Law in the Spirit of our Age: Between Modernity and Postmodernity?

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The paper examines the epistemic position of the subject of law *vis-à-vis* modernity, postmodernity and the related themes of modernism and postmodernism, taking Western jurisprudence as the analytical paradigm. Western jurisprudence is given a wider meaning, especially through the formalist devices thereof, as these have spread all over the globe in one way or another. Furthermore, inductive exemplification of the matter is achieved through referral to certain provisions of the Latvian Civil Code on the occasion of the presentation of this paper in the 73rd Scientific Conference of the University of Latvia in February 2015. Beyond this, drawing on wider theoretical matter from Western jurisprudence, the analysis concludes with a finding, which suggests that the epistemic position of law seems to maintain its largely modernist core still (albeit not without postmodernist challenge and/or benefit to the subject's modernist credentials).

Keywords: law, modernity, modernism, postmodernity, postmodernism, Western jurisprudence.

Content

> [Riggan]: 'That's just labels. Marginality... You kidding me? Sounds like you need penicillin to clear that up. That's a label. That's all labels. You just label everything. [..] You just... [..]. You know what this is? You even know what that is? You don't. You know why? Because you can't see this thing if you don't have to label it. You mistake all those little noises in your head for true knowledge.
>
> [Tabitha]: Are you finished?
>
> [Riggan]: 'No! I'm not finished! There's nothing here about technique! There's nothing in here about structure! There's nothing in here about intentions!'[1]

1. Introduction

Lawyers would almost always show a preference to a world of rules over a world of chaos. A world of objectivity would almost invariably be preferred over a world of subjectivity.[2] Yet, even beyond law, most of us, in a choice between a world of chaos and a world of order, would probably aspire to a world of order. Yet, we all live in a rather chaotic world. The paper posits that law represents to this day the last bastion of modernity within theoretical disciplines, even if the postmodern challenge may be more real than apparent within the discipline. It is, therefore, the purpose of this paper to maintain that law still preserves its intellectual modernist core intact (albeit not without postmodern exception in the periphery of our subject).

The paper is divided into the following analytical segments: firstly, it addresses the question of modernity and postmodernity (taking into account the affiliated concepts of postmodernism and modernism); secondly, it critically evaluates certain paradigms of modern and postmodern manifestations of contemporary law (as the case may be); in the third part, it exemplifies the matter by taking the experience of the Latvian Civil Code into account and by offering the reader an inductive analysis as to the fact that our law in the West might still predominantly aspire to modernity rather than to postmodernity. Finally, in the concluding part of this analysis, the question as to whether law in the West presents itself as a largely modernist paradigm in its ideological fundamentals is briefly addressed.

2. Western Jurisprudence as our Analytical Paradigm

Western jurisprudence is chosen as the analytical paradigm of our analysis. Aside from the fact that Western law happens to be the leading legal paradigm in the world, this is also a choice, which has to do with the research interests of the author. So, too, one is reminded that the legal West has escaped the rather narrow confines of Europe's and North America's legal systems. The 'West' in legal terms (e.g., in the formal element of the matter) can, therefore, be said to include the

[1] *Birdman (Or the Unexpected Virtue of Ignorance*), 2014.

[2] *Feldman, S. M.* An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship. *Vanderbilt Law Review*, 2001, 54, p. 2355.

formal structures of such jurisdictions as Japan,[3] Israel,[4] Russia,[5] India[6] and Turkey[7] amongst other legal systems around the world. It is a different question, however, and, admittedly, one, which will not have to be addressed herein, whether or not the systems referred to above are wholly Western or not. The point remains: Western law has been embraced beyond the West and, as such, it is deemed appropriate that this will be our analytical guide herein for reasons of practicality.

3. Modern *vs* Postmodern

The analysis will initially proceed with an examination of the modern and the postmodern. The first remark to be made is that, whilst law is still a predominantly modernist realm, it is the ethos of postmodernism, which defines today's culture.[8] A word of caution must be offered at this stage: modernity's 'death' might have been somewhat exaggerated with the advent of postmodernity.[9] Beyond this, except for a clash of ideologies in the subject area (see the clash between modernity and postmodernity), there is also considerable rhetoric, which is otherwise not of a great significance. For better or worse, '[p]ostmodernism has been [..] tamed and safely integrated into the current social order'[10]. Furthermore, despite decisive victories of postmodernism in the theoretical disciplines (e.g., see the victories of postmodernism in literature studies, historical studies and social theory), the war between postmodernism and modernism has not been fully decided in the realm of law: law seems to remain on the modernist side of things. With these remarks in mind, one would wish to expound on the matter, that is, through examination of the themes of modernity, postmodernity, modernism and postmodernism in greater detail.

Modernity's beginnings are ambiguous. Yet, they are not all too uncertain. There are many candidates here; the most obvious nominees as to the conventional beginning of modernity are the following: the invention of the printing press by Gutenberg (1440), the fall of Constantinople to the Ottomans (1453), the Columbian discovery of America (1492), Luther's publication of his Ninety-Five Theses (1517) and the creation of the East Indian Company (1600) to state the historically obvious.

[3] On Japanese law, see, e.g., *Harding, R. L., Platsas, A. E.* Japan as a Postmodern Legal Reality. *University of Miami International and Comparative Law Review,* 2013, 21 (1), pp. 1–30.

[4] On Israeli law, see, e.g., *Platsas, A. E.* The Enigmatic but Unique Nature of the Israeli Legal System. *Potchefstroom Electronic Journal*, 2012, 15 (3), p. 17; reproduced as *Platsas, A. E.* The Enigmatic but Unique Nature of the Israeli Legal System. *European Journal of Comparative Law and Governance,* DOI 10.1163/22134514-45060, 2013. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164253 [last viewed 27.03.2015].

[5] On Russian law, see, e.g., *Maggs, P. B.* The Process of Codification in Russia: Lessons Learnt from the Uniform Commercial Code. *McGill Law Journal*, 1999, 44, p. 288, Maggs concentrating on the symbolic value of the Civil Code of the Russian Federation as a free-market economic constitution.

[6] On Indian law, see, e.g., *Baxi, U.* The Colonialist Heritage (in: *Legrand, P., Munday, P.* (eds.). Comparative Legal Studies: Traditions and Transitions. Cambridge University Press, 2003, pp. 53, 75). It is noted, that Baxi refers to Indian law's colonialist past and postcolonialist present in the wider context of comparative law.

[7] On Turkish law, see, e.g., *Ansay, T., Wallace, D.* (eds.). Introduction to Turkish Law. 5th edition, Kluwer Law International, 2005, p. 9.

[8] *Feldman, S. M.* An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship. *Vanderbilt Law Review*, 2001, 54, p. 2370.

[9] *Lendino, T. M.* From *Rosenberger* to *Martinez*: Why the Rise of Hyper-Modernism is a Bad Thing for Religious Freedom. *Campbell Law* Review, 2010–2011, 33, p. 699 (citing *Smith, J. K. A.* Introducing Radical Orthodoxy: Mapping a Post-Secular Theology. Baker Academic, 2004, pp. 31–32).

[10] *Lizardo, O., Strana, M.* Postmodernism and Globalization. *ProtoSociology*, 2009, 26, p. 37.

Conventionally, we could therefore argue that modernity might have commenced sometime between the 15th and the 16th century.[11] Renaissance may be perceived as the beginning of modernity, the Age of Enlightenment being the age of maturity of modernity, modernity's movements operating and continuing to operate well into the 19th and the 20th century. Part and parcel of modernity's agenda have been 'cultural rationalization, nation-state formation, industrialization and democratization'.[12] This is the age of the fall of the old Gods.[13] The pursuit for reason is the actual denominator of modernity. Reason is modernity's religion. Amoralism is its godparent. Actual religion is effectively sidelined. Thus, '[t]he separation of church and state is arguably the crown jewel of modernity's Enlightenment.[14] God, if and when accepted, is a *rational*[15] creator.[16] Modernity, as an era, is, therefore, one, which is driven and characterised by the pursuit of perfect reason, a reason free from moralist considerations. However, the above operate in the sphere of the ideal abstract version of modernity.[17] Beyond this, it is noted that one may nowadays speak of multiple modernities in addition to the fact that the perception of these modernities ought to be one, which gives recognition to the mixed and composite character thereof.[18] It has been also observed that the plurality of modernities may, in turn, be a phenomenon, which is multilayered, thereby allowing different societies to preserve different elements of a shared transnational modernity.[19] This reality does not exclude either convergence or overlap.[20] The latter make for an interesting thesis in that they give recognition to a plurality of modernities in addition to the recognition of a transnational modernity. As such, modernity as an abstract ideal seems to differ from the more practical manifestations of this era.

The analysis will now turn from modernity to the related concept of modernism. Modernism is, of course, the movement, which flourished within modernity.

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[11] Others have supported the idea that modernity began already in the 6th century stretching into its second phase from about the 13th century only for a new period of modernity to commence in the late 18th century and still continuing: *Schabert, T.* A Note on Modernity. *Political Theory,* 1979, 7, p. 125. It is noted, however, that aside from the fact that this thesis omits from its analysis the European Dark Ages, it also omits postmodernity altogether. Patterson suggests that modernity commenced sometime between the 17th and 18th century: *Patterson, D.* From Postmodernity to Law and Truth. *Harvard Journal of Law & Public Policy*, 2003. 26, p. 50, citing *Toulmin, S.* Cosmopolis: The Hidden Agenda of Modernity, The University of Chicago Press, 1990, pp. 198–201. Sabău argued recently in favour of a 16th to 17th century commencement of modernity: *Sabău, G.* Religion and Modernity. Instruments of Ideologizing the Religious Discourse. *Cogito Multidisciplinary Research Journal*, 2012. 4, p. 114.

[12] *Delanty, G.* The University and Modernity: A History of the Present (in: *Robins, K., Webster, F.* (eds.). Virtual University?: Knowledge, Markets, and Management. Oxford University Press, 2002, p. 39 as referred to in *Dam, S.* Unburdening the Constitution: What has the Indian Constitution Got to Do with Private Universities, Modernity and Nation-States? *Singapore Journal of Legal Studies,* 2006, p. 135.

[13] E.g. 'Dead are all gods': *Del Caro, A., Pippin, R. B.* (eds.). Nietzsche, Thus Spoke Zarathustra (*Del Caro, A.* transl., Cambridge University Press, 2006), p. 59.

[14] *Baker, H.* Competing Orthodoxies in the Public Square: Postmodernism's Effect on Church-State Separation. *Journal of Law and Religion*, 2004–2005, 20, p. 99.

[15] Emphasis added.

[16] *Baker, H.* Competing Orthodoxies in the Public Square: Postmodernism's Effect on Church-State Separation. *Journal of Law and Religion*, 2004–2005, 20, p. 99.

[17] *Nederveen Pieterse, J.* Multipolarity Means Thinking Plural: Modernities. *ProtoSociology,* 2009, 26, pp. 21–25.

[18] Ibid.

[19] Ibid., pp. 25–27.

[20] Ibid., p. 25.

Modernist projects are lesser movements, which emanated from and within modernity. Intellectual epistemic escorts to modernism are rationalism, objectivism, individualism, economic liberalism, capitalism and constitutionalism. The embracing nature of modernism, such a nature being denominated by the pursuit of reason, meant that there has been a certain wide range of schools of thought, which can be incorporated therein. Communism is a modernist creation. So is economic liberalism. Marxism is a modernist creation. So is early capitalism (as opposed to the late capitalism of postmodernism). Yet, even at the level of individual scholars, there have been personalities, which embraced a skeptical version of modernism based on the firm belief that the rediscovery of tradition could result in uncovering and the preservation of certain positive aspects of the past.[21] In this sense, the example of Arendt could be seen as a rather illustrative example of a critical modernist.[22] Other than that, modernism opposed traditional religion. Take for instance, Nietzsche, one of the fathers of modernist postmodernism.[23] A world of darkness[24] on the death of the old Gods but also a world of light[25] is what the dawn of a new modernism signified according to him. In any case, modernism came with the death of the old and with a certain degree of optimism for the abilities of the human being. Universities embraced modernism. Modernism seems to have been close to everywhere in Academy.

Let us now briefly turn to postmodernity. Overall, postmodernity has effectively grown in the 20th century. It coincides with the rise of the working classes around the world,[26] this being the era, which signified also the rise of consumerism. In addition, postmodernity may be perceived to be the era of nihilism. The era of postmodernity is one, which came with a culture of images[27] (as opposed to the culture of reason represented by the various modernities). *A*reason is the religion of postmodernity.

Modernity's relationship with postmodernity is particularly complex. It should suffice here to mention that there can be three (3) perceptions of the matter: the first, modernity is the predecessor of postmodernity (linearity thesis), the second, modernity is the flip-side of postmodernity and *vice-versa* (Janus face thesis) and the third, postmodernity is nothing but a radicalised[28] form of modernity (intensification thesis). In any case, the two concepts seem to be intertwined in that they centre in or move out from the same theoretical core; as Baker put it: "[i]f modernity is a dandelion with willowy fibers clustered around a fixed center (such as God or reason), postmodernity is the same dandelion having been blown

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21 *Antaki, M.* The Critical Modernism of Hannah Arendt. *Theoretical Inquiries in Law*, 2007, 8, p. 275.

22 Ibid., p. 251.

23 E.g., *Pippin, R. B.* Nietzsche and the Origin of the Idea of Modernism. *Inquiry: An Interdisciplinary Journal of Philosophy,* 1983, 26, p. 151; *Gooding-Williams, R.* Nietzsche's Pursuit of Modernism *New German Critique,* 1987, No. 41, p. 95.

24 *Fitzpatrick, P.* Legal Theology: Law, Modernity and the Sacred. *Seattle University Law Review*, 2008–2009, 32, p. 338, citing *Williams, B.* (ed.). Nietzsche, The Gay Science (*Nauckhoffr, J.* Cambridge University Press, 2001, p. 199).

25 Ibid.

26 *Toynbee, A.* A Study of History. Vol. 8, Oxford University Press, 1954, p. 338.

27 *Ciochină, R.* Communicating Postmodernity. *Contemporary Readings in Law and Social Justice*, 2013, 5, p. 939.

28 *Lendino, T. M.* From Rosenberger to Martinez: Why the Rise of Hyper-Modernism is a Bad Thing for Religious Freedom. *Campbell Law Review,* 2010–2011, 33, p. 708.

by a sudden gust of wind."[29] However, there are stark differences between these two worlds. The discipline of architecture is perhaps the discipline wherein the differences between modernity and postmodernity are most apparent. Thus, one could draw an analogy and claim that the divergence between modernist architecture (see, e.g., the *Narkomfin* building in Moscow) and postmodernist architecture (see, e.g., the Guggenheim Museum in Bilbao) are the clearest examples of these largely divergent worlds. These divergences are echoed in theory, too. After all, reason and *a*reason are readily apparent in the relevant theoretical discourses (as they are in postmodern and modern architecture).

Postmodernism is, of course, the very manifestation of postmodernity. If postmodernity is the era of aggressive epistemic pessimism and deconstructionism, postmodernism is aggressive epistemic pessimism and deconstructionism. As an epistemic term, we seem to first come across the word 'postmodernism' in the 1930s.[30] Naturally, this phenomenon is nowhere near uniform or coherent:[31] it has actually come to mean so many different things to so many different people that it may well mean almost anything to almost anyone. Nor its subdivisions, endemically found around the world, come with any degree of uniformity: the British, the French, the American and the German traditions of postmodern social theory are not quite exactly identical.[32] However, there seem to be two facets of postmodernism: the ideological facet and the cultural facet. These two facets feed into one another. Postmodernism opposes the West.[33] This is a movement, which emanated from the political left only to be embraced by the extreme political right. Postmodernism is, for instance, incorporative of fascism (even though the latter is not a synonym to the former). Nonetheless, the fascist ideals of social constructivism, cultural determinism and moral relativism are all in principle compatible with postmodernism. Thus, political postmodernism acts as a sort of peculiar political alliance of frustrated nihilist deconstructionist left-wingers and traditionalist neo-fascist right-wingers in that the former aspire to critique for the sake of critique, whilst the latter wish to constantly take advantage of postmodernism's sophistic agenda. Intellectual epistemic escorts to postmodernism are nihilism, deconstructionism, consumerism, materialism, relativism and simulationism. Theoretical disciplines suffered (or benefited depending on one's perspective) the most from the rise of postmodernism. The typical example here is that of the discipline of history: according to postmodernism there is no such thing as a single version of history, as historical meaning has always been "unstable,

[29] *Baker, H.* Competing Orthodoxies in the Public Square: Postmodernism's Effect on Church-State Separation. *Journal of Law and Religion*, 2004–2005, 20, p. 101.

[30] *Anderson, P.* The Origins of Postmodernity (verso 1998) p. 4, stating that it was Federico de Onis, who seems to have been the first person to have used the term of postmodernism in 1934 in his *Antologia de la Poesia Española e Hispanoamericana* (1882–1932).

[31] *Murphy, T.* Postmodernism: Legal Theory, Legal Education and the Future. *International Journal of the Legal Profession*, 2000, 7, p. 363.

[32] *Lizardo, O., Strana, M.* Postmodernism and Globalization. *ProtoSociology,* 2009, 26, pp. 38–60.

[33] *Moran, J. P.* Postmodernism's Misguided Place in Legal Scholarship: Chaos Theory, Deconstruction, and Some Insights from Thomas Pynchon's Fiction. *Southern California Interdisciplinary Law Journal*, 1997–1998, p. 159; *Caudill, D. S.* Arthur M. Goldberg Family Chair Lecture: Augustine and Calvin: Post-Modernism and Pluralism. *Villanova Law Review,* 2006, 51, p. 300; Cf. *Feldman, S. M.* An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship. *Vanderbilt Law Review*, 2001, 54, p. 2357.

contextual, relational, and provisional".[34] Accordingly, a political 'spin doctor' would not differ much from a postmodern historian, as for postmodernism there are several different versions of history: thus, postmodernism has simply opened Pandora's Box in the theoretical disciplines. To exemplify this, in the field of aesthetics, for instance, postmodernism, whilst not being a synonym term to kitsch, makes allowance for kitsch as a form of art. A wide number of disciplines today are affected by postmodernism. Postmodernism is everywhere.

Indeed, the clash between the forces of modernism and postmodernism has to do with the very preservation or demolition of the icon of perfect order and reason, which characterised modernity. The iconophiles (the modernists) wish to preserve this icon. The iconoclasts (the postmodernists) wish to destroy this image of the world. An excellent point previously raised is that we have now reached the stage wherein globalisation and postmodernism are indistinguishable from one another.[35] However, there is a continuity between modernist and postmodernism: *freedom*.[36] It is just that freedom for the modernists is one based on reason, whilst freedom for the postmodernists is based on tolerance and pluralism.

4. Legal Modern *vs* Legal Postmodern

Law remains modernist in its fundamental core. The most serious challenge to the modernist credentials of law to date has emanated from the critical legal studies movement (and, to a lesser extent from post-colonialist rhetoric and discourses). Beyond this, in the Western world, it is probably the French legal system, which seems to aspire to the greatest of extents to the very idea of legal modernity (see e.g. the trust of the Revolutionary Regime in law's self-sufficient effectiveness to the point that French judges were effectively forbidden to interpret the law through the *référé legislatif* in 1790 and for a certain period of time;[37] the double package of secularist legislation in 2004[38] and 2010[39] on the banning of religious symbols and the banning of concealment of the face, respectively, in addition to the 1905 Law on the Separation of Church from State[40]). Thus, it is France, through the medium of secularism, which amongst Western legal systems comes closest to the truths of legal modernity. Let us be permitted to propose that the legal secularism of France is a pro-active one; consequently, one would observe an active adherence of legal France to modernism (as opposed to the passive sort of adherence to the movement, which one might be able to identify in other Western legal systems). Yet, quite remarkably, it is also France – the country, where ideological postmodernism seems to have flourished the most. Germany, on the other hand, seems to have reverted to legal modernity with the fall of the Nazi regime, having recognised its postmodern

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[34] *Ciochină, R.* Communicating Postmodernity. *Contemporary Readings in Law and Social Justice*, 2013, 5, p. 933.

[35] *Lizardo, O., Strana, M.* Postmodernism and Globalization. *ProtoSociology*, 2009, 26, p. 61.

[36] *Lendino, T. M.* In Rosenberger to Martinez: Why the Rise of Hyper-Modernism is a Bad Thing for Religious Freedom. *Campbell Law Review*, 2010–2011, 33, p. 708.

[37] *Fitzpatrick, P.* "What Are the Gods to Us Now?": Secular Theology and the Modernity of Law. *Theoretical Inquiries in Law*, 2007, 8, pp. 165–166, citing *Stone, J.* Legal System and Lawyers' Reasonings. Stanford University Press, 1967, p. 213. Cf. the *référé legislatif* in 1790 with Article 4 of the French Civil Code 1804.

[38] Loi n° 2004-228 of 15 March 2004.

[39] Loi n° 2010-1192 of 11 October 2010.

[40] Loi of 9 December 1905.

legal past.[41] Moving on with our analysis into the wider legal West, we also observe that the rise of modernity in the Western legal sphere signified the full integration of individuality in human affairs: to be more precise, modernity first gave full regard to individuality as part and parcel of the human condition.[42] Individuality was, of course, recognised before modernity but modernity has integrated within its ideological fundamentals the respect for the individual.[43] Legal modernity was and still is anthropocentric. It has achieved the re-alignment of humanity's axis from theocentrism to anthropocentrism. In legal modernity, the individual remains the centre of one's analysis.

Perhaps an attempt to define legal modernity could be reduced into the following: modernity is the era, which seeks to achieve freedom for the individual through reason. Reason liberates. Freedom is the ultimate call of modernity in that the legal subject acts (or is expected to act) on reason. So are the very laws of the respective subjects of modernity. Modernist law, based on reason, guarantees the freedom of the subjects to such a law. As Coyle has remarked: "[l]aw is then the essence of laissez faire, in that it operates to protect the fabric of tradition and habit from the forces of modification and rule [..]."[44] Legal modernity's individuals are given full recognition of their civil and human rights. Yet, the man of modernity is not simply a man seeking freedom, based on legal reason. The modernist person is also a *homo economicus*, a rational unit in the sphere of economics. Accordingly, as in classical economics, the specific benefit of the individual, in modernist law, must amount to the overall benefit of individuals, these being the recipients as well as the authors of such a law.

The legal West is predominantly modernist. The following nouns seem to this day to define most of the things we do in law in the West: secularism, formalism, legalism, rationalism, positivism. Pretending otherwise should not lead us to any valid observations. Accordingly, one cannot pretend that in the West any given religious dogma signifies the law (even if this statement comes with certain qualifications in countries wherein God or a certain religious dogma are recognised a certain spiritual primacy[45]). In *Christian Legal Society v Martinez,*[46] for instance, the US Supreme Court rejected the position of an American university student organisation effectively excluding homosexual students from membership, as such students would not necessarily subscribe to the student organisation's 'Statement of Beliefs', thereby refraining from certain proscribed behaviour. Furthermore, the position of the student organisation was against the university's rules of non-exclusion in matters of the kind. The Supreme Court found itself having to choose between two offspring of modernity: secularism and classic liberalism. Refraining from the classic liberal position,[47] the court preferred a more regulated analytical model of liberalism, despite the fact that it rejected the idea that the particular organisation was excluding university students based on sexual orientation *per se*,

41 *Lizardo, O., Strana, M.* Postmodernism and Globalization. *ProtoSociology*, 2009, 26, p. 46.
42 *Coyle, S.* Legalism and Modernity. *Australian Journal of Legal Philosophy*, 2010, 35, p. 58.
43 Ibid.
44 *Coyle, S.* Legalism and Modernity. *Australian Journal of Legal Philosophy*, 2010. 35, p. 80.
45 References to divinity and/or a prevalent religion are clearly made e.g. in the Preamble to the German Basic Law, in the Quasi-Preamble to the Greek Constitution (as well as Article 3 thereof), in Article 62 of the Icelandic Constitution, and so on, and so forth.
46 561 U.S. 661 (2010).
47 *Lendino, T. M.* From Rosenberger to Martinez: Why the Rise of Hyper-Modernism is a Bad Thing for Religious Freedom. *Campbell Law Review*, 2010–2011, 33, p. 720.

when the organisation in question actually and indirectly did so by promoting the idea of freedom of religion. Thus, taking a highly secularist (as opposed to a classically liberal) approach, the court found that the particular organisation could not exclude students who would not follow its statement of beliefs. It was also concluded, that the university's non-exclusionary rules did not go against the letter and the spirit of the First Amendment to the US Constitution. Taking what one would could call a hypermodernist approach in the matter,[48] the US Supreme Court effectively endorsed and accepted a secularist position, which would actually proceed as far as disallowing a Christian youth club to operate the way they wished in matters relating to the ethos of their organisation. However, even Constitutions, which give primacy to a given religion or give recognition to the divine, ensure that freedom of religion remains an absolute fundamental.[49] In relation to this point, one could not deny either the fact that in the West the influence of legal modernism has resulted in constitutionalism becoming a sort of a new religion in legal terms. Nor could one deny that the rule of law in the West seems to operate "on positivist assumptions about the certain and objective application of legal rules [..]."[50] Close to the West's affection and fidelity to constitutionalism and positivism, legalism, too, has been, within the modern imagination, as Coyle notes, "a means of comprehending the predicament and actions of the individual."[51] Nevertheless, observation points also to the circumstance that, even in Western law, postmodernist discourses become ever more prevalent, if not more relevant.

Beyond this, despite the fact that the analysis concentrates on the realities of the West, it has to be stressed that beyond the West the situation is even more complex. Hence, it would seem that a number of Asian and African legal systems operate closer to the postmodern legal circle despite the formal modernist structures thereof. Take, for instance, India. A highly modernist legal elite and profession there are at odds with a predominantly Hindu-law aspiring society (especially beyond the urban and legal centres of India). Indian law must, therefore, result in a postmodern legal reality as a whole, despite its modernist outlook in formal legal terms.

Moreover, the connotations of legal postmodernism might be greater than what one might consider them to be. Legal rhetoric aside, the legal postmodern has now entered the legal modern. It is as if the core of modernity somewhat erodes in the face of postmodern legal practice. For example, private-public partnerships, which otherwise signify a break-away from the modernist division of law between public law and private spheres, or, more interestingly, the precautionary principle[52] in Europe and the USA and, of course, legal phenomena such as the very diminution of the welfare state:[53] these seem to be postmodernist twists in our predominantly modernist Western and Western-oriented law. Postmodernism opposes the distinction between the public and the private sphere as 'incoherent

[48] *Lendino, T. M.* From Rosenberger to Martinez: Why the Rise of Hyper-Modernism is a Bad Thing for Religious Freedom. *Campbell Law Review*, 2010–2011, 33, p. 699.

[49] E.g., Art 1 of the French Constitution; Arts 3 and 4 of the German Basic Law; Art 13 of the Greek Constitution; Arts 63, 64 and 65 of the Icelandic Constitution and First Amendment to the US Constitution.

[50] *Manderson, D.* Modernism, Polarity, and the Rule of Law. *Yale Journal of Law & the Humanities*, 2010, 24, pp. 477–478.

[51] *Coyle, S.* Legalism and Modernity. *Australian Journal of Legal Philosophy*, 2010, 35, p. 58.

[52] *Bergkamp, L., Kogan, L.* Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership. *European Journal of Risk Regulation*, 2013, (4), pp. 499, 501.

[53] *Edgeworth, B.* Law, Modernity, Postmodernity (*Ashgate*, 2003), p. 134.

and destructive',[54] as it opposes and threatens the pure application of the rule of law.[55] This new legal world of hybrid models departing from purism comes close to the postmodern legal paradigm. Aside from the above practical examples, the ideological division of legal postmodernism and legal modernism can be exposed in a figure such as the following one:

Legal Modernism	**Legal Postmodernism**
Order	Disorder
System	Chaos
Discipline	Lack of Discipline
Verticality	Lack of Verticality
Horizontality	Lack of Horizontality
Perfect Lines	Absence of Lines
Reason	*A*reason
Purism	Hybridism

Figure

On the other hand, despite the fact that the episteme of law still seems to largely resist the postmodern, theoretical postmodernism has much to offer in law. Almost any lawyer would actually be able to suggest that, to perfect one's vocation, or indeed one's thesis, one needs a Devil's advocate. Our Devil's advocate in modernist law is nothing else but postmodernism. Many of the things that frustrate us in law, are actually readily revealed to us by the legal postmoderns. As always, in law (as in life) one ought to attempt to seek positivity within negativity. Suppose then, that postmodernism represents nothing but 'the mother of all evil' in our modernist subject, law, ought we to proceed in our analysis by discarding all postmodernist discourses as devoid of any substance? Ought we to close our eyes to the variable interpretations, which postmodernism may offer to the effect of the re-invigoration of certain segments of our – again – largely modernist subject? It is opined that postmodernism has much to offer to our subject but not necessarily for the reasons, which legal postmoderns themselves readily offer. Rather the benefit of postmodernism may arise out of the fact that the postmodern dissenters to modernist legal orthodoxy must be offered the benefit of the doubt in order for them to actually identify the flaws of modernism. Our postmodern legal colleagues must, therefore, be offered the benefit of epistemic doubt for the benefit of the episteme of law. It is also posited that there are, in such a multiferous movement as legal postmodernism, a more beneficial high postmodernist stream and a less beneficial low postmodernist stream. The latter is probably of little use to any of us in law, as it is outright nihilist in its fundamentals. However, the former might actually prove quite beneficial in that it is more skeptical to the legal modernist thesis, which, arguably, is not quite exactly a flawless one (to put it mildly). For instance, one of

[54] *McConnell, M. W.* "God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age. *Brigham Young University Law Review*, 1993, p. 183.

[55] *Manderson, D.* Modernism, Polarity, and the Rule of Law. *Yale Journal of Law & the Humanities*, 2012, 24, p. 481 (citing *Tamanaha, B.* Law as a Means to an End: Threat to the Rule of Law. Cambridge University Press, 2006, p. 236).

the major drawbacks of Western-driven modernity, which the postmodern thesis seems to identify, has been the fact that Western narratives relating to a linear sense of modernity have been guilty of neglecting non-Western ethos.[56] At this point, one notes Feldman's division of postmodernism into meta-modernism and anti-modernism.[57] Such a division comes close to our division between high and low postmodernism respectively, but actually fails to address the importance of these two versions of the postmodern movement in practical terms. Perhaps Feldman's affection to postmodernism would not allow him to discard the antimodernist sub-division thereof as rather superfluous and peculiar, even though he admits that the particular branch of postmodernism is radically relativistic,[58] it causing 'the ire of so many modernist critics'.[59] Despite this, one is of the view that the frank points of legal postmodern discourses might actually improve the flaws of legal modernism. The critiques of high postmodernism against modernism may actually be re-invigorating to modernist law.

It is noted, however, that postmodern colleagues often blur their vision with certain 'pomobabble'[60] (to use a rather postmodern legal term), whilst at other times their viewpoints are nothing but deconstructionist.[61] These are by far the two greatest academic sins committed by postmodernists and legal postmodernists alike. However, as stated, it is important for legal scholars to constructively use certain of postmodernism's arguments. The typical example here would be the so-called 'anti-humanist' spirit of legal postmodernism.[62] As Murphy reminds us, legal postmodernists generally reject the idea of universal human rights or the human values behind the idea of liberalism.[63] It will not be argued herein whether universal human rights are a fact of life or not. Nor will it be argued whether relativist and culturalist understandings of human rights law present us with a superior form of legal analysis in the subject area. The question here would be whether the epistemic pessimism of legal postmodernism has defined the subject of law, e.g., in human rights law. One is of the view that, whilst human rights discourses relating to relativism and universalism are certainly part and parcel of academic law discourses,[64] the pessimistic spirit of legal postmodernists in the area

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[56] *Singh, P.* Colonised's Madness, Colonisers' Modernity and International Law: Mythological Materialism in the East-West *Telos*. *Journal of East Asia and International Law*, 2010, 3, p. 89.

[57] *Feldman, S. M.* An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship. *Vanderbilt Law Review*, 2001, 54, pp. 2373–2374.

[58] *Feldman, S. M.* An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship. *Vanderbilt Law Review*, 2001, 54, pp. 2373–2374.

[59] *Feldman, S. M.* An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship. *Vanderbilt Law Review*, 2001, 54, p. 2374.

[60] For an intriguing analysis in the matter, see: *Arrow, D. W.* Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated. *Michigan Law Review*, 1997–1998, 96, p. 461; also, *Dibadj, R.* Postmodernism, Representation, Law. *University of Hawai'I Law Review,* 2006–2007, 29, pp. 383–386.

[61] *Patterson, D.* From Postmodernity to Law and Truth. *Harvard Journal of Law & Public Policy,* 2003, 26, p. 64; *Dibadj, R.* Postmodernism, Representation, Law. *University of Hawai'I Law Review*, 2006–2007, 29, pp. 386–389.

[62] *Murphy, T.* Postmodernism: Legal Theory, Legal Education and the Future. *International Journal of the Legal Profession*, 2000, 7, p. 367.

[63] Ibid.

[64] E.g., *Maduagwu, M. O.* Ethical Relativism Versus Human Rights. International Progress Organization/ Third World Centre for Research and Publishing, 1987; *Dundes Renteln, A.* International Human Rights: Universalism versus Relativism. Sage Publications, 1990; *Corradetti, C.* Relativism and Human Rights: A Theory of Pluralistic Universalism. Springer, 2009.

has not quite exactly defined human rights law analyses. Academic law thrives on critical viewpoints but not necessarily on nihilistic deconstructionism. Thus, while full recognition is afforded to postmodern narratives and discourses in law, these do not seem to have had considerable impact on the subject. Of concern in postmodern legal rhetoric is the fact that in the name of postmodernism a new reality might be presented as an ideal reality.[65] On the other hand, whilst the author would not necessarily come to the defense of postmodern discourses, it is noted that the wide-ranging nature of the postmodernist movement may have been used to justify that, which cannot be reasonably justified. Equally, legal postmodernism seems to have been used as a sort of academic scapegoat by its opponents. Is it also noted that legal postmodern scholars do not necessarily wish to permanently reverse privileging in given matters;[66] instead it has been suggested that their efforts are geared towards identifying and pinpointing the very 'instability and contingency of the usual privileging'.[67] Arguably, this manifestation of postmodernism relates to what has been taxonomised herein as high postmodernism. This being the case, one can only presume that the close-to-endemic opposition of modernist scholars to legal postmodernism has to do with the shortfalls of low postmodernism, which caused considerable harm not only to the subject of law but also to high postmodernism itself. High legal postmodernism has clearly been a victim of low legal postmodernism.

Furthermore, the demarcation between legal modernity and legal postmodernity (indeed the demarcation between legal modernism and legal postmodernism) is not always clear. Take, for instance, Feldman's claim that 'postmodernists argue that normative scholarship is misleadingly out-of-touch with social reality'.[68] One does not have to be a postmodern though to argue the very same thing. Tons of ink have been spent in legal academia ever since, and all because of the rise of legal modernism in arguing and proving the same point. One does not, therefore, need to be a postmodern scholar to criticise the shortfalls of normative scholarship. Thus, one of the main issues in postmodern legal discourse is that legal postmoderns often enter the intellectual fields of others only for them to claim these fields as their own. Academic trespassing might be then another obvious shortfall of legal postmodernism. In addition, whilst it would be fair to state that postmoderns are not the only ones to criticise the shortfalls of normative scholarship, misunderstandings occur because of the epistemic positioning of legal postmodernism in the discipline.

The divisions between legal moderns and legal postmoderns run deep in any case. Take, for example, the binary type of thinking of moderns as compared to the *a*binary type of thinking of postmoderns. In a legal area, according to legal modernism, there will be either objective knowledge or subjective knowledge. The postmoderns proceed beyond objectivity and subjectivity, while the moderns imply

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[65] *Murphy, T.* Postmodernism: Legal Theory, Legal Education and the Future. *International Journal of the Legal Profession*, 2007, 7, p. 370.

[66] *Feldman, S. M.* An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship. *Vanderbilt Law Review*, 2001, 54, p. 2355, citing *Balkin, J. M.* Deconstructive Practice and Legal Theory. *Yale Law Journal*, 1987, 96, p. 743.

[67] Ibid.

[68] *Feldman, S. M.* An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship. *Vanderbilt Law Review*, 2001, 54, p. 2360.

that postmodernism is a subjective relativistic school of thought.[69] Yet, most of our law is about the clash of objectivity and subjectivity (the preference being for the former). Let us take any civil code around the world as our example. Whereas civil codes often come with legal tests using legal objectivity and legal subjectivity in an interchangeable fashion, their coherent whole, their systematic ordering as well as their consolidated legal framework amount to highly modernist creations. Is it not the case then, that codes are about consolidating that which was otherwise and previously fragmented? Is it not a fact of life, that codes attempt to bring order into a given chaos (despite their shortfalls, which become apparent after codification process)?

5. The Modernist Spirit of Latvia's Civil Law

The analysis will attempt to offer a number of examples *vis-à-vis* modernist credentials of Western law through the Latvian Civil Code (LCC). The author is aware of the dangers of inductive exemplification through a given codified text in a given Western legal system but the use of the LCC is made on a purely indicative basis. Nonetheless, the LCC is an interesting civil law text when it comes to the furtherance of many of the points raised herein. The history of the Latvian Civil Code, for instance, brings us directly back to the 19th and 20th centuries (these being otherwise the centuries, when the modernist spirit of codification has been only strengthened). As a brief historical note, we shall mention here that the Civil Law of Latvia of 1937, effectively, drew material from the Local Law Collection of the Baltic Provinces of the Russian Empire of 1864 initially.[70] However, because of Friedrich Georg von Bunge's role in the drafting of the Local Collection of the Baltic Provinces, the Civil Law of Latvia falls in the wider German circle of jurisprudence.[71] As such, it is noted that the Latvian Civil Code comes close to the German BGB of 1900,[72] the latter being one of the clearest examples of legal modernity in that this has been and still is a code, which is based on rationalism, technicality and abstraction. Beyond this, efforts to directly or indirectly update the Latvian Civil Code occurred in 1997, 2007 and 2014.

One readily identifies the following indicative provisions of the Latvian Civil Code as highly modernist ones: Arts 1, 5, 1403, 1404, 1482. Of course, the list is not intended to be exhaustive. Thus, the examples used are presented on an indicative basis. The first example is Art 1 LCC. This inserts good faith into the Code. That, of course, makes for a conscious choice for all civil matters to be ultimately *reasoned* under the notion of good faith (especially in the absence of a specific provision for matters, which the code may not have foreseen). Art 5 LCC is an interesting one, too, in that the rather abstract notions of 'justice' and 'general principles of law' used in the provision become relevant in practical matters. Again, the LCC asks from the person applying it to *rationalize* in given matters by following certain principles of law. Abstract as these principles may be in the first instance, they actually enable the judge to move beyond the strict letter of the civil code. Finally, in a display of perfect

[69] *Feldman, S. M.* An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship. *Vanderbilt Law Review*, 2001, 54, pp. 2366–2367.

[70] *Torgans, K.* European Initiatives (PECL, DCFR) and Modernisation of Latvian Civil Law. *Juridica International*, 2008, p. 137.

[71] Ibid.

[72] *Torgans, K.* European Initiatives (PECL, DCFR) and Modernisation of Latvian Civil Law. *Juridica International*, 2008, p. 137.

rationalism, Arts 1403 and 1404 LCC inform us that lawful transactions are based on lawful relations, whilst matters of the kind must be driven by intent and form. Formalism is further stressed in Art 1482 LCC, the provision requiring transactions to be evidence in writing. As stated, these examples have been offered on an indicative basis. At this point, it is further submitted, however, that the majority of civil codes around the world are ultimately governed by the modernist spirit of rationalism, just like LCC is, even though it is understood that different civil codes come with various structures and different degrees of systematisation.

6. Conclusion

To conclude, very much like Riggan's call for structure and technique to his play's critic, law to this day seems to still largely aspire to the calls of legal modernity: system, order, discipline, structure, reason, positivism, legalism, formalism and secularism. The LCC is indicative of the prevalent modernist spirit of Western law, even though the identification of directly modernist provision might be the subject of more extensive research in a number of jurisdictions in the future. Furthermore, it has been opined that law remains faithful to modernism, thus still operating in modernity. Nonetheless, the author would wish to maintain that law's adherence to the modernist paradigm is not without a challenge. In a sense, the very legal realist movement, thereafter the movement of critical legal studies, indirectly – the law and economics movement, and, of course, post-colonialist discourses are all in one way or another either predecessors of legal postmodernism (as in the case of legal realism) or auxiliary intellectual forces to legal postmodernism (as in the case of critical legal studies, law and economics and post-colonialist discourses).[73] In a theoretical discipline such as law, these postmodernist forces of apparent negativity are ultimately nothing but positive forces for the discipline. Accordingly, it is one of the great paradoxes of the discipline that certain of the most outspoken negative streams of academic law result in the strengthening and perfecting of our subject, modernist law.

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[73] E.g., *Dibadj, R.* Postmodernism, Representation, Law. *University of Hawai'I Law Review*, 2006–2007, 29, pp. 407–408.

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