

EDITORIAL: ON AGE AND LEGAL GENIUS

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Science's most famous cat was an oddity. Not only did she have the formidable capacity to be both dead and alive when put in a box with radioactive material, her master Erwin Schrödinger was, even at the tender age of 38, thought much too old to have 'created' her in the first place.¹ Theoretical physics was a young man's game at the beginning of the 20th century. Heisenberg was 25 when formulating the uncertainty principle, Einstein published his work on the photoelectric effect at 26, Bohr proposed the model of the hydrogen atom when 28. Quantum mechanics lived by the maxim: 'a person who has not made his great contribution to science before the age of thirty will never do so'.²

The relationship between age and genius has fascinated humankind for a long time. What seems to be clear is that age matters when it comes to creative and scientific output.³ After a period of little or no creative output, our ingenuity peaks in our 30s and 40s before slowly, yet steadily, declining. What is less clear is how exactly age matters. Overall, the average age for great scientific contributions seems to have gone up. Formal education and the increasing wealth of information, coined the 'burden of knowledge' by Benjamin Jones, play a key role in this development. Yet, the age of genius varies strongly for different fields, a fact suggested to depend on the nature of the activity. Conceptual breakthroughs require less time than experimental ones. As a result, writers peak earlier than chemists.

Is law more like poetry or experimental physics then? There is no

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¹ John Polkinghorne, *Quantum Theory - A Very Short Introduction* (Oxford University Press 2002) 19 et seq.

² Quote attributed to Albert Einstein. Somewhat ironically, Einstein himself could be seen to have violated his own principle by publishing what many hold to be his most significant contribution, the general theory of relativity, at the age of 37.

³ For an overview over this field of research and some interesting insights that have informed this editorial, see Benjamin Jones, E.J. Reedy and Bruce A. Weinberg 'Age and Scientific Genius' (2014) NBER Working Paper 19866.

systematic data on age and ‘legal genius’. This might partly be due to the absence of legal equivalents to the Nobel Prize or Fields Medal, which serve as core indicators for scientific success.

Equally likely, this empirical gap might be caused – as much as it might pain us – by the limited attraction of legal scholarship for the wider public, compared with fields such as physics, medicine and literature.

The work of some key figures in legal research in the 20th century suggests that we are a field of late-bloomers. Kelsen was 53 at the publication of the first edition of the *Pure Theory of Law* (79 at the publication of the better-known second edition), Hart was 54 when *The Concept of Law* came out and Dworkin 46 at the time of *Taking Rights Seriously*, his first major publication. The quality of legal scholarship, so it seems, grows with experience.

Yet, research lays bare one central advantage of the young age: the willingness to challenge the *status quo* more radically. The ability to depart from existing paradigms ‘may be greatest shortly after initial exposure to a paradigm, before it has been fully assimilated’.⁴ It is this ability of young researchers that the EJLS has always sought to promote. As of this issue, we want to make this commitment even more visible by including a section entitled ‘New Voices’. Its objective is to give young talented scholars, those currently enrolled in a PhD program (and equivalent, including the J.S.D.) or in post-doctoral positions, the opportunity to put forward an original argument in a reader-friendly way.

Two contributions are featured in the first edition of ‘New Voices’. The authors’ task was simple yet demanding. We asked them to submit pieces that would challenge a particular claim, idea or statement. Anything from mainstream arguments in the literature, to current regulatory proposals or recent court decisions was accepted. To ensure conciseness and legibility, the length of contributions was limited to a maximum of 5,000 words. The general idea was to think essay rather than academic article, to be shorter and more provocative, to footnote only where necessary.

Guido Comparato, research associate at the European University Institute,

⁴ *ibid*, at 20.

targets the use of legal culture in EU law scholarship. The cultural dimension of law has been prominent in debates on the Europeanisation of national legal orders, notably with respect to private law. Going beyond black-letter approaches, analyses focused on legal culture promised to explain the difficulties the European project has faced in view of the diversity among Member States. Yet, might ‘the employment of the notion of legal culture [lead] to more orthodox outcomes than expected’ and ‘[impoverish] rather than [enrich] the legal debate’? Do cultural approaches aiming at explaining diversity in fact ‘presuppose homogeneity’?

Proportionality in *jus in bello* is the object of our second submission, authored by Joshua Andresen from Yale Law School. The almost universal acceptance of proportionality has, somewhat paradoxically, gone hand in hand with the belief that it is largely impossible to apply the doctrine in this domain. The author deconstructs the ‘perplexity over proportionality’ and challenges the claim that lies at its core: that ‘the demand to balance military advantage and injury to civilians is extraordinarily difficult because we are asked to balance two incommensurable values’. Can proportionality, properly applied, help us with decisions that involve the weighing of complex factors, such as targeted killings, and ‘improve both the protection of civilian lives and the attainment of military goals’?

We welcome ‘New Voices’ submissions by authors interested for future issues of the EJLS.

General Section

The articles featured in our general section are a natural progression of the above two contributions in terms of both originality and critical bite.

The issue starts off with two pieces that offer us fresh perspectives on themes with a long pedigree in legal scholarship. Nuno Garoupa and Mariana Pargendler analyse the question of legal families, an issue that has fascinated legal research for centuries, through the lens of law and economics. Andreas Grimmel takes on the topic of judicial activism in the

early days of the Court of Justice of the European Union. The argument put forward is bold: is the charge of activism a mere ‘myth’ resulting from a context-insensitive reading by political scientists?

The ‘fourth instance’-doctrine of the European Court of Human Rights is the object of Maija Dahlberg’s contribution. Although presented as homogenous by the Court, the doctrine is shown to be used in four greatly varying ways, some defensible, others not. The following two contributions deal with the question of legal exports. Nathalie Neumayer inquires into whether the English law of unjust enrichment could use a German-style absence of basis doctrine. Stefano Berteà and Claudio Sarra target the question of foreign precedents and provide some theoretical foundations in this respect. The issue concludes with a sharp analysis and, at the same time, powerful plea for change. Elisabetta Catelani and Elettra Stradella lay bare the gender biases inherent in Italian legal education and provide suggestions for progress.

We hope you will enjoy reading these as much as we did.

Masthead Changes

It is the natural element of the cycle of life of a journal run by PhD students that people come and go. Yet, this issue stands out as it marks the departure of two editors that have left an important imprint on the EJLS. Emma Linklater, who has been the soul behind many of the recent changes within the journal, will step down from the position of executive editor. She will be replaced by Marita Szreder, who has already co-edited the current issue. Stephen Coutts, one of our most senior and dedicated editors, has also left the journal. Mikhel Timmermann has taken over Stephen’s responsibilities as the Head of Section for European law. We wish Emma and Stephen the best of luck for their new projects and challenges.