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Central European with a Post-Socialist Limp

On the Slovene Legal Identity

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Abstract: According to David and Grasmann, the recognised comparative law scholars, there are basically three main criteria for differentiating between legal families and their subgroups: 1. meta-legal considerations; 2. legal sources; and 3. dogmatic legal structures. Concerning the last two criteria, which could also be designated as formal elements of a country's legal identity, Slovenia has been deeply “immersed” in the civil law of a Central European type. Even after the decline of the Habsburg Empire, what remained to apply on the territory of nowadays Slovenia as part of the then Kingdom of Yugoslavia, was to an important extent Austrian law. Moreover, even the “decadent capitalist code” such as the *Allgemeines bürgerliches Gesetzbuch* (ABGB) more or less survived in spite of the communist “withering away of the state and law”, and can today still be applicable to some older cases. After one thousand years of Germanic dominance, the Slovenes turned to the East in trying to build their national identity, one hundred years ago when the Empire collapsed. Although that seemed to be a necessary move towards stronger national identity, it was their first step away from the rule of law. The second step away from that was the period of communism that endured almost half a century. Nevertheless, the formal part of the Central European legal identity somehow survived in Slovene law, with certain “injuries” of course, but it is mainly the meta-legal considerations, their sociological and psychological elements in particular, that nowadays make a difference between the situations of the rule of law in the Republic of Slovenia and, for example, in the Republic of Austria, both parts of the onetime joint Empire.

Keywords: legal culture, legal consciousness, Slovenia, formal law, informal law

1. The Slovene historical overview in a nutshell

At the beginning of Christian times, the territory of the present Slovene state was an integral part of the Roman Empire, which was mainly populated by Celtic and Illiric tribes, to a certain extent Romanised. At the Great Migration period, between the 4th and 6th century, a number of Germanic tribes crossed the territory on the way to nowadays Italy, leaving behind only pieces of the onetime great Empire. Thus, when

Slavic tribes moved here, in the 7th century, they faced almost an empty territory (Granda, 2008, pp. 16–42). The Slavs established at least two barbaric micro states: the Dukedom of Carinthia is quite well documented,¹ which is not exactly the case concerning the Dukedom of Carniola. When the Slavic tribes were baptised, their barbaric states lost sovereignty to be subdued first by the Bavarians and later the Franks to eventually become part of the Frankish Kingdom (Granda, 2008, pp. 42–47).

The Slavs brought with them their tribal customary law, and also got in touch, at least indirectly, with Roman law (*ius civile*). Moreover, with the process of early feudalisation in the Frankish Kingdom of Charlemagne, they needed to apply Frankish state feudal law (such as capitularies) (Vilfan, 1996, p. 23). With the fall of the Frankish Kingdom, the Slovene territory remained part of the Holy Roman Empire (ethnically German) (Granda, 2008, p. 53), in which a plurality of customary legal sources (territorial customs) as well as canon law applied. In the late Medieval period, a very significant influence on legal culture came from the reception of Roman law (gradually *ius commune* as the “learned” law of law faculties was developed, based on Roman law, canon law and parts of feudal law) (Škrubej, 2010, pp. 225–228), as well as from newly emerging town law (Vilfan, 1996, p. 146).

More than one thousand years of Germanic dominance ended with the fall of the Habsburg Empire after the First World War. Due to such long-term historical influence, in terms of comparative law criteria, the Slovenian legal system is generally considered to be a typical Central European legal system within the broader civil law family. One of the strongest incentives shaping the Slovene legal identity was the Austrian Civil Code (*ABGB*),² adopted in 1811, that *de facto* applied in part all the way until 2002, when the Slovene Code of Obligations was enacted, which not only broke with the former Yugoslav Obligational Relations Act, but also finally with the *ABGB*.³ Moreover, until 1919 when the University of Ljubljana was established with the Faculty of Law being one of the founders, the education of lawyers was predominantly Austrian, and thus in German language.⁴ Moreover, especially in constitutional law and legal theory, great intellectual

¹ Thanks to the writing by the Archbishop of Salzburg, *Conversio Bagoariorum et Carantanorum*, from 871 (Škrubej, 2010, pp. 104–106).

² Based on the “revolutionary” federal Yugoslav statute of 1946, which repealed all pre-Second World War legislation, the *ABGB* was also formally repealed but still remained in force *de facto*, since major civil legislation (in the area of torts, contracts, real estate and inheritance) was enacted only in the '70s of the previous century. If the *ABGB* had not applied in some manner, there would have been large gaps in the law in civil legislation for several decades (Pavčnik, 2007, pp. 397–398).

³ Until 2002, the contract of donation was regulated solely by the *ABGB*, which was one of the reasons why the relevant *ABGB* provisions were applied between 1978 and 2002. Finally, the contract of donation was included in the Slovene Code of Obligations, in 2002.

⁴ The Slovene legal terminology was basically established 151 years ago when attorneys began to be appointed by the Slovene Bar Association, instead of the Austrian King, and the use of Slovene language started to be at least partially allowed in offices and courts (Razdrih & Premzl, 2018). The crucial year for this development was the revolutionary year of 1848, when statutes were decided to be published in all major languages of the monarchy (Babnik, 1894).

inspiration for Slovene lawyers to last for decades came from Hans Kelsen, the famous Austrian professor of law and judge.⁵

After the decomposition of the Austrian–Hungarian Empire, the Slovenes finally stepped out of the long-lasting Germanic influence to join Croats and Serbs and other Yugoslav nations in what was after 1929 called the Kingdom of Yugoslavia (or, colloquially, the “Old” Yugoslavia). That country was a unitary constitutional monarchy dominated by the Serbian King, in which Serbian nationalism was constantly in tension with the aspirations of other nations, mostly the Croats as the second biggest nation. Although the Old Yugoslavia was formally more promising than before for the development of Slovene nationality and their “own” law, e.g. there was own university legal education possible for the first time, and what applied in the territory of Slovenia was mostly Slovene and old Austrian law, the actual grounds for legal development were far from ideal. Although the first Yugoslav constitution was adopted democratically in 1921, it was soon replaced by a constitution imposed by the King. Due to constant national tensions, a greater wave of the unification of laws, mainly in the area of criminal law, came not until the last decade of the monarchy, when the King’s dictatorship ruled.

The Old Yugoslavia was generally not fertile soil for the rule of law, democracy and human rights to flourish. However, compared with the life in the Austrian–Hungarian monarchy, there was a slight step forward for the Slovenes in their continued building of national identity, creating potentials for own statehood to come in less than a century thereafter, and making at least the contours of what later became their own legal system.⁶ Still the overall legal culture in the Old Yugoslavia decreased in comparison with the one existing especially in the last decades of the Habsburg Empire, especially after the bourgeois revolution in 1848, when greater autonomy of the nations within the monarchy, constitutionalism and human rights including language rights of the nations were emphasised.

After the Second World War, Slovenia was recognised as a separate republic within the federal (New) Socialist Yugoslavia, having its own constitution and legal system in the framework of the federal constitution and legal system. It was another step forward towards the “final self-determination” of the Slovenes on their way to achieving statehood. However, the totalitarian system of socialism, preventing democracy and human rights, and the communist idea of “withering away of state and law”, in which the principle of the rule of law was not very high in the social pyramid of values, were serious obstacles for a prosperous legal culture to develop. In the communist Yugoslavia, all the pre-war laws were officially annulled immediately after the Second World War by a special law, which means that the principle of discontinuation regarding the previous law was introduced. For that reason, soon after the war a new constitution was established as well as new laws

⁵ It was his *Reine Rechtslehre* and particularly the *General Theory of Law and State*, which determined the curriculum of all kinds of courses in legal theory and legal philosophy for decades to come, not only in Slovenia but in the whole region. Furthermore, the first dean of the Ljubljana Law School was his student and fellow discussant (Pitamic, 2005).

⁶ There were certain legal acts by an autonomous Slovene government enacted (called “Naredbe”) in 1918 when the Habsburg monarchy was falling apart and the Slovene did not yet join the Croats and the Serbs in a new state (Škrubej, 2010, pp. 298–301).

introduced mainly in the area of criminal law, where “political” crimes against the state were severely punished, nationalisation regarding large areas of land and factories took place, and also an agrarian reform was implemented. Furthermore, in the area of civil law when large gaps in the law were faced, the Austrian ABGB *de facto* still applied,⁷ all the way until the late ’70s when the new Obligational Relations Act, Inheritance Act and Basic Ownership Relations Act⁸ were enacted, replacing the ABGB, however, not entirely.

2. Independent Slovenia’s legal identity: “Returning” to Central Europe

After the collapse of communism in Central and Eastern Europe and Yugoslavia’s disintegration, the Republic of Slovenia was established, which in its Constitution of 1991 left out the elements of socialist law and “promised” to return to the classical legal family of civil law, the Central European subgroup. What is typical for that subgroup is *inter alia* a well-developed dogmatic structure thanks to the strong influence of the reception of Roman law including the Pandectist movement, a great role of legal academics, and the influence of the German BGB and the Austrian ABGB. According to Article 1 of the Constitutional Act to Implement the RS Constitution,⁹ Slovenia relied on the principle of continuity with the former Yugoslav and socialist Slovene law unless it was contrary to the new Constitution of 1991. All major laws from the communist period were indeed superseded by Slovene ones: e.g. following denationalisation and privatisation laws, the first criminal substantive and procedural laws were adopted in 1994, whereas major civil laws in 2002 (the Code of Obligations and the Real Estate Code). However, our Inheritance Act is still from 1976, in which only a small number of provisions were substituted due to the new constitutional order. Technically, you can even find a law from 1946 that would be still applying, at least in part.

The idea that the Slovene law was to “return” to the Central European subgroup of the civil law legal family after the communist “experiment” seems to be obvious. According to David and Grasmann, there are basically three criteria to determine a legal system’s place in the comparative law taxonomy: legal sources, dogmatic legal structures and meta-legal considerations (David & Grasmann, 1988). What follows from those criteria is their formal and informal aspects.¹⁰

⁷ Even though it was officially abolished along with all other pre-war laws, it actually remained to apply with some limitations stemming from the constitution and other *leges specialis*, at least when it concerned the prohibition to own private property beyond a certain limit.

⁸ Dealing with real estate law.

⁹ Off. Gaz. RS, Nos. 33/91-I and 21/94.

¹⁰ Cf. Zweigert’s and Kötz’s five criteria of classification including historical background and development, a predominant and characteristic mode of thought in legal thinking, distinctive institutions, the kind of legal sources a legal system acknowledges and the way it handles them and its legal ideology (Zweigert & Kötz, 2011, p. 68).

According to the traditional role of legal sources, Slovenia would be a country of the Austrian law-oriented member of the Central European subgroup of the civil law legal family. The decisive factor for that was the historical influence of the Austrian law, in the area of civil law mostly the *ABGB*. It was already emphasised that the Code remained to apply in Slovenia even after the Empire's falling apart and was, together with large parts of other Austrian laws from other areas, in force there until 1946, when it was formally repealed by the communists. Still, under the communist rule there was no civil law legislation adopted until the '70s,¹¹ the *ABGB* remained in force *de facto*, and remained as such for certain areas of law (such as the contract of donation) all the way until 2002 when the Slovene Code of Obligations and the Real Estate Code were enacted, already in the second decade of the (independent) Republic of Slovenia. Nevertheless, Slovenia did not opt to re-adopt a great civil code like it had existed before.

The strong historical influence of Austrian law was more or less also exerted in other fields of law, e.g. in criminal law and administrative law. Although there was some legislative activity in the Kingdom of Yugoslavia, the basic tenets from the historical predecessors remained, which could also hold true, to some extent, for the period of communist Yugoslavia except for those areas that were changed for ideological reasons.

Concerning the dogmatic structures criterion, it needs to be said that there has been a great influence of Roman law in the area of civil law, which was manifested through several waves of reception, and the teaching thereof at the university, where the concept of *ius commune* was created (Robinson et al., 2000, pp. 106–124), consisted of Roman law, canon law and parts of feudal law, which even formally, however subsidiary if there was no local legal custom, applied in the Holy Empire. Associated with that is the tradition of great abstraction, generality and systemisation of law, which contributed to its typical dogmatic structures.

When the above-mentioned first two criteria are concerned, the Slovene legal system seems to be a typical Central European legal system within the legal family of civil law. However, when it comes to the third criterion, i.e. meta-legal considerations, which include historical, psychological and sociological circumstances, the situation is already quite different. This criterion is more specifically studied in the confines of legal sociology, and is usually depicted as legal culture, being an informal rule of law or legally oriented social behaviour. In comparison with older European democracies within the subgroup of Central European law, it seems that this criterion in particular shows why the Slovene legal system has not yet returned fully to its historical family.

This also seems to be a common feature of other ex-communist countries in Central European, such as Poland, Hungary, the Czech Republic, Slovakia and the countries in ex-Yugoslavia. Their desired transition from the group of socialist/communist countries to the traditional group of Central European legal systems was also not fully successful. Theorists who deal with such issues suggest that we should have the group of post-socialist countries as a special subgroup within the legal family of civil law. The mentioned countries share certain common characteristics, such as lower trust of their people in legal

¹¹ 1978 – Obligational Relations Act; 1976 – Inheritance Act; 1976 – Marriage and Family Relationships Act; 1980 – Basic Property Relations Act.

institutions and the rule of law in general, too frequent changes in legislation, court delays with long duration of proceedings, legal formalism, etc. (Kühn, 2011; Manko, 2013a; Manko, 2013b, pp. 207–233; Uzelac, 2010, p. 377). From the formal point of view, there is no huge difference between post-socialist laws and their fellow legal systems of older democracies in the same subgroup of Central European states.¹² What makes a difference is legal consciousness or the informal part of legal culture, which proves that the idea of the rule of law has not yet sufficiently been normatively integrated among the people after the transition.

3. Slovene post-Socialist legal culture

3.1. A concept of legal culture

It is a commonplace today to deal with ‘legal culture’ instead of merely with (formal) ‘law’ when we try to come to a broadest possible picture of law. This kind of shift of attention in the definition of law from formal (or ‘positive’) law to ‘law in practice’ seems to have become important with the advent of sociology, and subsequently legal sociology, and also the relevance of psychology in law, when sheer legal positivism was departed from in order to take into account a more comprehensive notion of law in society. In this context it is important to consider Pound’s (1910) differentiation between “law in books” and “law in action” since these two syntaxes when juxtaposed can have a very different meaning, not being mere reflections of each other. As we will see in the continuation, this is of additional importance when different legal cultures are compared with one another.

The concept of legal culture was introduced in legal science by Friedman in 1975. It was derived from the concept of general culture being either everything human in opposition to the natural or biological (being a broader definition of culture) or what is as such culturally specific (as a narrow definition of culture) (Silbey, 2001, p. 8624). Friedman, who found that there is 1. internal legal culture being a culture of legal professionals; and 2. external legal culture composed of the general public’s attitude toward the law, conceived it as those parts of the general culture such as customs, opinions, ways of doing and thinking that bend social forces toward or away from the law (Friedman, 1975, p. 15). In the context of such what interested him were a) the “social and legal forces that make the law”; as well as b) the “impact of the law on the behaviour in the outside world” (Friedman, 1975, p. 3). He was aware of the fact that patterns of social attitudes and behaviour towards law and legal systems vary depending on specific legal cultures, groups, organisations or states (Friedman, 1975, p. 194).

Legal culture (considered as a collective or social concept) as well as legal consciousness (more used to depict individual perceptions) are concerned with the understandings and meanings of law, legal institutions, and legal actors that circulate in social relations (Silbey, 2001, pp. 8623–8624). Both the mentioned concepts became of interest for legal

¹² Slovenia is for that reason frequently compared with their northern neighbour Austria.

scholars when formal legal institutions (such as formal legal materials, formal offices and institutions) and everyday social relations began to intersect and share cognitive resources.¹³ According to Varga, the concept of legal culture is intended “to express how people experience a legal phenomenon, conceived as a kind of objectified potentiality; how and into what they form it through their co-operation; how and in what way they conceptualise it, and in what spirit, frame and purpose they make it the subject of theoretical representation and operation. In the beginning, it was “sociological interest that brought the conceivability of such an interest into jurisprudential thought” (Varga, 1992, p. 82).

Legal culture has become an interesting subject of study not only in general jurisprudence and legal sociology but also in comparative law. This was an evolution made in recent decades, since from the beginning of the 20th century within comparative law the main focus was on (legal sources and particularly) civil law when the general jurisprudence and also other legal disciplines were very much influenced by positive law. The interest in comparative legal cultures rather than just comparative law could also be considered a shift of attention from positivistic to more multidimensional accounts of law in particular societies.

Before it is discussed in what manner the Slovene legal ‘system’, or better called legal ‘culture’,¹⁴ deviates from all the typical characteristics of the Central European subgroup, we need to describe at least the basic tenets of the (ideal) model of such legal culture. Then it becomes easier to discuss departures from the model.

A model that integrates elements of formal and informal law can be designated as an integral model of legal culture. According to Friedman, in relation to informal law, legal culture or its informal part is further divided into ‘internal’, being the culture of legal professionals, and ‘external’ legal culture, as the legal culture of ordinary people. Moreover, a model according to a four-dimensional concept of law is built, in which the four elements of legal norms, legal values, legal relations and ADR elements inseparably converge (Novak, 2016).

3.2. The integral concept of legal culture

One way of defining it is through a three-dimensional theory of law¹⁵ as developed by Reale and other legal philosophers, mainly associating law with its three basic features such as legal norms, legal values and legal relations. This theory of law is otherwise also known as the integral theory of law. It finds the elements of law such as legal norms,

¹³ There are basically two approaches to studying legal culture: a) taking it as an analytical concept within a theory of social relations; and b) dealing with it as concrete measurable phenomena (Silbey, 2001, p. 8625).

¹⁴ When ‘informal’ characteristics such as meta-legal considerations are added to the ‘formal’ portrait of a legal system, the thusly composed entire picture, of formal and informal law, is begun to be called (legal) ‘culture.’

¹⁵ The founder of this theory was allegedly Kantorowicz, who already at the beginning of the 20th century developed the following trichism: legal philosophy, legal dogmatics and legal sociology (Kantorowicz, 1925; Pokrovac, 2018). This theory was in the global context mostly propagated by Reale (1968); see also Lima (2008). One of the most influential adherent of this theory in former Yugoslavia was Visković (1976). However, the three-dimensional theory of law is still alive – see in particular Falcón y Tella (2010).

social values and social facts as being part of an integral whole. This means that any of these elements cannot be understood alone – but all of them can only be comprehended in the whole: any fact in these legal worlds (i.e. legal norms, legal values and legal relations) has an impact on the two other worlds (Visković, 1976, p. 112). Every aspect of this theory: i.e. legal norms, legal relations and legal values constitutes the whole and, vice versa, the whole is expressed through any of them.

For example, due to an economic crisis, a state introduces a new tax to burden real estate valued 1 million euros or more, by amending tax legislation in order to fight the crisis. Certainly this amendment would have normative (positive law) consequences that are easily recognised in the legal system as certain legal rules are changed. From the axiological point of view this would have positive effects at least for a majority of people as they would perceive such a measure as justified as imperatives of social justice were allegedly followed. Moreover, this would also have implications on legal relations (both between individuals as taxpayers and the state and between the taxpayers themselves in their transactions that are “taxed”). This normative change of legal rules would on the one hand “activate” the axiological dimension in society and also the sociological-psychological dimension in the sense that some people would try to evade this tax and would try to seek gaps in the legal regulations of this tax.

Furthermore, the (*meta*) principle of the rule of law, being the apex of legal culture, can be understood in the sense of the integral theory of law. In this context what can be understood under the normative-dogmatic component of the rule of law is a set of (positive or formal) legal rules and legal principles (i.e. legal norms), which are part of a legal system, either in the form of general legal acts (constitution, statutes, executive regulations), which are generally created in the process of law creation, or individual legal acts (judgements, orders, decisions) that are basically made in the process of law application. The axiological dimension of the rule of law would moreover indicate how the positive law is a reflection of dominant social (or individual) values such as legal certainty and justice.

As the social component of the rule of law we could reflect on the (informal) legal culture in a certain state, or how the rule of law as the normative-dogmatic concept is perceived in the society referring to legal consciousness or normative integration about the rule of law in such a society. As to this aspect of the rule of law we want to know how its normative-dogmatic aspect “works” in the real world – how it is reflected as a fact in legal relations.

To these three dimensions (legal norms, legal values and legal relations) this author has added a fourth dimension which is resolving social conflicts by ADR techniques (Novak, 2016). These are alternatives to formal legal proceedings. They are complementary to the operation of the rule of law in a state and society, as they contribute to resolving social disputes out of court and thereby help courts operate more efficiently.

Therefore, to form a concept of legal culture one needs to extend one’s concept of law or legal system being composed of these four dimensions, into comprehending that legal system both formally and informally. This actual dimension of legal culture is very important because often two legal cultures could appear quite close concerning formal legal

norms, but are in fact very apart regarding how these formal norms work in practice, or what the attitude of people is towards such norms. Hence we deal with the sociological and psychological aspect of formal legal norms. The same would apply to a distinction between the formal and actual aspects of legal values and legal relations, as well as ADR methods.

Thus, a broad view of legal culture includes both formal law (like Pound's law in books), referring to 'legalistic' (positivist) or normative-dogmatic aspects of law, and informal law (Pound's law in practice) encompassing axiological, psychological and sociological dimensions of law.

It is more than clear that an overall legal culture existing in a certain (state) territory encompasses also the major constitutional principles such as the democratic state and the rule of law principle. Moreover, the latter seems to be the synonym for legal norms applying in a certain legal system as being an overarching principle defining the legal system. What follows is a short analysis of the above-mentioned (four) components of the rule of law, in the sense of its integral conception, of which the normative-dogmatic aspect of the rule of law is dealt with first.

Firstly, the normative-dogmatic component of the rule of law primarily concerns (positive or formal) legal norms being part of a legal system. This subject matter is usually considered by the general theory of law.¹⁶ What are dealt with in this context are legal norms (legal rules and legal principles), legal relations, legal acts, which appear in law creation and law application processes. Included with that could also be legal interpretation, gaps in the law and systemisation of law (see Novak, 2010, pp. 6–11).

Secondly, concerning axiology in law legal values are considered with regard to deontology or ethics in law. Thus the axiological-deontological component of the integral theory of law deals primarily with (ideal) law (and the rule of law) as it ought to be. Immanent to/in law are the following values: legal certainty, justice, constitutionality, legality, clearness and determinacy of legal norms, etc. A majority of the mentioned values can be found in the overarching constitutional principle of the rule of law, which seems to be the red thread of all law. Moreover, law itself regulates certain values such as human dignity, respect for human beings, etc. (Visković, 1976, pp. 105–145).

Thirdly, the sociological aspect of law (legal culture with respect to the rule of law) needs to be mentioned which unlike formal normativity addresses an actual state of affairs concerning law and its normativity. From legal sociology it follows that for the effectiveness of a legal system legal culture, which stimulates spontaneous law abiding – certainly if there exists a certain consensus or rule of recognition with respect to the legal system as being perceived as democratic and legitimate – is more important than forceful implementation of legal rules by the state or its agents (Novak, 2012, pp. 93–105).

Legal culture is otherwise a concept from the province of legal sociology, however, by its complexity it seems to exceed the frameworks of that discipline since it deals with a collective legal consciousness that involves all aspects of the integral concept of law

¹⁶ According to Barberis, a major task of general theory of law is to establish what (positive) law *is*, while legal philosophy deals with what this positive law *ought* to be (Barberis, 2012, pp. 15–16).

(including legal rules, legal values and legal relations). To this, the fourth element of the integral theory of law, namely ADR as an important component of modern law, could be added.

3.3. The (integral) model of Central European (CE) legal culture

What needs to be described in such a model, firstly, is its formal law component. When it comes to legal norms, there is a traditional CE requirement that the norms of general legal acts (such as statutes) need to be as short as possible, concise and clear. Here one should remember the advice of the German scholar von Ihering that the legislature should think as a philosopher and speak as a peasant (Heindl & Schambeck, 1979, p. 189). A tendency towards systemisation, classification and abstraction within that subgroup historically culminated in the Pandectist tradition in the 19th century (Robinson et al., 2000, pp. 273–275).

With respect to individual legal acts (such as court judgements) it has been required that ideal ones must be as short as possible, concise and comprehensible.¹⁷ Moreover, this subgroup was also very much influenced by Hans Kelsen and his pure theory of law, in which legal norms are to be arranged in a strict hierarchical pyramid, almost alike with the Pandectist tradition or the rationalist German Natural lawyers that insisted on a rigid schematic approach (Robinson et al., 2000, pp. 218–220). Also, Kelsen importantly contributed to the birth of the European model constitutional court, whose most prominent and model example within the subgroup became the German *Bundesverfassungsgericht* after the Second World War. Thus, the strong requirement of constitutionality and legality, that lower general legal norms be in conformity with superior ones and individual legal norms consistent with general legal norms, is in the “genes and tissues” of this subgroup’s legal systems.

Concerning legal values, the CE post-war tradition began with Gustav Radbruch, his insistence on the importance of human rights as the *minima moralia* of our civilisation, and his formula of denial (non-law) and unbearableness suggesting, *inter alia*, that legal norms must contain particularly legal values of moral nature (such as equality, justice, human rights, legal certainty), in a proper manner and extent (Radbruch, 1973, pp. 345–346). Radbruch’s ideas referred to extreme situations of injustice, however, it symbolically presented an important link between law and morality.

With respect to legal relations, there is a standard requirement in the CE group, as in any legal system aiming at stability and normative integration (Vertovec, 2010), that legal social relations should not be regulated in every detail, and that too frequent changes in general legal acts are not welcome. This is not a particular feature of only the CE subgroup but may well be a part of any legal system’s model.

¹⁷ This is a typical stylistic feature which differentiates the CE subgroup from the Western subgroup. For that reason, consider within the civil law family the difference between the style of judgements’ reasoning in Germany and France (David & Grasmann, 1988).

Finally, concerning ADR, such possibilities for dispute resolution must be available to a sufficient extent in the norms of general legal acts, and ADR is to be provided as an effective alternative to formal legal procedures. In a well-organised and functioning society, there should not be too much pressure on courts to resolve disputes, but people should also try the so-called alternative ways to resolve their disputes, which many times contribute to better social effects than court proceedings. It is certainly not possible to say what the right proportion between ADR channels available and court proceedings initiated is but the fact that ADR facilities exist and people do make use of them points to a conclusion that traditional legal proceedings are not the only manner of resolving disputes.

Furthermore, the model's informal law component demands in its a) internal variant, concerning the legal profession, the following: legal norms must be consistently applied in legal practice or there should only be minor discrepancies. If lawyers as legal professionals, so to say the "servants" of the rule of law, do not follow legal norms, how could that be expected from lay individuals?

Then, legal values should be perceived as appropriately contained in the formal legal system, and legal rules should in general be perceived as consistent with the legal values encoded. If that is not the case, it is very hard to speak of the legitimacy of a legal system, and when trust in the legal system is lost what usually follows is anomie.

Moreover, with respect to legal relations, (co)gent formal legal relations need to be quite seriously respected in actual legal relations, or only minor discrepancies are allowed thereof. If this is not the case, it is difficult to say that legal norms are generally abided by and that the rule of law generally applies.

Finally, with respect to ADR, its possibilities are relatively frequently resorted to. This points to the fact that there is still trust in less formal ways of dispute resolution.

Concerning the b) external (non-professionalist) variant of the model's informal component, relating to legal norms there should be a high degree of normative integration: legal norms are relatively strictly followed in everyday life, or there are only minor deviations. As to legal values, legal norms need to be generally perceived as conforming to legal values, and actual relations should be perceived as legally consistent with legal values. Concerning legal relations, there should be a high degree of normative integration meaning that actual legal relations are not far from formal legal relations. Last but not least, there should be a spontaneous use of ADR methods in everyday life, and not too many request for disputes to be resolved in formal legal procedures.

The model is also presented below in the form of a table with all essential characteristics.

Table 1.
The model of Central European legal culture

	Formal law	Informal law	
		Internal legal culture	External legal culture
Legal norms	General Acts: short, concise and clear Individual Acts: short, concise and comprehensible; proper time for adoption or issuance Proper consistency among general acts and individual with general	Legal norms are strictly applied in legal practice (negligible deviations)	High degree of normative integration: relatively strict abiding by legal norms in everyday life (negligible deviations)
Legal values	Contained in legal norms: in a proper manner and extent	Legal values are viewed as properly incorporated in the legal system Legal rules are predominantly viewed as consistent with legal values	Legal norms are viewed as consistent with legal values Actual relations viewed as legally consistent with legal values
Legal relations	Legal relations not overregulated Changes in general legal acts not too frequent	Formal legal relations relatively strictly adhered in actual legal relations (negligible deviations)	High degree of normative integration: actual relations not too far from formal legal relations
ADR	Accessible through legal rules in a proper manner Provided as an effective alternative to formal legal procedures	Frequent applications of ADR methods	Spontaneous application of similar methods in everyday life: formal legal procedures not too frequently requested

Source: Compiled by the author.

4. Slovene (post-Socialist) departures from the model

What needs to be followed is an analysis how a particular legal culture such as the Slovenian departs from a typical (above mentioned) Central European model.

When Slovenia had declared independence, it wanted to return from the group of socialist law countries to the Central European family within the European Continental legal systems, due to historical influences in this territory mostly from Austrian law. For that reason, it even changed its constitution to adopt a new one following the German model. However, today it is impossible to say that the Slovene legal culture is Central European such as the German, Austrian, or Swiss since it is (still) quite different from these systems. Due to several decades of socialism which have very much changed the pre-war Slovene legal system and many elements thereof have not yet been eradicated, it needs to

be described as a part of the post-socialist legal culture, which is still in transition. Concerning the problems the Slovene legal system has been facing there are quite a few resemblances with other former communist systems.

In his article on general failings of the Croatian legal system when compared with modern developed democracies, which is quite typical for virtually all former Yugoslav republics including Slovenia, Uzelac stems from the position that post-socialist legal systems are necessary heirs of their socialist past. In socialism law was mainly instrumentalised: to serve economic and political policies in order to overcome socially and economically unjust ideals of bourgeois law (Uzelac, 2010, p. 377). This idea is still to some extent reflected in certain fundamental features of post-socialist legal traditions: 1. a legal process as the tool for the protection of the interests of political elites; 2. fear of decision-making; 3. low but comfortable status of judges; 4. feminisation of the judiciary; 5. deconcentrated proceedings; 6. orality as pure formality; 7. excessive formalism;¹⁸ 8. lack of planning and procedural discipline; 9. multiplicity of legal remedies that delay enforceability; and 10. endless cycles of remittals (Uzelac, 2010, p. 382).

What about Slovenia? How much its rule of law, legal system and legal culture departs from the ideal model described above?

If we compare the normative-dogmatic element of the integral theory of law from the ideal model of the rule of law with the one existing in Slovenia, we will find certain deviations in the latter from the former. Both in the area of law creation as well as law application. In the relation to the first process, general legal acts (particularly statutes and executive regulations) seem to be sometimes too long and not always well prepared, too many in number and too frequently amended. Their texts are often too detailed, often they are difficult to be interpreted. Legal formalism is still too much embedded in the legal profession. Secondly, referring to law application, individual legal acts (i.e. judgments and decisions) are often adopted only until very long proceedings, tend to be quite long and also their language is less comprehensible and their style is sometimes poor, with procedures for their making often being too long. Additionally, with respect to legal relations, it follows that Slovene social relations are many times legally overregulated.

Despite the above-mentioned failings of the Slovene contemporary legal system, the normative-dogmatic aspect of the legal culture is, however, not the gravest problem of Slovene law. In the context of such, Slovenia does not seem to depart that much from more developed European legal cultures. Thus, one of the main ideas of this chapter is that the problem of our law is not that much of a normative-dogmatic character. We will notice that when a difference between formal and informal elements of the model is concerned, there are greater deviations with respect to the informal elements than the formal ones.

In the formal dogmatic-normative sense, our legal system is not ideal but seems to be comparable with other systems in the subgroup. The problem appears when we move from the formal level of the rule of law to its informal level. Here we meet the greatest problems, which are typically analysed by sociology of law, such as problems with regard to

¹⁸ In a similar manner Manko has criticised the hyperpositivism of Polish (ordinary) courts by arguing that those courts still very much rely on linguistic and logical interpretation instead of also applying purposive interpretation, balancing and legal policies (Manko, 2013a; Manko, 2013b). Moreover, Kühn criticised the judiciary of new EU countries as being outmoded and unprepared for new tasks in the EU (Kühn, 2011).

normative integration, legal consciousness, legal effectiveness and legal culture (see Igličar, 2004).

Therefore, concerning the model's informal law component in its a) internal variant, concerning the legal profession, with respect to legal values, sometimes there is a wish that they be more directly considered in legal practice. Also, concerning ADR, legal professionals do not often enough make use of ADR procedures.

Concerning the b) external (non-professionalist) variant of the model's informal component, relating to legal norms there is a low level of normative integration: people less than ideally abide by legal norms in everyday life (e.g. still too many try to avoid taxes, abuse social benefits). With respect to legal values, legal norms are perceived as often inconsistent with legal values, and actual relations are perceived as legally incompletely regulated with respect to legal values. As to legal relations, there is a low level of normative integration: actual social relations are removed from legally regulated relations. Finally, with respect to ADR, there is a less spontaneous use of similar methods in everyday life – there are still too often requests to have formal legal procedures.

The above-discussed Slovene deviations are also presented in a special table below, in which they are depicted in italics to be separated from those characteristics where the Slovene legal culture meets the model more or less.

Table 2.
Slovene (post-Socialist) departures from the model

	Formal law	Informal law	
		Internal LC	External LC
Legal norms	General acts: <i>too long and badly prepared; too many; too often changed</i> Individual acts: <i>too long and not enough understandable; excessive length of proceedings</i> ¹⁹	Major following in legal practice (minor departures)	<i>Low degree of normative integration: lack of major following in everyday life</i>
Legal values	Contained in legal norms: conformity of legal norms with legal values	Perceived as properly included in the legal system Legal norms perceived as consistent with legal values <i>Occasional wish that legal values would be more seriously considered</i>	<i>Legal norms perceived as often inconsistent with legal values</i> <i>Actual relations perceived as not fully regulated in conformity with legal values</i>

¹⁹ All those characteristics of post-socialist legal procedures that are mentioned by Uzelac in his article contribute to the overall length of legal proceedings (Uzelac, 2010, pp. 380–382).

	Formal law	Informal law	
		Internal LC	External LC
Legal relations	High enough mutual conformity of legal acts (in terms of constitutionality and legality): individual legal acts consistent with general legal acts <i>Over-regulated</i>	Taken into consideration in actual relations (minor departures)	<i>Low degree of normative integration: actual relations quite apart from legally regulated relations</i>
ADR	Properly accessible in legal norms Regulated as rather effective alternative to formal legal procedures	<i>Not frequent enough use of ADR</i>	<i>Less spontaneous use of similar methods in everyday life: too much demand for formal legal procedures</i>

Source: Compiled by the author.

5. Going forward?

If we want to remedy the defects, deviations, or departures from the model, we need to know the reasons and causes for them. As it was emphasised, there is a great problem with the informal part than the formal elements of our legal culture. You can replace formal laws as a relatively quick step, but it takes time to change informal patterns.

The theory of normative integration points to the effectiveness of law being dependent on how legal norms are internalised, which means that people follow them spontaneously. They internalise legal norms if they take them as being “theirs”, legitimate, meaningful, or simply needed.²⁰ Connected with normative integration is the concept of (personal and collective) legal consciousness. Ross differentiated formal legal consciousness, which requires that we abide by law, from material legal consciousness that signifies following law that is legitimate (Ross, 2004, pp. 54–56). If legal norms are well-integrated assuming to be legitimate, the collective legal consciousness would be at a higher level, because it would dictate their respect. The level of both normative integration and legal consciousness may result in a greater or lesser effectiveness of a legal system. The connection here is causal: the greater the normative integration and higher the legal consciousness the greater the effectiveness of the legal system. The effectiveness of law could also be viewed either in a formal manner as the activities of legal authorities, or in a material manner meaning law application in real life (Ross, 2004, pp. 54–56). If that is below a certain degree, people would not spontaneously follow legal norms, and no control and sanctioning would improve that.

²⁰ What is important here is not only a general situation in the society, but also family upbringing and the process of internalising social norms, which is the subject of study by social psychology and psychoanalysis (see Olivecrona, 1971, pp. 246–260).

In Slovenia, the level of normative integration, and in relation with such also the most general level of legal culture, is lower than in older Western democracies. Since that was at a higher level at the time of the Austrian–Hungarian Empire, and perhaps to some extent also during the Old Yugoslavia (Pavlin, 2012), it could be ascribed to consequences of the communist experiment with the “withering away of state and law”, and too slow a process of revitalisation of the rule of law in the independent Slovenia.²¹ If during socialism, there was a high level of collective consciousness concerning economic and social rights (or welfare state), this cannot be said for the formal aspect of the rule of law and law’s general authority in society.

A discrepancy between the normativity and actuality of a legal system and consequently lesser effectiveness occurs when the said dimensions are too much apart. The legal system of the Socialist Federal Republic of Yugoslavia (as well as the Socialist Republic of Slovenia) was quite alienated from the Slovenes particularly for two reasons: a) it was not democratic having being appropriated by political elites; and b) it was not autonomous in the national point of view. In order that the contemporary legal system works better, given that the mentioned reasons ceased to apply, it would be necessary to raise the level of normative integration and collective legal consciousness.

A lower level of legal consciousness from desired has also resulted from many negative stories of economic transition. The entrance into the EU, with the prior incorporation of legislations in the areas of anti-corruption, public procurement, public access to information, judiciary and public administration reforms, however, contributed to some extent to a raise in the level of people’s legal consciousness. Thereby a European legal framework was established improving primarily the normative-dogmatic and axiological dimensions of the legal system. However, there is still much to be done in the areas that affect the mentioned informal dimensions of law.

References

- Babnik, J. (1894). *Nemško–slovenska pravna terminologija* [German–Slovene Legal Terminology]. Dvorna in državna tiskarnica.
- Barberis, M. (2012). *Pravo in morala danes* [Law and Morality Today]. *Revus*, 16, 13–54. Online: <https://doi.org/10.4000/revus.2091>
- David, R. & Grasmann, G. (1988). *Einführung in die grossen Rechtssysteme der Gegenwart. Rechtsvergleichung*. C. H. Beck Verlag.
- Falcón y Tella, M. J. (2010). *A Three-Dimensional Theory of Law*. Martinus Nijhoff Publishers.
- Friedman, L. M. (1975). *The Legal System. A Social Science Perspective*. Russell Sage Foundation.
- Granda, S. (2008). *Slovenia: An Historical Overview*. Government Communication Office.
- Heindl, G. & Schambeck, H. (1979). *Prozesse sind ein Silberschweiss oder Juristen Brevier*. Paul Neff Verlag Wien.
- Igličar, A. (2004). *Sociologija prava* [The Sociology of Law]. Pravna fakulteta in Cankarjeva založba.
- Kantorowicz, H. (1925). *Staatsauffassungen: Eine Skizze*. Braun.
- Kühn, Z. (2011). *The Judiciary in Central and Eastern Europe. Mechanical Jurisprudence in Transformation?* Martinus Nijhoff Publishers.

²¹ Similar problems can be encountered in virtually all ex-communist countries.

- Lima, A. C. (2008). A Brazilian Perspective on Jurisprudence: Migule Reale's Tridimensional Theory of Law. *Oregon Review of International Law*, 9, 77–148. Online: <https://ssrn.com/abstract=1124461>
- Manko, R. (2013a). Survival of the Socialist Legal Tradition? A Polish Perspective. *Comparative Law Review*, 4(2), 1–28.
- Manko, R. (2013b). Weeds in the Gardens of Justice: The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome. *Polemos – Journal of Law, Literature and Culture*, 7(2) 207–233.
- Novak, M. (2010). Uvod v pravo [An Introduction to Law]. *Evropska pravna fakulteta v Novi Gorici*.
- Novak, M. (2012). Slovenska pravna država v luči integralne teorije prava [The Slovene Rule of Law State in the Light of the Integral Theory of Law]. *Poligrafi*, 17(67–68), 93–105.
- Novak, M. (2016). *The Type Theory of Law*. Springer. Online: <https://doi.org/10.1007/978-3-319-30643-8>
- Olivecrona, K. (1971). *Law as Fact*. Stevens & Sons.
- Pavčnik, M. (2007). *Teorija prava [The Theory of Law]*. GV Založba.
- Pavlin, N. (2012). *Pravna kultura slovenskega sodstva [The Legal Culture of Slovene Judiciary]*. *Evropska pravna fakulteta v Novi Gorici*.
- Pitamic, L. (2005). *Na robovih čiste teorije prava [At the Borders of the Pure Theory of Law]*. *Pravna fakulteta v Ljubljani in SAZU*.
- Pokrovac, Z. (2018). *Slobodno stvaranje prava. Hermann U. Kantorowicz i slobodnopравни pokret [Free Creation of Law. Hermann U. Kantorowicz and Free School of Law]*. Naklada Breza.
- Pound, R. (1910). *Law in Books and Law in Action*. *American Law Review*, 44(1), 12–36.
- Radbruch, G. (1973). *Gesetzliches Unrecht und übergesetzliches Recht*. [1946] In E. Wolf & H.-P. Schneider (Eds.), *Rechtsphilosophie* (pp. 339–350). K. F. Koehler.
- Razdrh, A. & Premzl, P. (Eds.) (2018). *Slavni slovenski pravdarji [The Famous Slovene Litigants]*. *Odvetniška zbornica Slovenije*.
- Reale, M. (1968). *Teoria Tridimensional do Direito [The Theory of Three-Dimensional Law]*. Saraiva.
- Robinson, O. F., Fergus, T. D. & Gordon, W. M. (2000). *European Legal History*. Butterworths.
- Ross, A. (2004). *On Law and Justice*. The Lawbook Exchange.
- Silbey, S. S. (2001). *Legal Culture and Legal Consciousness*. In N. J. Smelser & P. B. Baltes (Eds.), *International Encyclopedia of Social and Behavioral Sciences* (pp. 8623–8629). Pergamon Press. Online: <https://doi.org/10.1016/B0-08-043076-7/02913-2>
- Škrubej, K. (2010). *Pravo v zgodovini: s poudarkom na razvoju na današnjem slovenskem prostoru [Law in History: With an Emphasis on Developments in Today's Slovene Territory]*. GV Založba.
- Uzelac, A. (2010). Survival of the Third Legal Tradition? *Supreme Court Law Review*, 49, 377–396. Online: <https://ssrn.com/abstract=2498760>
- Varga, Cs. (1992). *Comparative Legal Cultures*. Dartmouth.
- Vilfan, S. (1996). *Pravna zgodovina Slovencev: od naselitve do zloma stare Jugoslavije [From the Settlement until the Break of the Old Yugoslavia]*. Slovenska matica.
- Visković, N. (1976). *Pojam prava: prilog integralnoj teoriji prava [The Concept of Law: A Contribution to the Integral Theory of Law]*. *Biblioteka Pravnog fakulteta u Splitu*.
- Visković, N. (2006). *Teorija države i prava [The Theory of State and Law]*. CDO Birotehnika.
- Zweigert, K. & Kötz, H. (2011). *An Introduction to Comparative Law*. Oxford University Press.