

# **AT THE CROSSROADS OF LAW AND IDEOLOGY: THE IDEOLOGY OF LAW AS A REFLECTION OF SOCIAL ONTOLOGY?**

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## **INTRODUCTION**

This paper examines the relationship between ideology in law and social ontology. The analysis proceeds on the basis that law's ideological existence may be signified by the sociologically ontological. The paper negotiates three (3) questions: first, whether there should be a link between ideology and legal doctrine; second, whether the social ought to characterise such ideology and, third, what should be the actual input of ontology in the ideology of law. Finally, the paper is concerned with the idea as to whether local differentiation of social ontologies justifies legislatures and electorates, when it comes to the latter infiltrating domestic law with their own ideology.

## **I. A FEW DEFINITIONS: IDEOLOGY, SOCIAL ONTOLOGY AND THEIR RELATIONSHIP**

With regard to the concept of ideology, different scholars and theoreticians have reached very different positions in the matter. For instance, Marxists would denote through the term 'ideology' a conspiratorial world of perfect abstraction, such a world having being created to control the masses.<sup>1</sup> Political scientists would perceive ideology as worlds of optimisation through theoretical position.<sup>2</sup> Anthony Downs, classically, defined ideology as 'a verbal

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<sup>1</sup> John L Martin, 'What is Ideology?' (2015) 77 *Sociologia, Problemas e Práticas* 10.

<sup>2</sup> *ibid.*

image of the good society’<sup>3</sup>. Structurally, however, ideologies are ‘patterned clusters of normatively imbued ideas and concepts [...]’<sup>4</sup>. Ideologies are also perceived as belief systems to existential concerns.<sup>5</sup> Interestingly, others have perceived ideology as ‘the ideational equivalent of actual patterns of relations’<sup>6</sup>. Preference is given to Downs’ more classical definition in that it is taken as a powerful presumptive point that ideologies, at least in principle, aim for the bettering of societies. This being the case, shedding a somewhat greater light in the discussion as to ideology’s fundamental nature, the author holds the view that ideology amounts to the *logos* of that which is (to be) seen or perceived. Combining the etymology of the term with Downs’ definition, one reaches a reasonably preferred view as to the definition of the concept in question: ideology is the perception of the *logos* in pursuit of bettering society.

Social ontology, on the other hand, seems to be a more straightforward concept when compared to the concept of ideology. One could favour Brian Epstein’s definition on this one: social ontology is ‘the intersection of metaphysics and philosophy of social science that investigates the nature of the social world’<sup>7</sup>. Social ontology, however, is not about that which merely exists or merely about the existence of social objects;<sup>8</sup> it is predominantly about the relationship of different entities within the social.<sup>9</sup> Social ontology is about the social world and its corresponding connotations. It is about the very varieties of social objects and non-social objects which may have certain social properties.<sup>10</sup> Indeed, it is about the relations between social facts and other facts which generate them or about explaining social facts through other facts.<sup>11</sup> Ontology *per se* is about ‘patterned ways-of-being-in-the-world that are lived and experienced as the grounding conditions of the social [...]’<sup>12</sup>. Ontology, thus, is about the real. Social ontology could be *mutatis mutandis* taken to be a close notion to political phenomenology. Yet, unlike political phenomenology, social ontology is about the real by taking into account specific context.<sup>13</sup> A multiplicity of ontologies is contemplated depending on the context. It also seems that the concept in question includes such matters as ‘temporality, spatiality, corporeality [and] epistemology [...]’<sup>14</sup>. Ontology, of course, is also about the social. For us, in law, the social world is of the utmost significance. Without a doubt, law is almost invariably about the nature of things in the social ecosystem. The retreat

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<sup>3</sup> Anthony Downs, *An Economic Theory of Democracy* (Harper 1957) 96.

<sup>4</sup> Manfred B Steger and Paul James, ‘Levels of Subjective Globalization: Ideologies, Imaginaries, Ontologies’ (2013) 12 *Perspectives on Global Development and Technology* 23.

<sup>5</sup> Mary V Wrenn, ‘The Social Ontology of Fear and Neoliberalism’ (2014) 72 *Review of Social Economy* 341.

<sup>6</sup> Martin (n 1) 11.

<sup>7</sup> Brian Epstein, ‘A Framework for Social Ontology’ (2016) 46 *Philosophy of the Social Sciences* 147.

<sup>8</sup> *ibid* 150.

<sup>9</sup> *ibid* 149.

<sup>10</sup> *ibid* 150.

<sup>11</sup> *ibid* 152-153.

<sup>12</sup> Steger and James (n 4) 23.

<sup>13</sup> Epstein (n 7) 149.

<sup>14</sup> Steger and James (n 4) 23.

of despotic regimes all over the world with the rise of democratic systems of governance has, for many decades now, been instrumental in the greater linking of the law to the social ontological.

Evaluating the two concepts (that of ideology and ontology), one readily observes a stark opposition between them: whereas ideology is ethereal and theoretical, ontology tends to be very real and practical. Law is somewhere in between the worlds of ideology and ontology. At other times, however, euchological or declaratory law may express a mere ideology. Practically, however, law tends to reflect an ontology of things (which may or may not generate an ideology for law). So too, whereas we in the discipline of law, have taught and have been taught about a given ontology creating the (ideology of) law, law too can, conversely, create new ontologies. The relationship between ontology and ideology is, therefore, ambiguous but it seems that in democratic societies the social fact determines the law (and its corresponding ideology) to a greater extent than law determines the same fact.

Social ontology and ideology in law can be related. This becomes clear, if we take the narrower concept of social ontology and juxtapose it with the wider concept of ideology in law. Thus, by accepting that social ontology is concerned, first, with the discovering of facts for social facts and the enquiring into what the grounding conditions for social facts are,<sup>15</sup> we observe a strong link of ontology with ideology in law. In this respect, to promote our thinking, one accepts that ontology discovers social fact, this potentially leading us to believe that ontology relates to ideological fact in law too (the latter fact falling within social fact *mutatis mutandis*). After all, fact may create a given ideology (even though it would be also fair to suggest that the underlying causes of social fact may be the precise fundamental reasons as to the creation of ideology in the first place). However, social fact becomes most illustrative of legal ideology when an explanation is provided as to the grounding of ideology upon social fact. Here, one could argue that e.g. in the Anglo-Saxon world individualism is praised and followed as a matter of fact for at least a number of centuries now. Or alternatively, one could argue that in the same world the idea of the welfare of the individual has already been promoted first and foremost for a considerable period of time. This being the traditional position *in fact*<sup>16</sup>, the principle of *laissez faire, laissez passer* has found fertile ground amongst many Anglo-Saxon countries. According to this pattern of thought, whilst Adam Smith has been a most influential theoretician of economic analysis, it is social fact that created Adam Smith's theories rather Adam Smith creating theories *stricto sensu*. Adam Smith or Karl Marx, for that matter, as theoreticians, are offspring of a given ontology of things. To put it otherwise, the British Empire's Sale of Goods Act 1893 was not an act that came about simply because Adam Smith and a number of other economic philosophers were as influential as they have been, but also because the ideas of liberalism were, in any case, gaining ground amongst

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<sup>15</sup> Epstein (n 7) 158.

<sup>16</sup> Emphasis added.

members of the leading classes of British society. Ontology would also tell us that the Bolshevik Revolution was a fact of life. Yet, it would additionally tell us that there have been social conditions for such a revolution to occur. However, the very fact that the Bolsheviks created a new *status quo* amongst the Russians must have affected the ideology of their new law to be, socialist law, and so on and so forth.

Ontologies (as opposed to ontology taking the form of the discipline in question) are in a constant state of flux.<sup>17</sup> These are rather rapid movements within social factuality. Ontology, indeed social ontology, examines these realities but it would be questionable as to how the mostly slow-moving machinery of normative jurisprudence throughout the world meets the expectations created by the ontologies of contemporaneity.

## II. SHOULD THERE BE A LINK BETWEEN IDEOLOGY AND LEGAL DOCTRINE?

There are a plethora of examples of political or ideological concepts which have found their way into law. Law is ideology to a considerable extent. For instance, we know that since the 1970s, the idea of the rule of law was a political one.<sup>18</sup> Yet, very few would deny that this idea is anything less than doctrinal<sup>19</sup> in the realm of law.

The fact that political or ideological matters found their way into law does not mean that this ought to be the case (see *ergo hoc propter hoc* fallacy for more on this). Nonetheless, it would be fair to suggest that ideology may be beneficial for law. Moreover, the subject of social ontology expects us to ask *why* we have the social facts we do.<sup>20</sup> There are two levels of analysis here: a micro-level (e.g. why modern European law is economically liberal as a whole) and a macro-level (e.g. why ideology, in the form of liberalism, has found its way into such instruments as the civil codes and the competition laws of Europe). The former question can be answered through historical, social and political reason. The latter question is more challenging though; there does not seem to be a most definite response as to why economic ideology defined the laws of Europe. It would be a less challenging question as to why the theories of economic liberalism prevailed over the theories of economic socialism in Europe, but the point remains; ideology remains an unknown quantity as to why it infiltrates our laws. One may speculate that the Enlightenment implied the freedom of the person. Modernism, the pinnacle of the Enlightenment, put forward the theories of individualism for society, these theories having in turn crystallised into an ideology, which was ‘necessary’ for the law. Accordingly, law’s infiltration by

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<sup>17</sup>Steger and James (n 4) 18.

<sup>18</sup> Joseph Raz, ‘The Rule of Law and its Virtue’ in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 211.

<sup>19</sup> eg Raz (n 18) 213.

<sup>20</sup> Epstein (n 7) 160.

ideology may be perceived as a justificatory act for the ruling classes of Europe and/or for the upcoming classes thereof.

It has been argued that ideology may ultimately amount to a system justification process.<sup>21</sup> Indeed, this is a process which offers reassurances to the existential concerns of the individual.<sup>22</sup> Paradoxically, according to this theory, an individual may actually uphold the *status quo*, even if it does not promote the best interests of the individual.<sup>23</sup> To revert to our question, however: should law act as a system of justification through ideology? In other words, ought ideology *justify* law to the point that it informs doctrine? First of all, one is of the view that ideology is not a prerequisite to the existence of legal doctrine. Ideology may well arise out of common established practice. Thus, bartering, as a human act, must have been an act free-from-ideology in the first place. Its crystallisation into *do ut des* and *quid pro quo* came later. Doctrine can indeed be free from ideology, because, arguably, ideology is better suited to political goals and endeavours. That is not to say that law is not a political endeavour or that it has to be devoid of ideological elements. Quite the contrary, yet it is contemplated that the process of ideologisation should be something which does not always necessarily characterise the law from the outset. Ideology, as stated, might act as a reassurance for the individual to goals that have little to do with the benefit of the individual. Secondly, the ideological tenets of a theory do not guarantee its practical implementation or success. Thus, ideologised legal doctrine does not guarantee its success. Thirdly, whereas *ratio legis est anima legis* is a well-known maxim amongst lawyers, the maxim is not about an ideology of rationalisation but rather about the fact that law must be driven by reason (just like any other scientific endeavour). Fourthly, it is preferable to allow the ideologisation of law to occur in an eclectic fashion. Thus, the author is of the view, that, whereas certain ideologisation of the law may be beneficial to the system of law as a whole, or to a given legal ordering, the degree of ideologisation should be carefully circumscribed, so that law does not become a mere reflection of ideology. Thus, ideologies may well define and confine the law. Again, that is not to say that ideologies must define and confine the law.

### III. SHOULD ONTOLOGY CHARACTERISE IDEOLOGY IN LAW?

Kelsen once argued that there is little that connects, or ought to connect, legal norms with sociology. Norms, in his perception of the world, were prescriptive; sociology was descriptive. Commensurately, if Kelsen was right, the normative in law ought not to be driven by the social. This is hardly the orthodox view nowadays. It seems that the more established view is that the

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<sup>21</sup> Wrenn (n 5) 342-343.

<sup>22</sup> *ibid* 341.

<sup>23</sup> *ibid* 342.

social drives the legal. In democratic societies, this position is not simply condoned; it is taken for granted.

In Western societies –to this day– the social seems to infiltrate law with predominant ideology. Joseph Raz, thus, reminds us that the very [Western] idea of the Rule of Law is one which comes with a number of principles: law's prospectivity, openness and clarity;<sup>24</sup> law's relative stability;<sup>25</sup> the fact that law's ensuing particular legal orders should be followed by the aforementioned principles too;<sup>26</sup> the independence of the judiciary;<sup>27</sup> compliance with natural justice;<sup>28</sup> the conferment of powers of scrutiny of the law on the judiciary;<sup>29</sup> access(ability) to the courts;<sup>30</sup> public agencies should not be allowed to pervert the law.<sup>31</sup>

For others the question is not whether the social should characterise law's ideology as a whole but whether and how this can be best achieved. For instance, it has been suggested that 'shar[ing] a common language and [being] involved in conversations in that common language, [already creates] a social contract'<sup>32</sup>. Thus, for these scholars, the question is not whether law ought to be ultimately ideologised or not, through the social, but whether a social pact is created in the first place. Equally, it would seem that the breaking free of law from ideology is well-possible (if not desirable). Why should law have an ideology in the first place? After all, many of us would disagree on ideology but few of us would disagree with the fact of life that law ought to be generally devoid of coarse ideological constraints.

The constitutional crises in certain countries of Eastern and Southern Europe, in the period between 2012 and 2015, are illustrative of the fact that the social ontological (e.g. change of government at its simplest form) may lead to the ideological crystallisation of the ontological into law (but not necessarily for the right reasons or in the right way). As stated, the typical situation here would include the change of political authority in a given country, through democratic means, only for such a new political authority to interpret pre-established notions of the rule of law in an arbitrary fashion (all in the name of democracy and the popular will). What is common between the aforementioned constitutional crises is that the will of the people is either exaggerated or neglected, the political authority using the idea of electoral supremacy (a majority in parliament) as a pretext for certain (ab)use of constitutional power. The question then becomes *how* the social ontological transforms itself into a concrete legal norm. How far ought the legislator go? When does the legislator go too far? Does the fact that a given government has been entrusted political power for a certain period of time

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<sup>24</sup> Raz (n 18) 214.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid* 215.

<sup>27</sup> *ibid* 216.

<sup>28</sup> *ibid* 217.

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid* 218.

<sup>32</sup> John R Searly, 'Social Ontology: Some Basic Principles' (2006) *Papers Revista de Sociologia* 54.

mean that its main concern ought to be that it acts to the satisfaction of the social ontological? There are no hard and fast rules here but democratic legitimacy alone ought not to be always sufficient for lawmaking processes in transforming the will of the social ontological into concrete norm. Democracy is a magnificent form of government but democracy which deteriorates into populism in the name of the social ontological becomes a new tyranny.

On a wider level, one cannot but include in their analysis the fact that the world's social imaginary is one which intensifies discursive networks generated all over the world.<sup>33</sup> The fact antecedent to that is a reality wherein ideologies are constantly moulded, formulated and developed. Equally, world social ontology here would certainly pinpoint the fact that the ideological offspring of globalisation further affects such ideologies as those of capitalism, cosmopolitanism and internationalism: ideas which come from the past.<sup>34</sup> The recalibration of leading ideologies is a fact of life. Law ultimately and *de facto* succumbs to the forces of social change. If the ontological affects the real, it also affects (and ought to affect) the law. Law ought to follow suit but by refining the socially coarse or the socially colloquial (the latter two often present themselves in the form of ideology). Thus, ideology in law through the social ontological is welcome on the basis that law filters social ontological information before it embraces it. Anchored in modernity, most contemporary ideological streams created and continue to create conflicting normative discourses.<sup>35</sup> The conflict of ideologies must be only a positive matter for the development of law. The creation of hybrid public-private law models, in the form of business models relating to public-private partnerships, is only an illustrative example of the clash and the synthesis of conflicting schools of legal and political thought.

Furthermore, suppose that law became free from ideology altogether. Would it not be a truism that such a type of law would have its own ideology, i.e. the fact that it would have an ideology which asks for law to be devoid of ideologisation? In other words, is it not true that law-free-from ideology is ideologised in the first place, simply because its aim would be to liberate itself from ideology? Just like Hart's positivist thesis, which was 'moralist' in that it was repugnant of moralism, it may well be the case that the liberation of law from the ideological forces of a given social ontology might actually make law more ideological (than it would previously have been). Hence, ideological minimalism in law does not mean that law actually breaks free from ideology.

Admittedly, of course, societies come with their own internal systems of logic.<sup>36</sup> One may agree or disagree with their particular internal system of logic. What is important, however, is that this internal logic defines the whole system. In their manifested superficial complexities, societies seem to be defined by simple logical structures.<sup>37</sup>

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<sup>33</sup> eg Steger and James (n 4) 20.

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> Searly (n 32) 55.

<sup>37</sup> *ibid* 56.

#### IV. WHAT OUGHT THE ACTUAL INPUT OF ONTOLOGY INTO LEGAL IDEOLOGY BE?

It has been recently argued that generative ideology ‘seems to provide [...] an ontology’.<sup>38</sup> Additionally, to this day, one is not absolutely certain what the actual input of social ontology in legal ideology should be. Ontology otherwise may be well-defined by both posited and non-posited law. For instance, one notes in this respect that natural law is taken to be both ideal (in that ‘it is prescribed by the intelligible necessities of human essence’)<sup>39</sup> and ontological (in that ‘it is engrained in the structures of human concerns’)<sup>40</sup>. To make matters more interesting, democracy, as a system of governance, takes it for granted that law ought to ultimately reflect the majorities of the social ontological. How can these worlds be bridged? Social ontology might consider it appropriate for rapists and murderers to be electrocuted upon conviction. What is the role and the input of lawyers in such a scenario? What is the role and the input of politicians in such a state of affairs? What is the role and the input of democracy in dealing with this? Ought democracy be used as the altar of sacrificing one’s humanity (as in this particular case), simply for us to claim that the socially ontological: a. is satisfied and reflected upon the law and that b. law thereafter becomes ideologised?

The perplexities of the ideologisation of the law though the social ontological do not stop here. In fact, one may question altogether why, for instance, prevalent theories of economics have found their way in the statute book. Close to this comes the fact that ‘ideologies of globalisation now pervade social life almost everywhere across the globe’<sup>41</sup>. Whereas, the ‘sanctity’ of leading economic theory such as economic liberalism and the new-old economic orthodoxy of globalisation are not questioned here, one questions *why* should the law be a. ideologised in the first place and b. why should the law be followed by economic theory. Thus, to give an example, is the proliferation of economic law treaties (*sensu lato*), in the decades that preceded the Second World War, law’s response to ideological economic orthodoxy? This may well be the case. However, law’s relationship with economic ideology can be highly conflictual. Surely, many in the law school would observe the prevalence of economic analysis over traditional legal doctrine with a certain suspicion in the first place, even though others would readily point to the fact that economic liberalism and the western legal model has somehow found its way into many systems around the world. Thus, one does not question here why the Sale of Goods Act 1979, the German Civil Code of 1900 or the French Civil Code of 1804 are infiltrated with legal ideology (see economic liberalism) but why they are ideologised in the first place.

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<sup>38</sup> Martin (n 1) 29.

<sup>39</sup> Paul Valadier, ‘Jacques Maritain’s Personalist Conception of Human Dignity’ in Marcus Düwell, Jens Braarvig, Roger Brownsword and Dietmar Mieth (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014) 261.

<sup>40</sup> *ibid.*

<sup>41</sup> Steger and James (n 4) 19.



In theory, a despotic ruler might actually omit any ideological elements in the laws of the State, which he would rule. In practice, from the moment a ruler scourges domestic law of any ideological elements, such a ruler creates an ideology for the law (an 'ideology of non-ideology', so to speak). That is not to state that a secular State ought not to create an environment free-from-religious ideology in the public sphere. That is not to state either that a civil society ought not to create an environment free-from-political ideology in the same sphere. There are European countries, these days, which expect their citizens not to carry or wear religious symbols in certain areas and aspects of their public life. Other European countries do indeed recognise the prevalence of a certain religious dogma. Yet, that ideology is one of secularism (and certainly one which after World War II many citizens around the world accepted and embraced). So too, it is rare (if not an impossibility) that law is perfectly free from any sort of ideology (just like law cannot be wholly freed from morality). Indeed, this opens the discussion for the most crucial question herein: whether a certain ideology in law through the social ontological can flourish.

Law can never be truly free from society. Law serves society. Law serves man. Law respects the individual. Society does not always have to serve the law. Individuals are enabled from law's operations. So too, just like there is a duty to respect good law, there is moral responsibility for the citizen to disregard bad law. To state, therefore, that our legal dogmas are to operate wholly free from the social ontological would miss the point. The question, more precisely, would have to be *what is the extent to which law ought to be ideologised by the social ontological*. To this, one must, of course, take into account the example of microchips regulation. The lay person knows little about building a microchip (let alone about regulating it). Even if the totality of these lay persons amount to the social ontological, law would have to be free from any 'ideology' in the matter, in that microchips regulation has zero connotations for the social (technical experts in the area being part of the social but not amounting to the social). Equally, if law is to deal with the regulation of abortion, the death penalty, criminal law, then it is understood that such areas of law may be highly ideologised (and for this reason highly respectful of the social ontological). Thus, the ideologisation of the law, through the social ontological, depends on the subject area wherein such an ideologisation is to occur.

Yet, *when* does the ontology of the social cease to 'interfere'? Can it stop 'interfering' in a democratic State? Ought ontology be a continuous force in informing the ideological in law (if at all)? One response might be that, as a matter of fact, '*ontological subjectivity does not preclude epistemic objectivity*'<sup>42</sup>. Taking this position literally, one could actually suggest that technocrats might be better-suited to preserve and observe the law as a mostly-free-from-ideology realm than, say, any given social ontology would. It goes without saying that this could be the view taken, in that technocrats are, by definition, persons characterised by epistemic objectivity. Contrary to this runs the position whereby

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<sup>42</sup> Searly (n 32) 55. Emphasis in the original.

the social ontological (especially through the device of democracy) can override considerations of technocrats and political and legal experts. According to this view, the social ontological ought to hold primacy (if not exclusivity) in law creation. Surely, both positions have elements of positivity and negativity in them. For instance, one could not simply leave the State in the exclusive hands of technocrats, especially if the social ontological would be in perfect disagreement with such a state of affairs. Equally, a mature ontology of the social could not simply escape the absolute need for technocrats to bring about and implement legislation (which otherwise ought to operate in favour of the social). So too, one should admit that democracy does not necessarily oppose technocracy. Thus, the social ontology of a State may be one which upholds its ideological principles of democracy by simultaneously recognising the need for technocratic guidance in an ever-increasing number of matters.

Ontology consolidates political power. Ontology consolidates legal power. Thus, legal and political power are not mere ideograms or chimeras. They are formations of the real upon the ideal. If ontology is taken to be the real, whereas ideologies are taken to be the transcendental, one could certainly propose the input of ontology in legal ideology. Yet, is this relationship one which is as wide as a highway or as narrow as the passage of an hourglass? To put it another way, should ideology define the law or should it simply inform the law? Whereas there is little that forbids the former to be the case, one's proposition is for a limited model, whereby ideology of the ontological informs the law. Again, the particulars will be for the ontological. Yet, the ontological is not given a 'free ride', just as democracy ought to never deteriorate into a governance of populists and demagogues. Our metaphor continues: 'a highly potent drug can produce its effect with only a small amount'<sup>43</sup> [thereby leading to efficacy and, potentially, therapy]. In large quantities, however, the very same drug may prove lethal.<sup>44</sup> Pharmacodynamics, therefore, as a sub-discipline, is the field which examines the effect of the concentration and effect of a given drug in an organism. The teachings of pharmacodynamics seem to be quite didactic for the infiltration of law with that drug called ideology. Ideology in law, through the social ontological, may be therapeutic, i.e. for the overall well-being of law. Extensive or excessive infiltration of ideology into the law, however, may prove lethal for law itself. It is one thing for law to have overall ideological co-ordinates and quite another for law to navigate through a predefined, often parochial, course for the mere sake of upholding ideological purity, which may be dictated by the physician called society. Drugs in themselves may or may not be lethal, just like ideas may be beneficial or detrimental to law. The social ontological holds ultimate responsibility for the prescription of ideology into law, just like a doctor of medicine holds responsibility for the right type and level of prescription to a given patient.

To proceed with an example from law itself, the device of the modern rule of law is a device for which jurists are largely responsible (such a concept

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<sup>43</sup> eg Jahangir Moini, *Cardiopulmonary Pharmacology for Respiratory Care* (Jones and Bartlett 2011) 53.

<sup>44</sup> *ibid.*

otherwise having a strong political basis). Yet, we also know that such a magnificent device is one which operates in society and for society. In ontological terms, the measurement of the rule of law in a given socio-legal context allows us to determine the form thereof.<sup>45</sup> Ontology *de facto* defines the rule of law.<sup>46</sup> Thus, if the socially ontological is followed by ‘reduction of arbitrary exercise of power, [...] rationality, predictability, fairness and accountability and [...] a balance of powers’<sup>47</sup>, then one should be confident as to the fact that the rule of law is recognised. Moreover, whereas for lawyers, the rule of law is very much a legal question, for the lay person the existence of a state of affairs where the rule of law prevails becomes a precondition for their well-being (especially if such a rule of law is inclusive of human rights compliance). Yet, it would be true that the rule of law is also very much the responsibility of the citizen. Adherence to the law is not something which is confined to the minds of jurists. Predominantly, the rule of law is ‘terraformed’ by the citizen, as it is the citizen who ultimately upholds or disregards it. The ontology of the State too may uphold or compromise the rule of law. So too, such an ontology may be responsible for creating ideologies in law, indeed ideologies which actually shape the very precise nature of the rule of law.

Often, the question is not whether normative contestations become instilled with ideology. Rather, the question becomes whether they ‘add substantially to the intensity of concurrent ideological struggles [and vice-versa]’<sup>48</sup>. If so, the instillation of law with ideology becomes a perilous exercise: law followed by ideology on the ontological real becomes then a tyranny of political ideology and potentially a legal reality which is devoid of substance, in that substance may have been sacrificed on the altar of ideology. The opposite is also true: the creation and the strengthening of ideologies in law, through the law, is not to be welcomed necessarily: take, for instance, in this respect, the fascist ideals of De Ambrio and D’Annunzio’s corporatist Charter of Carnaro, which inspired and influenced to a certain extent the statist-corporatist structures of Mussolini’s Italy. So too, the Nuremberg Laws of Hitler’s Germany were created out of Nazism’s peculiar narratives relating to racial ‘purity’. Law, thus, as a tool of reinforcing or generating ideology, can range from it being of questionable real value (at best) to it being an altogether repugnant exercise (at worst).

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<sup>45</sup> cf Elaine Mak and Sanne Taekema, ‘The European Union’s Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application’ (07 March 2016) 8 *Hague Journal on the Rule of Law* 4-5 <<http://link.springer.com/content/pdf/10.1007%2Fs40803-016-0022-1.pdf>> accessed 19 April 2016.

<sup>46</sup> But cf Nick Cheesman, ‘Law and Order as Asymmetrical Opposite to the Rule of Law’ (2014) 6 *Hague Journal on the Rule of Law* 105 distinguishing between the rule of law as that which *ought* to be and the rule by law as that which *is*. The more established approach here would be that of Holmes. See Stephen Holmes, ‘Lineages of the Rule of Law’ in José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (CUP 2003) 49 arguing that what we have ontologically vis-à-vis rule of law is, in any case, an approximation to the ideal of the rule of law.

<sup>47</sup> Mak and Taekema (n 45) 8.

<sup>48</sup> Steger and James (n 4) 18.

## V. LOCAL ONTOLOGICAL VARIATION AS JUSTIFICATION FOR LOCAL DIFFERENTIATION IN THE IDEOLOGISATION OF LAW?

Suppose now that the citizens of imaginary State of Fantasia believe in a new system of governance whereby 75% of all individuals' and corporations' income is (re)distributed amongst all of the citizens for the purposes of public welfare. According to this new system of governance, it is only 25% of the income to individuals and corporations that can be used at will and/or for the exclusive purposes of one's private welfare. Nonetheless, the political elite of Fantasia pointed out to its electorate that such a type of law would fall foul of the basic tenets of economic liberalism, otherwise the country's economic model for many decades. It is now questionable whether: a. the citizens ought to support the established belief around the world that the State ought to promote the well-being of the individual without the redistribution of welfare (classical liberalism), b. whether democracy in the imaginary State of Fantasia makes such a State free to create a type of redistributive law as the one proposed in our example. The question is one which has to do with the very ontology of this State but, also, with the established ontology of the world (see the predominance of economic liberalism). Which one is to prevail in a democratic State with a powerful technocratic elite? The question becomes one of collective intentionality.

Ontology, as it is crystallised into 'collective intentionality'<sup>49</sup>, does not always act as a *carte blanche* in given matters. The people of Fantasia, on the other hand, may well be right or they may well be wrong; they may wish to pay due consideration to their political and technocratic elites or they may not. After all, the question of the distribution of wealth within Fantasia may be an internal matter for its citizens alone, despite the fact that the world largely subscribes to the truths of economic liberalism. The point remains, however: collective intentionality is not necessarily justificatory of ideologised law or political realities. For instance, the German people effectively elected Hitler to come to power. That is not to say that one could justify the atrocities which Hitler engineered, designed and committed, in the name of a perverted democracy. Democracy respects the individual in every possible way (the protection of the human rights of the individual being a central consideration in this respect). Thus, a drunken State, a State with no moral limitations, a State which denies the application of human rights, devoid of any legal checks and balances, can never be 'justified' in its actions by mere ideological interference emanating from the social ontological. Nor could we simply suggest that the social ontological is justified in its actions by the mere reason of the fact that it was 'democratically' legitimised to act as it did. Democracy proceeds above and beyond mere legitimisation exercises.

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<sup>49</sup> Searly (n 32) 56.

## CONCLUSION

To recap, it was the purpose of this exposition to shed some light on the relationship between ideology in law and social ontology. In turn, three (3) questions have been the subject matter of the analysis herein: whether ideology and legal doctrine should be interlinked; whether the social ought to affect legal ideology and to what extent should ontology have an impact on the ideology of law. At a wider level, the paper examined whether legislatures and electorates are justified local differentiation to the point that they infiltrate domestic law with ideology *stricto sensu*.

Law, otherwise, is almost inseparably interwoven with the ontological and the ideological. Ontology informs ideology, whereas ideology occasionally amounts to the very spirit of the law. At other times, certain ideologisation of the law, through the ontological, may be a welcome occurrence. It is the responsibility of the academic community, the responsibility of electorates and/or their political leaderships to carefully filter when, whether and how ideological elements find their way into law (if at all). Ideology and law are not supposed to have or generate an automatic correlation between themselves. Equally, the two may occasionally be imperceptibly and closely linked.

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