should have raised some doubts as to their legality. In answering this question, I relied on the works of scholars who had dedicated themselves to the study of the inner mechanisms of the bureaucratic apparatus. Bauman, as one of the foremost students of Nazism and the reasons for the perpetration of the genocide, famously argued that three conditions have to be met in order for normal individuals to participate in the most atrocious crimes. While certainly I am not implying that the Erasure should be compared in brutality to the extermination of the Jews, his insights into how great and efficient bureaucratic machineries function is of universal value. Bauman thus argued that the acts (of the legal officials) ought to be authorized by superior officials; second, that the work (bureaucratic and other activities) must be made routine by rule-based practices that also specify the role of each individual in the process; and finally, that victims of violence be dehumanized. Our analysis has demonstrated that all these elements were present in the workings of the Slovenian administrative officials who actively participated in the Erasure.

The discussion in this dissertation has, in my opinion, produced answers that provide us with a better understanding not only of particular legal concepts, such as legal status, legal personhood, legal exclusionism, Rule of Law etc., but especially of the way these concepts are connected with each other and what may be the consequences of their interaction if law is employed to malicious ends. We have seen that the person in law is a fundamental legal status that creates the players of the legal game and enables the game to be played at all; but we have also seen that despite this fundamental role, legal personhood can also be quite a precarious legal status, susceptible to various manipulations and limitations. These manipulations and limitations of personhood can be achieved by using the very same legal means participate in its creation. Some of the ways that the law can be employed in the deprivation of legal personhood have been examined on the case of the Erasure; they include

the use of vague and ambiguous laws; laws that establish unjustified distinctions between different, yet comparable groups of people; retroactive amendments introducing last-minute changes to status-acquisition conditions; secret executive decrees that may produce dire consequences for affected individuals yet are never made known to them, neither *a priori* nor *ex post facto*. The list of exclusionary mechanisms, however, is not conclusive and could continue. Benign legal instruments, when created in violation of formal legality requirements and then put into practice by a cooperative (loyal) administrative apparatus, can ultimately produce the results we have seen in the Erasure or worse: human beings can be put in seriously precarious legal conditions, without access to some of the most fundamental legal protections, into a kind of legal limbo, a condition of utter insecurity and precariousness.

Legal exclusionism ought to be, in my mind, one of the central topics in contemporary theoretical study of law. As I hope to have shown, legal exclusionism touches upon issues that are of fundamental importance for the very concept of law, as well as for our everyday use of it. While the question of legal personhood has, in recent times, become somewhat more present in scholarly debates, these discussions have mainly revolved around its extension to non-human animals and other non-animal entities. Very little has been said about the very things we take most for granted – for instance, the legal personhood of human beings. Yet, as I hope to have shown, the dangers related to possible deprivations of the status are too great and too complex to be left unexamined. I also believe that besides legal scholars, legal practitioners should also be interested in the topics discussed here. This is particularly true for the law-makers, for it is primarily them who by adopting faulty laws most contribute to the possibilities of abuses of law for exclusionary purposes; but it is also the public administrative officials who should take to heart the stories of Erasure, of Guantanamo Bay prisoners, the innocent migrants locked in prison-like structures etc. and re-examine their self-perception as officials of the legal system; the way they operate on the daily basis in confront to their clients; and the way they comprehend the hierarchal system of which they are part of. I am certain that greater awareness of the inherent exclusionary capacities of law and the consequences that may be produced when unleashed by thoughtless public officials could greatly contribute to the reduction of their occurrence. Hopefully, this thesis has contributed somewhat in that direction.

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ABSTRACTS

Abstract

Legal personhood is the legal status that endows human beings (and certain non-human entities) with the capacity to participate, actively or passively, in the generality of legal relations and to perform acts-in-the-law. It is a fundamental legal status, constitutive of the concept of law itself as well as a threshold status, distinguishing subjects of law from legal objects. Legal personhood is today understood as a quasi-natural status, attaching to every human being unconditionally and inalienably from birth until death. It is argued that full deprivation of legal personhood, as in the case of antebellum slavery, is today legally impossible. This thesis examines the notion of legal personhood (of human beings) and, opposite to the former claim, proposes that even today human beings can be spoiled of legal personhood. This phenomenon is called legal exclusionism and it is argued that legal personhood can be deprived from human individuals in different ways, to a different degree and, consequently, to a different effect.

This thesis has three parts. In Part I, the notions of legal status and legal personhood are analysed, respectively. For the purposes of this thesis, legal status is understood as an intermediary legal term (a *tû- tû*) connecting a set of access criteria with a set of normative consequences (entitlements). It is further claimed that a given legal status (its content or the set of normative consequences stemming from the status) is partially determined by an underlying reason or interest for having that status. Legal personhood is then treated as such a legal status. It is proposed that the reason underlying its existence is the very need for having subjects of law, entities able to act in the legal sphere, to perform acts with legal consequences and enter into legal relations. Various theories of legal personhood are then examined and, finally, one proposal for expanding the rigid “persons-things” dualism (by introducing a third conceptual category of entities in law) is briefly presented.

The central object of investigation, examined in Part II, is the so-called Erasure – an administrative cancellation of some 25,000 individuals from the registry of permanent residents, conducted by Slovenian authorities in 1992 following Slovenia’s separation from the SFRY. The Erasure, affecting those non-Slovenian residents who did not wish to (or were unable to) obtain Slovenian citizenship, left the affected individuals without political, social and economic rights in Slovenia, in a condition best described as rightlessness. A reconstruction of the relevant legal sources (official declarations, constitutional acts, legislation etc.) that underlay and determined the legal frame of the Erasure is provided and it is argued that the Slovenian constitutional order is permeated with a nationalistic component. This distinct quality of the legal order was a core element of the Erasure. Thereafter, the consequences of the Erasure for the legal condition of the affected in general and, in specific, for their status as persons in law is also looked at.

In Part III, the aforementioned legal sources are submitted to an analysis from the criteria of formal legality (formal Rule of Law), as first proposed by Lon Fuller. Particular attention is given to the condition of congruence and, more generally, to the organizational and operational principles underlying the work of the State administrative bodies. It is shown that the relevant legal acts in the analysed case were produced in violation of most of the formal Rule of Law demands, such as generality, publicity, prospectivity etc. On the other hand, the actions of the administrative bodies were perfectly in line with the requirements of the superior organs – the administrative officials followed the secret internal orders of their superiors to the letter, without expressing any doubt whatsoever as to their legality. It was this attitude of blind compliance that made the Erasure such an efficient operation.

The conducted analysis does not allow us to conclude that legal personhood can be deprived *in toto*. Nevertheless, the examined case demonstrates that legal personhood can indeed be manipulated with, i.e. limited, diminished, hollowed out etc. Several different legal sources and methods have been exposed that enable depriving human beings (deliberately or not, directly or indirectly) from different incidents of legal personhood. Analyses of other examples may reveal other methods for depriving legal personhood and the creation of different types of legal semi-persons (legal chimeras). This thesis points to the possibility of employing the same analytical tools for the study of other historic and contemporary cases of legal exclusion. It is thought that a comparative analysis of several such cases would bring to the surface some common characteristics of all cases of legal exclusionism, past and present alike.

This thesis demonstrates that the law's status-granting, personhood-creating quality also has its flip side: law can just as well be used for status-depriving, personhood-manipulating purposes. While legal exclusionism is therefore *in abstracto* part of law's nature, particular cases of legal exclusion can be avoided or, at least, mitigated if more attention is given to the quality of law-making and the manner of its application by law-applying bodies.

Keywords

Legal Exclusionism, Legal status, Legal personhood, Rule of Law, Erasure

Riassunto

La personalità giuridica è uno status giuridico che conferisce agli esseri umani (e ad alcune entità non-umane) la capacità di partecipare – in modo attivo e passivo – alla generalità delle relazioni giuridiche e la capacità di eseguire atti giuridici. Si tratta di uno status giuridico fondamentale, costitutivo del concetto stesso di diritto. Inoltre, si tratta di uno status limite, ovvero di uno status che distingue i soggetti del diritto dagli oggetti del diritto. Oggi la personalità giuridica è intesa come uno status quasi-naturale, attribuito ad ogni essere umano in maniera incondizionata e inalienabile. Oggi, inoltre, la privazione totale della personalità giuridica, come nel caso della schiavitù, si dice impossibile. Questa tesi esamina il concetto di personalità giuridica (degli esseri umani) e propone – diversamente dalla asserzione precedente – che gli esseri umani ancora oggi possano essere spogliati della loro personalità giuridica. Questo fenomeno è chiamato esclusivismo giuridico. Si sostiene che gli esseri umani possano essere privati della personalità giuridica in modi diversi, in misura diversa e, di conseguenza, con effetti diversi.

Questa tesi si compone di tre parti. Nella Prima parte si analizzano i concetti di status giuridico e di personalità giuridica. Ai fini di questa tesi, status giuridico è inteso come un termine intermedio (un *tû- tû*), che connette un insieme di condizioni di accesso ad un insieme di conseguenze normative. Si afferma, inoltre, che uno status giuridico qualsiasi (il suo contenuto ovvero l'insieme delle conseguenze normative derivanti dallo stesso) è parzialmente determinato dai motivi o dagli interessi a esso sottostanti. La personalità giuridica è intesa nella stessa maniera. Si sostiene che il motivo a fondamento della sua esistenza si trovi nella necessità stessa di avere soggetti di diritto, i.e. entità dotate della capacità di agire nella sfera giuridica, di effettuare atti dotati di conseguenze giuridiche e di entrare in relazioni giuridiche. Si esaminano diverse teorie della personalità giuridica e si presenta, infine, brevemente una proposta per il superamento del rigido dualismo “persone-cose” (introducendo una terza categoria concettuale delle entità giuridiche)

L'oggetto centrale dell'indagine nella Parte seconda è la cosiddetta Cancellazione – la cancellazione amministrativa di circa 25,000 individui dal registro dei residenti permanenti, condotta dalle autorità slovene nel 1992 in seguito alla separazione della Slovenia dalla RSFJ (SFRY). La cancellazione, colpendo i residenti non-sloveni che non hanno voluto (o potuto) ottenere la cittadinanza slovena, ha lasciato questi stessi individui senza diritti politici, sociali ed economici in Slovenia, in una condizione di privazione totale dei diritti (Eng. *rightlessness*). Si fornisce una ricostruzione delle fonti giuridiche rilevanti (dichiarazioni ufficiali, atti costituzionali, legislazione ecc.) che fondano e forniscono la cornice giuridica della cancellazione. In seguito si sostiene che l'ordinamento giuridico sloveno sia permeato di una componente nazionalistica. Questa particolare qualità dell'ordinamento giuridico è stata un elemento centrale della cancellazione. Infine si analizzano le conseguenze della cancellazione sulla condizione giuridica delle persone colpite, nello specifico, le conseguenze sul loro status di persona giuridica.

Nella Parte terza si sottopongono le suddette fonti giuridiche ad una analisi a partire dai criteri della legalità formale (Eng. *formal Rule of Law*). Particolare attenzione viene data alla condizione di congruenza e, più in generale, ai principi organizzativi e operativi che stanno alla base del lavoro degli organi amministrativi statali. Si dimostrano che gli atti giuridici rilevanti nel caso analizzato sono stati prodotti in violazione della maggior parte dei criteri della legalità formale, come, per esempio, quelli di generalità, pubblicità, prospettività ecc. D'altra parte, si osserva che le azioni degli organi amministrativi sono state perfettamente in linea con i requisiti degli organi superiori – i funzionari amministrativi seguivano gli ordini interni segreti dei loro superiori “alla lettera”, senza mai esprimere alcun dubbio in merito alla loro legittimità. È stato questo atteggiamento di conformità cieca che ha reso la cancellazione una operazione così efficiente.

L'analisi condotta in questa tesi non consente di concludere che la personalità giuridica può essere privata *in toto*. Tuttavia, il caso dei cancellati dimostra che la personalità giuridica può effettivamente essere manipolata, limitata, diminuita ecc. Diverse fonti e mezzi giuridici consentono di privare gli esseri umani (deliberatamente o meno, direttamente o indirettamente) di diversi elementi della loro personalità giuridica. L'analisi di altri casi può rivelare altri metodi di privazione della personalità giuridica e la creazione di diversi tipi di semi-persone (chimere giuridiche). Questa tesi indica la possibilità di impiegare gli stessi strumenti analitici per lo studio di altri casi storici e contemporanei di esclusivismo giuridico. Si ritiene che un'analisi comparata di distinti casi possa portare alla superficie alcune caratteristiche comuni a tutti i casi di esclusivismo giuridico, sia storici che contemporanei.

Questa tesi dimostra che l'aspetto del diritto responsabile del conferimento degli status giuridici e della creazione delle persone giuridiche, ha un lato oscuro: la legge può anche essere utilizzata per la privazione degli status e la manipolazione della personalità giuridica. Mentre l'esclusivismo giuridico *in abstracto* fa parte della natura stessa del diritto, casi particolari di esclusione giuridica potrebbero essere evitati o almeno attenuati, se si prestasse maggior attenzione alla qualità della creazione del diritto e al modo in cui questo viene applicato da parte degli organi statali.

Parole chiave

Esclusivismo giuridico, status giuridico, personalità giuridica, Rule of Law, Cancellazione

Resumen

La personalidad jurídica es el estatus jurídico que otorga a los seres humanos (y también a ciertas entidades no humanas) la capacidad de participar – de forma activa o pasiva – en la generalidad de las relaciones jurídicas y de realizar actos jurídicos. Esta es un estatus jurídico fundamental, constitutivo del concepto mismo de derecho, así como es también un umbral que distingue los sujetos del derecho de los objetos del derecho. Hoy en día, la personalidad jurídica se entiende como un estatus cuasi-natural, perteneciente a todos los seres humanos de forma incondicional e inalienablemente desde el nacimiento hasta la muerte. Se argumenta que la privación total de la personalidad jurídica, como en el caso de la esclavitud, es hoy jurídicamente imposible. Esta tesis examina la noción de personalidad jurídica (de los seres humanos) y, en contraposición a la pretensión anterior, propone que incluso hoy los seres humanos pueden ser privados de la personalidad jurídica. Este fenómeno se denomina exclusionismo jurídico. Este propone que la personalidad jurídica puede ser privada a los individuos humanos de diferentes formas, grados y, en consecuencia, con efectos distintos.

La tesis está compuesta por tres partes. En la primera, analizo las nociones de estatus jurídico y de personalidad jurídica, respectivamente. A los fines de esta tesis, se entiende por estatus jurídico un término jurídico intermedio (un *tû-tû*) que conecta un conjunto de criterios de acceso con un conjunto de consecuencias normativas (derechos). Además, se afirma que un determinado estatus jurídico (su contenido o el conjunto de consecuencias normativas derivadas del estatus) está parcialmente determinado por una razón o interés subyacente. La personalidad jurídica es tratada en este sentido. Se propone que la razón subyacente a su existencia es la necesidad de tener sujetos de derecho, entidades capaces de actuar en el ámbito jurídico, de realizar actos con consecuencias jurídicas y de entablar relaciones jurídicas. A continuación, se examinan diversas teorías de la personalidad jurídica y, por último, se presenta brevemente una propuesta para ampliar el rígido dualismo “personas-cosas” (introduciendo una tercera categoría conceptual de entidades jurídicas).

El objeto central de esta investigación, examinado en la segunda parte, es la cancelación (Eng. *Erase*). Esta figura fue puesta en práctica en 1992 por Eslovenia, tras su separación de la RFSY, al cancelar administrativamente a aproximadamente unas 25.000 personas del registro de residentes permanentes. La cancelación, que afectó a los residentes no eslovenos que no deseaban (o no podían) obtener la ciudadanía eslovena, dejó a los afectados sin derechos políticos, sociales y económicos en Eslovenia, en una condición mejor descrita como la ausencia total de derechos (Eng. *rightlessness*). Se proporciona una reconstrucción de las fuentes jurídicas pertinentes (declaraciones oficiales, actos constitucionales, legislación etc.) que fundamentaron y proporcionaron el marco jurídico de la cancelación y se argumenta que el orden constitucional esloveno está permeado por un componente nacionalista. Esta cualidad distintiva del orden jurídico constituyó un elemento central de la cancelación. A partir de ello, se examinan las consecuencias de la cancelación para la condición jurídica de los afectados en general y para su condición de personas jurídicas en concreto.

En la tercera parte, someto las fuentes jurídicas mencionadas a un análisis bajo los criterios de la legalidad formal (Eng. *formal Rule of Law*), tal como fue propuesto por primera vez por Lon Fuller. Se presta especial atención a la condición de congruencia y, más generalmente, a los principios organizativos y operativos subyacentes al trabajo de los órganos administrativos de Estado. Se demuestra que los actos jurídicos pertinentes en el caso analizado se produjeron violando la mayoría de las exigencias de la legalidad formal, como la generalidad, la publicidad, la prospectividad, entre otros. Por otro lado, las acciones de los órganos administrativos estaban perfectamente alineadas con los requerimientos de los órganos superiores – los funcionarios administrativos siguieron al pie de la letra las órdenes secretas internas de sus superiores, sin expresar ninguna duda en cuanto a su legalidad. Fue esta ciega actitud lo que hizo a la cancelación una operación tan eficiente.

El análisis realizado no nos permite concluir que la personalidad jurídica puede ser privada *in toto*. Sin embargo, el caso examinado demuestra que la personalidad jurídica puede ser manipulada, v. gr. limitada, disminuida, vaciada, etc. En esta tesis se han expuesto fuentes y métodos jurídicos diferentes que permiten privar a los seres humanos (deliberadamente o no, directamente o indirectamente) de los varios elementos de la personalidad jurídica. Los análisis de otros ejemplos pueden revelar otros métodos para privar la personalidad jurídica y crear diferentes tipos de semi-personas jurídicas (quimeras legales). Esta tesis apunta a la posibilidad de emplear las mismas herramientas analíticas para el estudio de otros casos históricos y contemporáneos de exclusión jurídica. Se cree que un análisis comparativo de varios casos traería a la superficie algunas características comunes de todas las exclusiones jurídica, pasadas y presentes.

Esta tesis muestra que el aspecto del derecho responsable en conferir estatus jurídicos y crear personas jurídicas, tiene un lado oscuro: el derecho también puede ser utilizado para la privación de estatus y para la manipulación de la personalidad jurídica. Si bien la exclusión jurídica es parte de la naturaleza del derecho, se pueden evitar casos particulares de ella o, al menos, mitigarse si se presta más atención a la calidad del proceso legislativo y a la forma de aplicación por los órganos competentes.

Palabras claves

Exclusionismo jurídico, estatus jurídico, personalidad jurídica, Rule of Law, Cancelación

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