TIME & LAW -
IS IT THE NATURE OF LAW TO LAST?
A CONCLUSION (1)

BY

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I. - Conceptions of time

The polysemy and, hence, ambiguity of the concept of time makes it both attractive and problematic. It is attractive in that so many different approaches and topics seem to be possible under the heading of such a concept, as it clearly appears from the papers presented at this conference. It is problematic, as far as a lack of common understanding of the concept of time means a lack of communication and of a real exchange of ideas. The concept of time is so polysemic that it is not only very difficult to be on the same wavelength, but, moreover, even when we are it can be hard to tell. Babel-like confusion is the threatening consequence. However, as the saying goes: «The conference started in confusion, and it ended in confusion, but at a much higher level».

Unfortunately, this is a paradox (and, of course, it is precisely for this reason that the saying is attractive). Scientific meetings should aim at eliminating as much confusion as possible.

The sense of a conclusion like this one is to try to reread the other papers from one common perspective, in other words, to try to locate them in one single conceptual framework. This, of course, inevitably involves some personal interpretation of the subject and of the papers, emphasising elements developed in some of them and neglecting others.

(1) References to papers presented at the conference are, as a rule, made in the text, between brackets. References to other materials are made in footnotes.
For this conclusion, an analytical approach of the different possible meanings of the concept of time seems to be the obvious starting point.

1. **Physical Time**

Do Times exist? This is the title of a contribution by Andreas Bartels to a recent book on Time, in which he is one of the authors who is studying the concept of time from the point of view of physics. The answer to that question, Bartels argues, depends on what conception of reality the question assumes. He distinguishes three forms of reality which can be applied to physical entities: first, reality in the sense of actuality; second, reality in the sense of objectivity; and third, reality in the sense of causal activity.

Bartels states that no contemporary physical theory supplies time instances with causal agency. He suggests that relativity theory renders implausible reality in the sense of actuality to spell out the reality of time instances, even if this conception has been central to the philosophical tradition from Aristotle till the present day. In this conception there is an ontological difference between the future, on the one hand, and the present and the past, on the other. The past and the present exist, the future, by definition, does not. But this approach relates the conception of existence to the point of view of some single observer at some moment of time. Therefore, Bartels argues, the reality status of times can change just because of a change of the reference point. The conclusion he draws from that is that in a relativistic world the transition from definiteness to non-definiteness does not reflect any intrinsic ontological structure of the world. As a consequence, the ontological significance of the epistemologically-rooted relation of definiteness disappears, and so does the plausibility of the idea of reality as actuality.

Without discussing the matter here, it can at least be stated that such an ontological approach to reality is not necessarily shared by everybody. A less ontologically determined conception of actuality may lead to different conclusions.

Finally, the conception of reality in the sense of objectivity, is developed by Bartels on the basis of a concept of proper time which seems to have a meaning only within physical theory.

However, if this concept of time seems to succeed in being observer independant, it is at the price of being no longer a universal measure of time: relativistic proper time has no structure of its own, independent of the motion of the matter.

The result is an empty concept for any approach in other fields, such as law.

This short analysis of just one approach of the concept of time within physics shows to what extent this conception, inevitably, is theory dependent and can hardly, or not at all, be rooted in some human-independent objective reality.

2. **Human time**

There is not only the (objective) physical time. This concept has been distinguished from other concepts of time, such as an (intersubjective) real time and a (subjective) psychological time. Both are meant to take into account conscious human beings.

The last one is simply the way an individual is experiencing time in his own life or from his own, subjective point of view. Valentin Petev points to the importance of the (subjective) time

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(2) O.c., p. 206.

(3) O.c., p. 208.

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(*) Relativistic proper time is the special coordinate time which is measured in a reference frame moved with the particle along its curve if suitable coordinates are chosen (orthogonal coordinate axes, and the tangential vector to the curve identified with the unit vector of the time axis). (o.c., p. 211).

(*) O.c., p. 212.

(*) Anyway, it is obvious that within physical science there is no common view on some basic understanding of the conception of time. In the introduction to the book in which Bartels' article was published this is clearly admitted: A general conclusion must be that the issue of substantial or relational time remains quite open. Both positions have to address two usually related but independent questions: (1) Are instants of time and durations parasitic on physical events and processes or not? (2) Does time have an intrinsic orientation independently of causal processes or not? Our understanding of physics does not give us the final answer yet. (J. Pate, U. Schepfeler, and M. Ursch, *Introduction*, in J. Pate, *et al.*, o.c., p. 1). At p. 30).

(*) Compare: Like all linguistic landscape, time is not just a matter of words or linguistic significance. It is also colours, tones, rhythms, touch, tension, relaxation and scent. (P. Fitzpatrick, *The Lost Temporality of Law,* p. 102). This obviously refers to time in the sense of psychological time.
dimension for the construction of one's personal identity («Temps et transmutation des valeurs en droit», p. 172).

«Real time», according to Massimo Pauri, consists in the real «becoming», a transsubjective and emergent feature of the world, in which conscious human beings are an essential element, and into which physics cannot inquire: «the essential link between the methodological foundation of physical theories and the issue of free action points to the conclusion that a physical description of a system including conscious subjects is not allowed in principle, in spite of the fact that, as judged a posteriori, the physical outcome of every free choice of action in the world fits necessarily within the nomological causal network that is represented in the physical description» (4).

Luc Wintgens and Roger Vergauwen start their paper with the discussion between realist and anti-realist approaches to reality («No Time for Time: Realism, Legalism, and the Logic of Situations», pp. 135-138). The essential questions are: is there any «objective reality» independently of our theories about the world? And if there is any, are we able to «see» it and to talk meaningfully about it? If the answer to one of these questions is negative, we only may talk about a «human time», not about a «physical time» which would exist independently from human interpretation and experience. In legal theory it is Legalism which presents law as being a true picture of reality, but, according to Wintgens and Vergauwen, without being able to follow this approach in a coherent manner (pp. 147-148).

3. «LEGAL TIME»

What kind of conceptions of «legal reality» do we start from when talking about time and law? From several papers it appears clearly that the discussion about «time» or «temporalities» in this context is often in the first place a hidden conflict between underlying differing conceptions of law. Just as the conception of physical «time» appears to be strongly related to the theoretical construction of physical «reality», any conception of legal «time» will rely upon a theoretical construction of legal «reality».

The basic opposite seems to be the one between law as a static system and law as a dynamic process.

In the static approach law is simply disconnected from time: it is conceived of as a synchronic system and studied at the level of normative coherence. The most notable example is to be found with Codes, which are approached as a system, partly backed by a moral system, and from which general rules, covering the whole of reality, may be derived. Bernard Jackson, in his paper, is criticising the static, «momentary» approach of criminal law to facts, which sometimes appears to lead to rather odd results, by isolating specific (facts) from their context: «both substantive criminal law, and the justification of decisions in it, reduce the diachronic to synchronic, history to structure, life to logic. By contrast, social understandings remain closer to narrative models» (p. 242). Nico Roos, for his part, is following a similar line of reasoning where he is arguing in favour of criminal law «becoming more directly connected to particular social fields or functions than to the doctrinal legal unities of the modern state» (p. 386, see also p. 424).

In the dynamic approach law is deliberately put in a time context: it is conceived of as a diachronic system. Here, it is sometimes aimed at a form of narrative coherence over time (the image of the chain-novel), sometimes at a radical rupture with the past (law then is partly disconnected from time, notably from the past) (5). A typical approach with a narrative coherence over time is to be found in the Common Law. Csaba Varga makes a link with the parables in the Bible as narratives, which form the counterpart of the static moral system, just like the precedents, as «examples», are the dynamic equivalent of the codified rules (pp. 213-224).

As already suggested by François Ost in his Introduction, these two approaches are just parts of one and the same reality: law is not just a timeless system, but it can be studied that way for some purposes; law is not just «past», but for a historical analysis such an approach might be most appropriate; law is not just «present», but, of course, an advocate has to find out which rules are valid «today», without having to be interested in what has been valid


before or what the law will be in the future; at last, law is not just «future», as it is rooted in the past and represents today's vision on that future.

We should now be able to leave aside the static, synchronic approach, as there seems to be no link with our topic, and limit ourselves henceforward to the dynamic, diachronic approach. But, this is only apparently possible: even in a time perspective a partly static vision of law remains possible. Here, we are at the core of the traditional opposition between natural law theories and positivism (see Wintgens and Vergauwen, pp. 143-144). Only pure positivism allows a fully dynamic, diachronic approach, in which law may change constantly and completely. At the level of form, rather than substance of law, this is also linked to the question whether there are some basic features considered to be essential to law or to legal systems in order to call them «law» or «legal system». To the extent that we would agree upon such «definitional» basic features that should be present in order to call something «law» we create elements of law to last eternally, by definition. A number of both such formal (definitional) and substantial (natural law) «legal universals» have been listed by Robert Alexy («Droit, discours et temps», pp. 15-29) (11). He defends the position that «the identity of a rational legal system is determined by universal as well as by contingent properties» (p. 27) (12). It means that law is both stability and change, both timeless and temporary. For Peter Fitzpatrick «Conventionally, the rule of law imports an assured stability and an ultimacy of determination set beyond the ravages of time. But for law to rule, it must also embrace the opposite attributes. ... For this, it must be saturated in temporality.» (*The Lost Temporality of Law*, p. 185).

In autopoietic legal theory the distinction is made between legal systems being cognitively open, on the one hand, and operatively closed, on the other. This means that the working of the legal system, as a system (e.g. the «code» of the legal language), is not influenced by the outside world, and, hence stable over time. The «materials» the legal system has to work with, however, are to a large extent produced by this external world. The legal system

selects, incorporates and «translates» this external reality into «law». Here, we have a constant change. Nico Roos argues that it is typical for the classical model of the criminal law as a temporalised, functionally differentiated system of action that it is operationally closed. This does not exclude change. On the contrary: the legal system develops strategies to keep such changes, notably adaptations to a changing world, under control. For Roos the motivation of the criminal verdict can be seen as an act of self-control, an account of how a case fits into the system and checking if a case demands any adaptation of the legal system (*On Crime and Time*, p. 392). Law has to change constantly, but this change has in its turn to be kept under control constantly, so that it does not endanger the legal system as such. This also seems to be another possible reading of Fitzpatrick's paper: here, it is the rule of law which is keeping the legal system (in occidental modernity) «operatively closed» (p. 186), whereas it remains «cognitively open» to any change of the law (see also pp. 197-198).

Law, most notably in modern societies, is often used as a means to deliberately organise, control, and steer society. By this, one tries to fix the present, and sometimes the past, for the time to be. In other words, present-day reality, or view on reality, is fixing the future (13). This is the point of view of the legislator. The judge, for his part, is rather looking to the past: previously enacted legislation, precedents, past behaviour of the parties, previously drafted contracts, wills, etc. The future of the legislator is a general, unknown one. The past of the judge is a concrete, known one.

II. - Conceptions of «time» in law

François Ost and Michel van de Kerkhove have made a distinction between different conceptions of «time» we can find in legal theory (14). I will follow their division for structuring the approaches to «legal time» to be found in the different papers.

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1. THE « FOUNDING TIME »

Peter Fitzpatrick quotes Blackstone for whom the common law was historically constituted by general customs which had been used « time out of mind » (p. 200), or, as Austin worded it in his criticism of this approach, « a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges » (quoted by Rigaux, footnote 4, at p. 56). Such a « founding time » is also to be found in the mythical « social contract », Wintgens and Vergauwen point to the a-historical, timeless character of this concept in Rousseau’s thinking (p. 140). As Ost and van de Kerchove define this approach, it conceives time as something sacred, mythical, which offers the social group their roots for cohesion and continuity (15). Another example is a Declaration of Independence (Fitzpatrick, p. 207, where this approach is criticised).

2. THE TIMELESS TIME OF LEGAL DOCTRINE

This approach refers to the static, synchronic, timeless approach of law, already mentioned above. By cutting law loose from its context law may be presented as if it had eternal validity (16). This approach is clearly present in Rousseau’s writings, where he argues that « the sovereign is presumed to confirm constantly the acts he does not abolish, although he could do so. Everything he once declared to will, he constantly wills, as long as he does not revoke it » (quoted by Wintgens & Vergauwen, p. 142). A similar position is taken by Robert Bork, where he argues that constitutional interpreters should restrict themselves to the conception of the constitution which would have prevailed at the time when the constitution was made (see Bell, p. 47).

3. THE « INSTANT TIME »

In legal thinking, the creation of a statute, of a contract, or of a will, is often considered to be a momentaneous event: everything which preceded the very moment of the (definite) creation of the « legal act » is considered to be irrelevant, and so does anything which follows it (17).

The concept of « instant time » is also prominently present in discussions about criminal procedure: as a reaction against overlong lasting criminal investigations and procedures different proposals for « quick justice » have been made, and sometimes realised, with as a main argument the psychological effect of immediate judgment and punishment (see on this especially : Michel Van de Kerchove, « Accélération de la justice pénale et traitement en temps réel », from Sophocles, over Beccaria (p. 375) and Bentham (p. 376) till the present day.

4. THE « LONGLASTING TIME »

The slow formation of customs, or precedents, or the consolidation of actual situations through prescription suggest a « longlasting time ». Ost and van de Kerchove’s reference to the German Historical School, notably Jakob Grimm (18), is also to be found in Fitzpatrick’s paper, where, moreover, Maine is referred to as the English counterpart of Savigny (p. 201). For Jacques Commare this conception of time is most typical for lawyers (pp. 320-321).

The element of « stability » this conception of time is based on, also implies that the past must be « closed » some time. Trials must have an ending: the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine. (US Supreme Court Justice Kennedy, quoted in Rigaux, p. 69).

5. « CONSOLIDATION TIME »

Starting from the categories distinguished by Ost and Van de Kerchove, Letizia Gianformaggio proposes an additional one, which she calls the « time of consolidation ». When comparing a number of Italian constitutional theories, she concludes that they all share a

(15) O.c., p. 390.
(16) P. OST. & M. VAN DE KERCHOVE, o.c., 390-391.
(18) O.c., 392.
common conception of a rather longlasting time which, however, in
opposition to the previous category, does not start *in time
immemorable*, but with the enactment of the constitution. On
the other hand, it is different from the *founding time*, as it does not
emphasise the mythical aspect of the Constitution. Neither is it
*timeless*, as historical developments are taken into account. This
consolidation of a constitution, both at the political and at the legal
level, according to Gianformaggio, plays an essential role in the life
of a constitution. A long duration and stability is essential to the
function of a constitution as the founding framework for the whole
legal system (Gianformaggio, pp. 352-354). This consolidation is
essentially the work of legal and political constitutional theory and
practice (p. 358), through an interpretation which adapts the mean-
ing of the constitution to the changing reality, and not the other
way around (p. 361).

6. THE VOLUNTARIST FUTURE TIME (*LE TEMPS PROMÉTHÉEN*)

When making statutes, and codes, one is not looking to the past,
but to the future. It is generally linked to a strong belief in
progress: the future will be better than the present. Moreover,
where a longlasting history of customs or precedents tends to make
the law static, the *voluntarist future time* approach to statutory
law deliberately leaves open the constant possibility of future
changes in the law (20).

As Leticia Gianformaggio argues, this *normativist* approach is
typical for modern times since the Enlightenment (p. 341).

7. THE *ALEATORY TIME*

When legislation is changing constantly in the modern Welfare-
State, the *future time* to live for a legislative rule becomes very
short. The possibility to grasp and to control the future proves to
be rather limited. If one wants to steer society, one constantly has
to adapt the legal rules to changes in this society, but at the same
time this weakens the position of isolated rules (20).

8. *ANARCHIC TIME*

In times of revolution everything seems possible. The ties with
the past are broken, and the future is completely open, but also
very uncertain. New ideas are worked out in new constitutions and
new legislation, but often changed rather soon after their enact-
ment. All revolutions show extreme changes at the start and a par-
tial return to tradition after a few years (21).

9. *ALTERNATING TIME*

The last category in the list of Ost and van de Kerkhove is a com-
bination of (some of) the previous ones. They consider this concep-
tion of time to be most typical for legal discourse. It is the altern-
ation between progress and conservation, between memory and
anticipation (22).

This, obviously, is the kind of balance one is aiming at in judicial
practice. John Bell asks: *Should law be conceived as a set of dis-
crete, posited norms emanating from human lawmakers at various
times or should it be conceived as a coherent system of standards
embedded in the values and practices of a contemporary legal com-
community?* (p. 31) He suggests that an *ambulatory* or updating
approach is the most suitable one. By this he means that the inter-
pretation to be given to a statute is that which fits its appropriate
modern meaning, even if that differs from the original meaning of
the text. This is what, on the Continent, is often called *evolution-
ary interpretation*. Most notably, the European Court of Justice is
following such an approach, and even imposing it on national courts
(see Bell, pp. 35-36). It is a balance between the old and the new,
between former society and current society. Over the course of
time, theories at one time emphasise the conservative position, at
another time the progressive one. Within legal doctrine and legal
practice there are always to be found proponents of a more or less
extreme position on both sides. The problem may also be worded
in the form of a paradox, like Bell ends his paper with: On the one
hand, law, in the sense of legal tradition, is part of a legal com-
community which ensures its survival; on the other hand, law as

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(20) O.c., 363.
(21) O.c., 394-395.
(22) O.c., 395-396.
justified norms is radically contemporary and destined not to survive in its present form. (Bell, p. 53).

The use of precedents in judicial practice seems to be some combination between the «longlasting time», the «voluntarist future time» and the «aleatory time». This appears clearly from the paper of François Rigaux, most notably where he concludes that judges often anticipate the expected decision of the higher court: «Here, the doctrine of precedent is turned toward the future, more exactly the known and published decisions which have an authority as a precedent, are not but an indication of how the highest court will judge tomorrow in the current case.» (p. 57). This is close to the American practice of the «predictive precedent»: when a federal jurisdiction has to apply the law of a State, this law not being established clearly, the federal court will «predict» how the Supreme court of that State would decide (see Rigaux, footnote 58, at p. 73).

Stanley Fish has interpreted the role of precedent as a kind of «voluntarist past time»: «precedent is the process by which the past gets produced by the present, so that it can then be cited as the producer of the present» (quoted by Rigaux, at p. 56).

This hermeneutic understanding of the concepts of «past», «present» and «future», as proposed by authors such as Heidegger and Gadamer, is also discussed by Guy Haarscher: «there is never a past which is not at least partially constructed by the present» (p. 160) (23). But he warns against a too radical «post-modernist» deconstructive view in which there is no «objective» past, only some purely subjective construction of it by its current interpreter. Actually, the past has to a large extent created the world view from which we now interpret that past. Interpreting, then, means: building bridges between the past and the present (p. 162). In law it means, e.g., that the order of time is reversed when judging a case: Justice is orientated towards the future, with the aim of creating a better world; convicting a criminal aims at influencing future behaviour; but this is only possible on the basis of proved facts from the past, which occurred after a previously enacted rule which

is governing that behaviour; however, these facts and rules from the past are interpreted, and thus partly created from the point of view of the present (p. 163). This seems to be more than just an «alternating time», it is rather a «dialectical time»: past, present and future are interacting in a complex way and resulting in some kind of dialectical synthesis.

Another balance between controlling the past and being controlled by it, is to be found in the limitation of the consequences of the annulment of an unconstitutional rule. In order to avoid chaos, or at least many intricate problems, the consequences of such annulments are often limited to the case under consideration and future cases. When retroactive effects are the rule, it is often possible for the constitutional court to limit the effects to parts of the past (Rigaux, p. 65). Here we see how the results of such weighing and balancing do not necessarily follow the lines of the distinctions between «past», «present», and «future» anymore: part of the past is added to the present, but the present is still determining the other part of the past, as rules and/or decisions which, today, appear to be void in principle, get now their definite legal validity.

III. – Conceptions of the «future»:

Is it the nature of law to last?

In philosophical theory on «time» a distinction has been made between three different conceptions of the future, in the sense of an open future:

1. An instant view of reality, in which there is no ontic difference between the open past and the open future. In this conception there is a symmetry between past and future: only the present is real, the past has gone and the future does not yet exist. In this conception any long-term planning is irrational, as is regretting whatever happened in the, now unreal, past.

2. An empty view, in which the open future, contrary to the fixed past, contains no entities at all. Here, the future is characterised by freedom, by the opportunity to choose amongst several alternatives.

3. The half-full view, in which entities in the future are real, when they are causally determined by past or present events. The future

\[ (23) \text{ Compare: «Even in 'easy cases', I maintain, it is the judge who re-creates or represents the sense of the other (legislative) discourse, even if he links this with a truth-claim that this was indeed the sense intended by the legislator.» (B.S. Jackson, On the Atemporality of Legal Time, p. 529).} \]
remains largely open, as it is only partially determined by present and past events (24). This is also the approach of systems theory, as discussed by Nikolaos Intzessilogiou (see, e.g., at p. 285).

This distinction seems to be a useful starting point for structuring the differing approaches concerning the future in law and legal theory.

1. The instant view: no real future

An absence of any view of the future can notably be found in the approaches classified under the headings of founding time, timeless time of legal doctrine, instant time, and aleatory time. Whereas both the founding time and legal doctrine assume the existence of some real past, the two other approaches completely represent the instant view as defined above: there seems to be neither a real past nor a real future.

The aleatory time approach, in particular, which seems to be so typical in current societies, shows an inherent paradox: starting from an empty view, in which any kind of future seems possible and could be realised through law, it appears that no future can be planned anymore as we know today that our newly enacted legal regulation will very probably be changed (very) soon.

The instant view, probably inevitably, is also to be found in computable representations of law. Sartor and Hernandez, in their paper, analyse the temporal aspects of legal norms with a view on a logic-programming-based formalisation. They distinguish four lengths or durations in legal time, notably at the level of the conditions, of the effects, of the period in force, and of the validity of a legal norm (Time in Legal Norms: A Computable Representation, pp. 446-447), but they are all looked at from an instant view: the time element is nothing but another condition for the present-day applicability or non-applicability of the norm under consideration.

2. The empty view: a completely open future

Two types of legal time mentioned above take such an empty view of the future: the anarchic time and the voluntarist future time. The difference is mainly that the revolutionary, anarchic approach tries to start from zero, throwing away everything which was created under the Ancien Régime. Here the future is not only completely open in the long term, but also in the very short term: everything needs to be changed and will be, as soon as possible. In the voluntarist future time of modernism, traditions do not bind the future either: if a majority of a democratically elected parliament wants to break with the past, there seems to be no obstacle whatsoever. In fact, quite the opposite is true: law is used as the main instrument to create a better, future society, not only at the political level, but at all levels: economy, social security, ecology, sexuality, etc. The empty view tends to evolve towards a totalitarian view: everything can be changed through law, anyhow and at any time (25). The future can arbitrarily be cut loose from the present and the past. A typical example has been Ceausescu's destruction of complete villages and towns in order to construct new ones, which, synchronously, were to better fit his present view on the future, but which, diachronically, did not at all harmonize with the tradition of the Romanian people.

Actually, a completely open, contingent view on the future is incompatible with law. If we take such a view of the way society could be structured in the future, we fail to take into account that any legal regulation implies at least the existence in the future of the same, or similar enough, conditions, comparable to the present ones, to the extent that they form the necessary basis for a meaningful application of these rules.

3. The half-full view: an open future, partly determined by the past

Three legal times take this intermediate position: the longlasting time, the consolidation time and the alternating time.


In the "longlasting time" approach of customary law or of other historically developed law, which places great emphasis on the roots of law in a strongly historically determined culture, the future appears to be more "full" than "empty": the future seems to be determined by the past to a very large extent, but still open to change.

In the "consolidation time" of constitutional interpretation and in the "alternating time", the degree to which our future is full or empty will depend on the approach chosen. In any case, there is always an important openness towards the future and an acceptance that some parts of the past determine some parts of the future.

Whereas the two previous approaches see a complete break between the past and the future, this "half-full view" accepts some unity between past, present and future: some narrative coherence.

As François Ost asked in his introduction: should we not start from a more substantial view of the legal system, based on values and principles which are both rooted in our memory and contain a project for a future? (p. 12; compare Petev, p. 183) And he gives some examples of current legal developments in this sense: instead of the previously dominant instant view of contracts, today some narrative coherence is created, on the basis of the good faith principle, with the past (the period of negotiating the contract) and with the future (the execution of the contract). Instead of a blind faith in the current political majority, eternal, or at least (very) long lasting, human rights are accepted to bind any such majority over time.

4. SOME CONCLUDING REMARKS: TOWARDS A "DIALECTICAL TIME" CONCEPTION

Is law made to last? Law, indeed, is made to last, by its very definition. It would make no sense to create any legal rule which would not be expected to last for at least some time.

Is law made to remain unchanged? No, and, again, even by definition: law is made to organise society, as societies are constantly changing, law has to follow, otherwise it would disorganise society rather than organise it.

Is law made to last eternally, rebus sic stantibus? Many, if not most, legal rules and rights are, indeed, created with the aim to last eternally, which means as long as possible taking into account factual and legal changes. In principle, legal rules are made to last, but one knows in advance that they will eventually change, and some may do so very quickly.

At the level of general rules, this means that they remain valid, in theory eternally, or for as long as they are not changed or withdrawn, e.g. by a legislator.

At the level of individual rights such as, for instance, property rights, many rights are meant to last eternally. These rights can thus be transmitted from one right holder to another and from one generation to another. The right holder, inevitably, will change, but the right as such will remain unchanged. In some cases the right will disappear, because the object of the property right was destroyed for instance, or because the owner was expropriated, but the bulk of these rights will last.

But, to take such a view of law, one needs a conception of law with room for a narrative coherence between past, present and future. The typical modern conceptions of time in law, such as the "voluntarist", the "timeless", the "aleatory" or the "instant", do not allow such a transgenerational approach.

A notable example is the way "social security" is organised today, compared to nineteenth century Europe.

Today "social security" is mainly organised around a redistribution of existing wealth amongst living citizen. It contains an "instantaneous" conception of solidarity between the generations: people pay, today, for their (and other's) parents and children. There is no solidarity over time. If the general wealth increases, everybody gets more, if it decreases most people will get less. The "baby boom generation" from after the last World war is now, amongst others, paying for the previous generation, which contributed much less to social security than the current generation does and will do. But at the same time this generation is told to invest in private funds, as it is very likely that there will be not enough money available to redistribute for their pensions when they retire after 2010.

In nineteenth century there was no "social security" for the poor. The rich, however, where mainly secured through inheritance law
(see, most notably, the regulation in the *Code Napoléon*). A striking example is the concept of ‘squanderer’ in the *Code Napoléon*. A person was (and in several countries, such as, e.g., Belgium, still is) considered to be a ‘squanderer’, and, therefore, was to be deprived of part of the power to administer his own money and property (art. 513 *Code civil*), when he spent not only his whole income for unreasonable purposes (which was legally acceptable), but when it affected his *capital*. Indeed, this capital or fortune was presumed to have been mainly inherited from the previous generations, and had to be kept for the future ones. Using this family fortune in an unreasonable way was going to affect the social security of future generations, and, hence, had to be prevented by legal means, notably a partial legal incapacity of the ‘squanderer’.

Another example is offered by François Ost, in his book *La nature hors la loi* (28). Ecological problems, in the modernist ‘instantaneous’ approach, are translated into current rights amongst today’s legal subjects.

One approach sees it as a problem of responsibility of individuals towards public authorities, to the extent that there is a breach of environmental law regulation, or as a case of responsibility between individuals: liability of the polluter vis-à-vis the victims, notably the ‘owner’ of the dead plants, trees or animals.

The other approach recognises animals, and sometimes even plants and trees, as being ‘legal subjects’ in their own right. Again, ecological problems are seen as a legal relationship between present-day legal subjects, in this case between human beings, on the one hand, and non-human ones, on the other.

Ost’s proposal is very close to the conception of ‘transgenerational patrimony’ in the previous example. In his view neither the conception of nature as a pure ‘object’, nor the ‘subjective’ approach, which confers ‘legal subjectivity’ to nature can solve the problem. He argues in favour of developing a legal concept of nature as a ‘common patrimony’, including responsibility for future generations.

However, in order to re-introduce such legal concepts and approaches, the basic attitude to law, and to its underlying concep-