Jungleland

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A new approach to the question «What is Law?»

Should we try to define law? If not, what sense does it make to speak of «soft law»? But if so, should we define it by its content, its character or by something else? And how are we to distinguish a decision of law from other decisions, e.g. political, social or economic? We suggest that the criterion, which defines law and distinguishes it from other realms, is the fact that the decision at issue can be appealed.

INHALTSÜBERSICHT

Outside the street's on fire
In a real death waltz
Between what's flesh and what's fantasy
And the poets down here don't write nothing at all
They just stand back and let it all be
And in the quick of a knife, they reach for their moment
And try to make an honest stand
But they wind up wounded, not even dead

Bruce Springsteen: Jungleland (1975)

I. Why ask the question?

The notion of «torture» has become opaque, the concept of the «unlawful combatant» is still used, and – regardless of so many presidents' promises – Guantanamo still exists and dozens of people are still held in indefinite detention there. France declared a state of emergency and extended it six times, only to finally transpose its provisions into national law. No need to mention Afghanistan, Iraq, Egypt, Libya, Ukraine or Syria; it will suffice to call attention to the fact that all over the world people are killed by drones. British Defence Secretary frankly vowed to eliminate all surviving British ISIS fighters to prevent them from coming back to the UK. Or shall we mention the Greek crisis and the role the International Monetary Fund or the European Central Bank played? Or the refugee crisis and Europe's countries introducing border controls in complete disregard of all European law and procedures? Or the EU's deal with Turkey, another flagrant violation of international law? Not to speak of the Corona measures with which governments around the world suspend constitutional rights and define *ad hoc* – day by day – the entire sphere of life.

An innocent observer might easily get the impression that the law is retreating, globally. But, is this impression correct? *What* is it, that is retreating?

When we tried to expound the topic we are currently working on to a former colleague at the CTLS, she, being very bright, immediately and without hesitation asked: Why would someone want to know that? What could we possibly gain by answering that question? Or in other words: Is the question really an interesting, a fruitful one? This is probably the first and foremost question of all, and she made us think quite a lot about it. To be honest, we had not done so before, first because – being curious by nature – we do not ordinarily put into question the questions we are interested in, and second – having grown up in a continental, more precisely, in the German tradition of thought – a precise clarification of the concepts we use, seems to us so adequate and helpful, that it constitutes almost a value in itself. Hence, before presenting our concept of law, we will first try to answer the question, why it is helpful to define law or – at least to distinguish it from other, similar concepts:

In order to review this impression, it seems necessary to go to the very roots and ask the – somewhat unexpected – question: What is law – and *what is it not*? Hence, first of all we will try to distinguish law from other, similar concepts:

Many are the definitions of law that have been proposed hitherto. Definitions are distinctions. In order to understand a distinction, we need to understand its aim: what objective does its creator pursue, what ends does the definition serve? Simplifying very much,[1] we can, by and large, distinguish three fundamentally different perspectives (leaving aside for now systems theory and its autopoietic and necessarily self-circular conception according to which everything is law that is regarded as such by the law):

(1) Most *philosophers* have tried to conceive law in perspective of justice. They have understood law as a specific type or aspect of justice. Justice, however, to them normally goes far beyond law and frequently serves as a basis and legitimation to fight certain legal rules, or even to declare them as non-law, illegitimate or outspoken illegal. The problem with such a perspective is evident: If you define law as a province of justice, you need to define justice, an endeavour not really successfully undertaken up until now. This is especially due to the fact that «justice» in general is (or can at least be) completely different from justice in the specific concrete case.[2] As long as we do not have a universally valid argument for the one or the other, the question of justice will always remain *contentious*.

(2) *Sociologists* (and analytical jurisprudence), on the other hand, understand law in the context of rule-making and rule-execution. The concept of law primarily serves them to distinguish one set of rules, rule-making and rule-execution from other such sets of rules as e.g. morals, ethics, politics, economy and so on.

1 And necessarily falsifying it by doing so, of course, but if you want to have an overview you must overlook many a thing, as the philosopher Max Scheler once said, or in the words of William James (Principles of Psychology, Chapter 22): «The art of being wise is the art of knowing what to overlook.»

2 Michel de Montaigne, Essays, III/13, Of Experience: *«All which makes me remember the ancient opinions, 'That ‹tis of necessity a man must do wrong by retail who will do right in gross; and injustice in little things, who would come to do justice in great: that human justice is formed after the model of physic, according to which, all that is useful is also just and honest: and of what is held by the Stoics, that Na-ture herself proceeds contrary to justice in most of her works: and of what is received by the Cyrenaics, that there is nothing just of itself, but that customs and laws make justice: and what the Theodorians held that theft, sacrilege, and all sorts of uncleanness, are just in a sage, if he knows them to be profitable to him.' There is no remedy: I am in the same case that Alcibiades was, that I will never, if I can help it, put myself into the hands of a man who may determine as to my head, where my life and honour shall more depend upon the skill and dili-gence of my attorney than on my own innocence. I would venture myself with such justice as would take notice of my good deeds, as well as my ill; where I had as much to hope as to fear: indemnity is not sufficient pay to a man who does better than not to do amiss. Our justice presents to us but one hand, and that the left hand, too; let him be who he may, he shall be sure to come off with loss.»* Translated by Charles Cotton, ed. by W. C. Hazlitt; online to be found at: www.gutenberg.org

This perspective conceives law essentially by linking it to the question of power. In a sociological perspective law should be distinguished or distinguishable from other forms of ruling, i.e., other forms of power. The enforcement of rules becomes the central element in such a perspective. Alas, if enforcement is the core of law, then, of course, as is easy to understand, transnational law suffers enormously, since most of it does not constitute law at all. If we do not follow, e.g., Hathaway & Shapiro[3] who recognize «outcasting» as a non-violent form of law-enforcement, we are required to use the mickey-mouse-concept of «soft law» (we would even say: «abuse», since it seems rather irritating and confusing to call something law that lacks the core element of what the same self definition of law requires. We can, of course, call black also «soft white» or vice versa, but doing so does not really add to clarity).

> Calling something «soft law» that lacks a core element of law, is like calling black «soft white».

(3) Finally, there is the perspective that tries to define law by its form or by formal factors. Here, you will find *legal theorist*, especially the positivistic school (H. Kelsen as well as H. L. A. Hart). To a certain extent, of course, we find here also the other two groups: the philosophers asking whether something having the form of law could possibly not be law or overruled by something like natural justice; and the sociologists using formal criteria like, e.g., the form of enforcement (M. Weber and his understanding of law as being enforced or enforceable by a specialised entity within the community, the «Rechts-Stab», a staff of people holding themselves specially ready for that purpose). The formal approach, however, has its shortcomings. It suffers, as is evident, from the fact, that essentially the distinction between «positive» and (any kind of) «natural» law cannot be upheld completely, as Kelsen's problems and his use of the «Grundnorm» (the basic norm) beautifully show. It is not possible to imagine a natural law completely devoid of positive (or positivistic) elements, and it is impossible as well to imagine a purely positive law without natural law elements.

If this summary is (more or less) correct (and if we allow for the fact that there are many more differing positions) we might conclude for the sake of our current endeavour: A definition of law seems meaningful if and inasmuch as it permits to understand and conceive law *without reference* to either (1) justice, (2) power or (3) its form. Our goal to define law therefore not only serves the purpose of distinguishing the concept («law») from justice and power, it tries to conceptualize «law» possibly without any reference to justice, power or law's proper form.

II. On the merits of the question itself

In the realm of transnational law, scholars have a strong tendency to assume law for structures they traditionally would not have. They do so, because they lack an anchor of «law» as the state would ordinarily provide for. Everything that transcends national borders becomes difficult. As long as recourse to national law or – as a complement of it – multi- and international law is possible, things remain relatively quiet. However, where internationally binding (and enforceable) rules are absent, the concept of law itself becomes questionable and sort of a nuisance, because it forces the legal profes-

3 Oona A. Hathaway & Scott J. Shapiro: Outcasting: Enforcement in Domestic and International Law, 121 (2), Yale Law Journal, 2011, 252-349.

sion to acknowledge either its helplessness or its lawlessness. Consequently, in transnational matters the concept of law is applied to circumstances and structures it would not traditionally be applied to in the realm of national law. Legal theorists widen the concept and enlarge it, calling it, e.g., «soft» law, a confusing concept, that designates a type of law that is not (according to the legal theorists' own criterion) true or «hard» law, but some sort of a bastard.

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An excellent example is Corporate Social Responsibility (CSR) and the question of globalization of law. Many – mostly system theorist – authors hail the advent of a global society and of a corresponding global law.[4] Some praise the universal condemnation of e.g. child labour, which is described as an effect of global law and global Corporate Social Responsibility. Independent of national legal orders, the aftermath of the Deepwater Horizon catastrophe is described as a convincing example of global law, where not national or international administrations but the global community itself – through the means of the international media exerted the necessary pressure to ensure compliance with their rules and regulations.[5] We, for once, as researchers in criminal law, are less enthusiastic and convinced, and essentially this was the starting point of our reflections. Doing so, especially in the realm of transnational law, leads to results much less convincing and welcome than one would think.

III. Traditional & Less Traditional Rule Making and Enforcing

In order to reflect on the quality of decision-making by the media, let us think for a moment about Deepwater Horizon and a very similar affair a few years before, Brent Spar, almost a companion to it. In 1995, media coverage was as intense for Brent Spar as it would be for Deepwater Horizon in 2010. As a result of the international protest, Shell (the owner of Brent Spar) had to refrain from sinking the platform at the very place it had been swimming for years. Instead it had to tow it to Amsterdam where the platform was disassembled. Today, even fierce environmentalists probably would agree that it would have been better to dump the platform, as it had been planned, right where it was swimming. As to Deepwater Horizon, is it not striking that the platform's owner (British Petrol) did everything to prevent the oil from staying at the sea's surface, everything to make sure it would be solved and sink to the bottom of the sea? A very clever idea, indeed, since this prevented photos of animals drowning and dying because of the oil spilt. And such photos would produce a devastating impression on the public opinion of the catastrophe, as they did in the case of Amoco Cadiz, a ship that sunk before the French coast in 1978 and thereby caused an oil spill. These two

4 See e.g. Mikhail Xifaras, The Global Turn in Legal Theory, The Canadian Journal of Law & Jurisprudence, 2016/8.

5 See e.g. Anne Mirjam Schneuwly, Corporate Social Responsibility an der Schnittstelle von Wirtschaft, Recht und Politik: transnationales CSR-soft law im globalen Kontext, Basel 2012.

examples, at least, in our mind, do not speak loudly in favour of international media coverage as a means of pressure to enforce rules. Neither do so examples of criminal law. The case of Dominique Strauss Kahn, former director of the International Monetary Fund and at that time potential candidate for the presidency of France, will suffice to show this. Everybody will remember the photos of DSK awaiting his hearing before the NY judge that brought his career to a sudden end. Media coverage itself (independent of its content) could easily be construed as damaging, or even as the main factor of damage. Or take another, more recent example: When in May 2015 some FIFA officials were arrested in a hotel in Zurich, journalists were already waiting in the hotel lobby when police arrived. Why on earth should a prosecutor inform the media beforehand of his plans to arrest someone? Obviously, media coverage seems to benefit some. What exactly makes us feel uncomfortable with a concept according to which media coverage or public pressure could be considered as law? In order to answer this, we need first to discuss another aspect of law.

The judicial decision always remains essentially free, another judicial decision by another court might simply void its validity and force.

IV. Law as Text & Law as Decision

In most continental jurisdictions (civil law countries), law would be linked – and closely so – to a text. That text, in turn, would be conceived as «the» law, it would constitute the law which in turn could be applied or not, applied correctly or incorrectly to a specific case. It is this aspect (the importance and structural role) the text plays which is mostly brought forward to distinguish common law from civil law jurisdictions. The distinction, however, is only partially correct since the important distinction between the two systems is not the text and its structural position itself, but the types of text referred to. While civil law countries primarily use «statutes», that is abstract texts framing typological symptomatic situations, common law countries primarily refer to the texts of specific decisions, so called precedence.[6]

But focussing on text does not help us. In any jurisdiction and any legal system the important question does not concern text or precedence, but the decision itself. Fact is, law essentially consists of decisions. One can have as many texts as one wants, if one does not have a decision, these texts remain silent and useless (no matter whether statutes or precedence). And, of course, it is not texts that force a court to decide in one sense or another, not even other courts, i.e., other decisions, can do that. The judicial decision always remains essentially free, another judicial decision by another court might simply void its validity and force. Texts merely serve as a guideline. They do contain neither their own meaning nor their interpretation. Texts cannot fix themselves or their meaning or interpretation, they are the mere objects and instruments of people that use them, and law-people are especially trained to use texts in any way they want. We could now delve into the philosophy of language and Wittgenstein and its philosophy of meaning

6 We can safely ignore the distinction of a reference to a case and one to the text of the case, since it would lead as astray for the scope of the present paper.

and interpretation, but we do not need to do so. Simply imagine a text (be it statute or precedence). Further, imagine an overwhelming majority of people (or to be even more blunt: the totality of all people ever having read it) understanding that text in a specific sense, reading a specific meaning into it. Now, imagine a court simply understanding that text in a completely differing way from everybody else, or – less disturbing – simply not applying that text to a specific case to which everybody else would have applied it. This example does not constitute law not being applied or not being applied correctly, because for such a proposition to be meaningful you must assume that your vision of the text (statute or precedence) is the correct and decisive one. Alas, this decision in a state under the rule of law belongs to the competent court, and explicitly not to anyone else. This is the reason why Oliver Wendell Holmes famously can define law as follows: *The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.*[7]

If in a lawsuit (any lawsuit), we remove decisions, we are left with nothing else than mere texts, and texts by themselves cannot help to solve the issue. But if we take away texts, we still have decisions. One must be a very fierce positivist to deny all decisions not referring to any text the quality of law. Hence, the notion of law does not necessarily contain a reference to texts and their meaning, but it always, and necessarily so, must focus on decisions.

Hence, the distinction between law in the books and law in action as well as that between positive and national law do only make sense for someone who links the concept of law to text. But such a link is neither necessary nor really helpful. But we might advance our understanding of the matter by asking what function texts serve in a legal dispute.

V. Why text in the first place?

Historically, the idea to introduce and rely on text in legal disputes stems from a thorough (and mostly well founded) mistrust of one party towards another. Text essentially has the function of a guarantee against the stronger party. But this, of course, must remain a mere (if understandable) wish, since the stronger party remains the stronger one and not only the decision to apply the text to a specific case but also its interpretation remain completely dependent upon her will and understanding. Salvatore Satta, an Italian professor of civil procedure (famous rather for his incredible novel «The Day of Judgement») puts the dilemma beautifully:

> «...valgono finché valgono, rebus sic stantibus, finché la natura, la passione, la follia non prendono il sopravvento.»

> *Queste promesse che gli uomini, paurosi l'uno dell'altro, si scambiano in una carta più o meno solenne sono come le promesse di eterna fedeltà nell'amore: valgono finché valgono, rebus sic stantibus, finché la natura, la passione, la follia non prendono il sopravvento.*[8] In English translation: *These promises that human beings, fearful of each other, more or less solemnly exchange on paper are like the promises of eternal*

7 O. W. Holmes, The Path of Law, 10 Harvard Law Review 457 (1897); find the full text under: www.gutenberg.org/files/2373/2373-h/2373-h.htm.

8 Salvatore Satta, Il Mistero del Processo, Piccola Biblioteca Einaudi 324, 2a edizione, Milano: Adelphi 2013.

faithfulness in matters of love: they are valid as long as they are valid, rebus sic stantibus (as long as things stay the same), until nature, passion or folly do prevail.

Therefore, using text as an instrument to limit the power of those who decide can never be successful, since texts can neither enforce their own application to a specific case nor provide their own interpretation. Only the person who decides can do that. This essential failure is the reason why texts (instead of binding and limiting the deciding powers) multiply. Texts do not create limits or clarity but give birth to other texts, as Montaigne knew.[9]

The fact that there is no necessary link of law to text and textualization should be most welcome to theorists of transnational law. Since text is not a necessary condition to a legal decision, neither is a national or multinational legislator. But this, of course, begs the question, how we possibly could distinguish decisions of law from, e.g. a political, economic or aesthetic or any other kind of decision.

VI. The difference between legal and non-legal decisions

If we are correct in assuming that the original goal of introducing text to the realm of legal decisions consisted in the attempt to limit the decider's powers, we might maintain that goal but try to achieve it by different means. Again, a criminal law perspective might be helpful: If we think of a criminal case, a criminal accusation, texts give us the impression (or the illusion) to protect us from the pure and overwhelming discretionary powers of the powerful party (the state, the prosecution) because they seem to create possibilities of defence. If the prosecution is obliged to declare openly its accusations, the defendant can argue against it. But this, and this is the crucial point, holds only true if there exists a possibility of appeal. If, and only if, the accusation (or for that matter, any other decision) can be appealed, the decider's powers can thereby be limited. Hence, discretionary powers are restricted not by means of texts, but by means of appeals.

We can generalize this finding and state as our central criterion of definition:

The characteristic and defining aspect of law (legal decisions) consists in the fact that legal decisions provide the possibility of an appeal. Appealability, then, is the proprium of law. Therefore, let us consider as «legal decision» any decision that provides a possibility of appeal. Further, let us consider as «legal decisions» only those decisions that provide such a possibility.

It is typical for political, economic, aesthetic or technical decisions that a possibility of appeal is absent. Of course, in most fields and most cases it is possible to complain about a decision and invoke compassion or grace, but we would not call this a proper appeal. It is not a second decision on the same grounds and the same assumptions; rather it constitutes a change of decision system or the omission or the waiver of a decision. But, in order to clarify what is meant when we speak of appealability, let us call appealable only decisions that provide for an appeal (1) beforehand and (2) on certain, pre-defined conditions (although not necessarily written ones).

In short, we shall call «law» every decision that offers (or contains) a remedy against itself.[10]

9 Michel de Montaigne, Essays, III/13, Of Experience: *„Who will not say that glosses augment doubts and ignorance, since there›s no book to be found, either human or divine, which the world busies itself about, whereof the difficulties are cleared by interpretation. The hundredth commentator passes it on to the next, still more knotty and perplexed than he found it. When were we ever agreed amongst our-selves: «This book has enough; there is now no more to be said about it»? This is most apparent in the law; we give the authority of law to infinite doctors, infinite decrees, and as many interpretations; yet do we find any end of the need of interpretating? is there, for all that, any progress or advancement towards peace, or do we stand in need of any fewer advocates and judges than when this great mass of law was yet in its first infancy? On the contrary, we darken and bury intelligence; we can no longer discover it, but at the mercy of so many fences and barriers."* Translated by Charles Cotton, ed. by W. C. Hazlitt; online to be found at: www.gutenberg.org

10 This, of course, directly leads to the question of what exactly is meant by a «remedy», and whether e.g. an only (limited) cognition of an appellate court should or should not be counted as such a «remedy»; an important question, no doubt, but one that

VII. Consequences of the definition

(1) First and foremost, a definition of law by the criterion of appealability is – as was our intention – independent of justice, power or the decision's form. Therefore, we do not need to refer to justice, power or form in any way when talking about law. We so can distinguish law from politics, a distinction deeply troubling not only to critical legal studies and Marrti Koskenniemi.[11] The trouble consisting in the Wittgensteinian problem, that law can be conceived as politics and politics as law, depending on how you look at them.[12] In civil law jurisdictions, the relationship of law and politics has been puzzling legal theory for a long time already: How is it possible that politicians decide about law texts, but independent courts decide about their meaning? Or think of the criticism of being «political» that is often brought forward against court decisions for which there is a great political and public interest. How could we ever distinguish a «legal» decision from a «political» one?

> We shall call «law» every decision that offers (or contains) a remedy against itself.

(2) Following our definition, the second consequence is that legal statutes as well as precedence, or for that reason, texts in general do not constitute any part of law. They are instruments and/or means of and for law, but they do not form any part of it.

(3) A third consequence is that certain decisions would appear to be legal decisions which ordinarily would not be counted or understood as such, especially due to the fields these decisions are rendered, e.g., in sports, economics or even religion. In all these fields, decisions, which offer a remedy, would be considered as legal decisions.

(4) Finally, a fourth consequence of our conception of law would be that no final decision of any kind or body of decision could be conceived as legal. If the appealability of a decision is the criterium individuationis, a decision that is not appealable could not be qualified as a legal one. Such a decision could not belong to law, even if was taken in a field traditionally conceived as law, and even if it was taken by a deciding body ordinarily qualified as a legal body of decision, e.g., by a court. This might be the most puzzling aspect of the proposal: Since most often, there does not exist a possibility to Supreme Court decisions, such decisions must be viewed not as law in our understanding, but as the exertion of power, as proper politics.

The political character of final, unappealable decisions becomes most obvious in the fact that a final decision is necessarily a correct one.[13] Very much like the Pope (who is officially infallible since the decree of 1870), a final decider (any supreme court judge) is necessarily infallible, simply because the decision is final. A quotation by the famous Justice Robert Jackson might catch this best: «We are not final because we are infallible, but we are infallible only because we are final.»[14] But then, infallibility is no legal concept and it does not work well

will not be discussed here but in a later analysis. However, it is most interesting to note, that e.g. the European Court of Human Rights cannot set aside the contested decision but only declare it to be contrary to the ECHR.

11 See e.g. Marrti Koskenniemi, The politics of international law, European Journal of International Law, 1990, 4-32,

12 See also The Hague Academic Coalition: As a rabbit or a duck? which can be found online.

13 This applies nota bene only in relation to a specific case. In terms of time, of course, a change of jurisdiction is possible.

14 Brown v. Allen 344 U.S. 443 (1953).

with law where appealability reigns. That appealability should be central for law, is of course not new.[15]

Appeals are known for a very long time. It is remarkable, however, that a right to appeal is by no means very old, evident or uncontested, especially in the Common law. And even where it is accepted, there remains a lot of vagueness. To give you just one example: Montesquieu, certainly not a man famous for a limited knowledge or understanding of law, writes in his Pensées diverses (our translation): «*When you have appealed to a judge against the judgment of another judge, and the appellate judge has pronounced her verdict, it is an abuse to allow an appeal to a third judge, because man's character is such that we do not like to follow others' ideas, so we find it natural to overturn what has been decided by those we deem of lower intelligence. Multiply the possibilities of appeal to courts, and you will see them to be occupied less with rendering justice to citizens than with the correction of each other.*»[16]

«Multiply the possibilities of appeal to courts, and you will see them to be occupied less with rendering justice to citizens than with the correction of each other.»

In fact, it is by no means evident why there should be any appeal at all and if so, why there should be more than one appellate court. And, of course, it is as dubious why the appellate procedure should be limited at all, even more so to only two or three courts. All these questions cannot be addressed with a traditional approach to the concept of law, but sure enough with our conception.

VIII. Advantages of appealability as the decisive criterion of law

To sum it up, using appealability as the defining criterion of law, things do change quite a bit in national matters. First, texts and the genesis of rules are seen as less important factors. Second, enforcement is not seen anymore as the dominant criterion defining law, and third, decisions that are not appealable are not understood anymore as legal decisions.

In transnational matters, all this seems much less of a threat and much more of a chance: We would not have to discuss the hard or «soft» character (lacking enforcement elements) of law, or its lack of justice, its proximity to power or its incomplete textuality. Instead of discussing and disagreeing about material issues, about values, power and economy, we could concentrate on practical (and procedural) issues and start to provide possibilities for appeal. We could do so in a very general way: By (1) defining the deciding bodies and institutions (national or international) against which we

15 See e.g. Joseph Raz, The Authority of Law: Essays on Law and Morality, Oxford UP 1979, 6-7. Raz lists «natural justice» (or due process) and judicial oversight as among the essential components of the rule of law.

16 In the original French this reads: „*Quand on a appelé d›un juge à un autre, et que celui-ci a prononcé, c›est un grand abus de permettre de recourir à un troisième, parce que l›esprit de l›homme est fait de manière qu›il n›aime pas à suivre les idées des autres, qu›il se porte na-turellement à réformer ce qui été fait par ceux à qui il croit des lumières inférieures. Multipliez les degrés des tribunaux, vous les verrez moins occupés à rendre la justice aux citoyens qu'à se corriger les uns les autres.*" (Tiré d'un travail inédit: Sur la manière d'étudier la jurisprudence, qui est à la Brède, l.c., 184). De l'Abus des jurisdictions, Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, Pensées diverses, Edition Garnier, Paris 1879, vol. 7, 181, the French text can be found online at: https://fr.wikisource.org/wiki/Pensées_diverses_(Montesquieu).

provide the possibility of an appeal, (2) defining the kind of decisions they render and (3) the appellate body competent to decide about the appeal.

In the end, perhaps a new approach could prove to be more promising than just to stand back and let it all be – while the law quietly perishes.