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The Two Forms of Legal Time: Pierre Legendre's *"La Durée Poignardée": Remarques sur la Structure et le Temps*

Andreas Rahmatian[1]

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Abstract
In his Leçons VII (Le désir politique de dieu) Pierre Legendre applies the idea or expression of 'instituting time' ('instituer le temps'), that is, working with time as a malleable material, but at the same time conceptualising time as dogmatic time, especially in the interpretation of law. As an example of this concept he refers to the English Common Law, a 'style' of 'governing by solving cases'. This text will analyse the notion of two times of law—inaugural/mythological and historical—and how it applies to Common Law judgments, as well as to Institutional Writers that are characteristic of Scots Law in particular.

Keywords Pierre Legendre · Dogmatic and historial time in law · English common law · Scots law institutional writers

Shaping Time, a Malleable Material: The Two Times of the Law

In a little chapter '*La Durée poignardée*'[1] in his *Leçons VII* '*Le Désir Politique de Dieu*' (chapter III), Pierre Legendre makes interesting observations about the structure of time in the law (Legendre 1988, pp. 115–125).[2] In Legendre's vast œuvre this small section may be overlooked easily, but that would be regrettable. Unlike musicians, for example (Rahmatian 2015, pp. 79, 83), lawyers do not normally appreciate that time is not a static background, but a constituting element of their art. Therefore, Legendre's remarks about time in the law are important for doctrinal lawyers and legal historians alike.

[1] 'The transfixed time' or 'stabbed time' is an allusion to René Magritte's famous painting of 1938. See also Legendre (1988, p. 119).
[2] See Legendre (1988, p. 134) for the same argument for politics.

✉ Andreas Rahmatian
andreas.rahmatian@glasgow.ac.uk

[1] School of Law, Stair Building, University of Glasgow, Glasgow, Scotland G12 8QQ, UK

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Legendre suggests to develop or shape time (*instituer le temps*) as if it were made of a malleable, ductile material. Time in law is first a dogmatic concept; one can speak of 'dogmatic time', or inaugural time, being the fiction of a mythological time (*temps inaugural*). The second type of time in the law is the simple historical time (*temps historien*) (Legendre 1988, p. 119). The foundational or inaugural time is a permanent and specific category. In Legendre's view, it is therefore irreconcilable with the modern trend, particularly promoted by management and managerialism, of having a developing law within parameters of social evolution: these parameters are then ascertained by a social science that is modelled upon the epistemic framework of the natural sciences (Legendre 1988, p. 116). According to that idea, law is not to be explored jurisprudentially, but 'jurimetrically', that is, according to a scientific method, whereby 'scientific' is to be understood as the method of the natural sciences. In this interpretation, the relationship of 'jurimetrics' to jurisprudence can be compared to astronomy or chemistry in relation to astrology or alchemy (Loevinger 1949, p. 483, to whom Legendre 1988, p. 115, refers). As a result, the 'jurimetrical' management of law-making and law-finding as a feature of the general claim of the idea of management to state-like universal governance or command as a self-referential foundation (Legendre 2007, pp. 33, 42–42, 49, Legendre 1992, pp. 91, 222) is incompatible with the concept of time as dogmatic-normative and as one of historical or even evolutionary processes. The quasi-sovereign power that universal management asserts with its stereotypical discourses of 'efficiency' and its processes is nothing but an imitation and caricature of the state. The issue of the structure of time does not come into this generally accepted self-referential normative creature and is therefore neglected in the current debate (Legendre 1988, p. 116).

The meaning and influence of the concepts of 'management' and 'efficiency' play an important role in Legendre's work generally, which cannot be pursued here.[3] In the present context, Legendre explains that 'management' (loosely meaning, to organise, coordinate, command and control) is to be considered as the technological version of the political, that is rooted in a dogmatic, also legal, order, down to the legal doctrine of precedent (Legendre 1988, pp. 63–65, 70). 'Efficiency' is a device with which simplified concepts of human nature, representation, religion, social change and progress, can be implemented as part of management in the structure and network of challenge and competition in the industrial economy and society. Managers do have a vague sense of being trapped in a religious web that management creates and executes, and management theory seeks to explore the religious with science-like methods; usually this approach is then considered as truly scientific. Efficiency as the method of management is martial—it purports a fiction of war –, and it not only implements simplifications of social concepts (in fact particular anthropological and historical constructions, see Legendre 1990, p. 5), but also establishes and enforces normativity, though not necessarily in the form of law specifically. Management is therefore not a new phenomenon, but anchored in the

[3] Probably the best known (and most popular) text in this regard is Legendre (2007) which also formed the basis of a television documentation by Gérard Caillat with ARTE, *Dominium Mundi: L'Empire du Management* (2007).

old mythologies, representations, emblems and discourses of religion and law (Legendre 1988, pp. 71–72, 83–84, 208–209), and realised particularly in the 'Enterprise-Factory' as the institution of the current 'industrial religion'. The normativity of that 'industrial religion' is determined by management in the name of efficiency and performance (Musso 2017, pp. 98–99).

A Technique in Legal Institutions to Master Time: *Ratio Decidendi*

The two different forms of time in law, the dogmatic or inaugural time and the historical time, can be explored nicely by looking at the structure of case law in the Common Law systems, and the *ratio decidendi* as the crystallised content of the *stare decisis* ('standing by things decided'), the principle that a court should follow precedent established by previously decided cases with similar facts. This doctrine of precedent is the basis that makes case law the main source of law beside statutes (in the UK: Acts of Parliament) in Common Law systems (Gillespie and Weare 2021, pp. 24–25, 68). The method of governing by solving or deciding cases—an old notion that stretches back to the scholastic jurists—incorporates mastering the different versions of time. Time is utilised to arrive at a judgment. The style of this practice varies from legal system to legal system and its procedural law. At least in Legendre's opinion, the British approach of *state decisis* comes closest to the medieval jurists' practice and spirit (Legendre 1988, p. 117).

To demonstrate the appearance of the two times in the law and of the law, Legendre gives the example of the case of *Beamish v. Beamish*,[4] a decision of the UK House of Lords in 1861 about the marriage by a priest in his own case. The marriage was concluded without a separate priest as the representative of the (Anglican) Church for a church ceremony, being the formalism that would be required for a valid marriage. Was the marriage valid without a separate priest as the witness of the bridal couple's consent? Was the bridegroom's position as a priest himself sufficient? This problem raises the question in a more general sense whether the Anglican Church would eventually follow the requirement of a public celebration of marriage before a priest as a required formality which the Catholic Church imposed at the Council of Trent (1563).

The judge, Lord Chancellor Lord Campbell, saw this case as an occasion for a more general review of the legal history of marriage '*avec un sens très sûr d'historien-juriste à l'anglaise*', as Legendre puts it. Lord Campbell's report constitutes both a historical and a symbolic account. On the one hand, in this decision we have, according to Legendre, the operation of *temps inaugural*, that is, fictional, or inaugural time, on the other hand, simple historical time, as reflected in the recording of historical processes and events. The scene or montage of the decision reveals first a legal interpretation and proof for the ascertainment of the right law, what is true and correct in this context, which is done by invoking the dogmatic or inaugural time. The mythical foundations of the written law of which the lawyers of the

[4] *Beamish v. Beamish* (1861) IX House of Lords Cases (Clark's) 274 (also: 11 E.R. 735).

present day see themselves as the heirs, are in the English legal system the *Common Law* and the separate body of law, *Equity*, and the statutes or Acts of Parliament. These legal institutions are the dogmatic foundations and the constituent elements of the dogmatic or inaugural time. In France, the equivalent would be the general principles of the law in administrative law or in private law, as exemplified by the French Code Civil.[5]

In contrast to the use of inaugural time, we encounter a simple application of the doctrine of precedent in the case: past decisions are consulted to form an authoritative legal opinion and decision for the present case. Here no reference to the symbolic sources of the law which form the basis of inaugural time is made; rather, the use of analogy to earlier decided cases is an application of historical time. This historical time is not only factual, but normative as well, and it contributes to the making of inaugural time: the decided cases of the past as the ingredients of the current of historical time are the foundation for the normative decision found for the present case: the judgment. Unlike in other legal systems, such as in France, where *stare decisis* does not form part of their law, in England even the House of Lords was bound by its own earlier decisions as precedents until its Practice Direction of 1966 which allowed the House of Lords (now: Supreme Court) to depart from its own precedent if justice requires that.[6] For Legendre, the English style of legal decision-making by the judges, with their prolix considerations and apparent tentativeness, facilitates the identification of the workings of the different types of time of the law. These are far less obvious with the very different form of court decisions in France that are modelled by the spirit of legal codification and in a somewhat military fashion ('*quelque peu militaire*'). Something intangible can be discerned through these two forms of legal time (Legendre 1988, pp. 117–119).

The Structure of the Decision of *Beamish v. Beamish*: A Scenic Work

In the light of these observations before, it is worth looking into the decision of *Beamish v. Beamish* in more detail, and commenting on Legendre's interpretation.

What is the 'intangible'(Legendre 1988, p. 117: '*quelque chose d'intangible*') and how does it become apparent in *Beamish v. Beamish*? According to Legendre, the intangible is revealed in the construction of this court decision and can be recognised in the distinction between the two forms of legal time: inaugural time as the foundational tool for the dogmatic or doctrinal system of the law, and historical time, as it is reflected in the judge's use of analogy to past decided cases as precedents (Legendre 1988, p. 119).

[5] See also Legendre (2012, pp. 123–125), on the different legal processes in English and French law, and Legendre (2021, pp. 73–74, 77).

[6] House of Lords Practice Statement (Judicial Precedent) [1966] 3 All E. R, 77 (HL), [1966] 1 WLR 1234: 'Their Lordships […] recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.'.

The architecture of *Beamish v. Beamish* serves Legendre's interpretation very well, but is otherwise quite unusual, compared to the normal court decisions in English law. The case arose because of a disagreement between the deceased husband's heirs where one party disputed the validity of the marriage as a preliminary question that would establish one of the heirs' entitlement as the legitimate son. In order to establish whether the marriage was valid if it had not been concluded before a separate clergyman because the husband was an Anglican priest himself, the judge of the lower court prepared almost a treatise about the legal history of English marriage law. This lengthy tract was received favourably by the judges of the House of Lords ('The elaborate opinion of the consulted Judges which has been delivered to us by Mr. Justice Willes, gives very ample and satisfactory reasons …'[7]) and incorporated in their judgment. The extensive excursion into legal history, starting with the Anglo-Saxon era and the pre-Reformation Catholic period turned on the following two questions: (a) Does the history of marriage law reveal any distinction between marriages by clergy and marriages by laity, and (b) Is the presence of a separate clergyman essential to the contracting of the marriage of the spouses or could any duty of the clergyman be discharged likewise by one of the contracting parties?[8]

As to the first question, legal history showed that marriage by the clergy was strongly discouraged in England before the Reformation, but, if marriage occurred, it was valid (no *impedimentum dirimens*) and equal to a marriage between laypersons.[9] The second question falls into three branches: (a) Is the clergyman's presence at the marriage only necessary to give the ceremony a religious character? (b) Or is the clergyman's presence essential to have a trustworthy witness to the contract who could prevent the marriage because he could validly raise a marriage impediment? (c) Or is the clergyman's presence necessary as a witness but he cannot prevent the parties from marrying one another even if that were impious or illegal?[10] The House of Lords answered this question in favour of the second version (b): the priest's presence is constitutive to the validity of the marriage because he can prevent it, particularly in case of attempted marriages within the degrees which the Church prohibited under Canon Law (such as between uncle and niece, between cousins). Since marriages of clergymen and laypersons are the same, it follows that, if the priest has to be present at the celebration of marriage in order to be a trustworthy witness and if he has the power in some circumstances to prevent the celebration of an unlawful marriage, he cannot be one of the parties entering into the marriage contract.[11] In this ruling the House of Lords (also) followed the earlier House of Lords decision of *The Queen v. Millis*[12] as a precedent. The marriage performed by the husband, being a priest himself, is therefore invalid.

[7] *Beamish v. Beamish* (1861) IX House of Lords Cases (Clark's) 274, at 350, per Lord Wensleydale. See also at p. 346, per Lord Cranworth.

[8] *Beamish v. Beamish* (1861), at pp. 285–286.

[9] *Beamish v. Beamish* (1861), at pp. 286–298.

[10] *Beamish v. Beamish* (1861), at pp. 303–304.

[11] *Beamish v. Beamish* (1861), at pp. 315, 321–323, 333, 347, 351–353.

[12] *The Queen v. Millis*, *R. v. Millis* (1844) X Clark & Finnelly 534 (also: 8 E.R. 844), HL.

The House of Lords' extensive use of legal history of Catholic and Protestant laws of marriage as an argument from authority and as a precedent, mixed with the true legal precedent of *The Queen v. Millis*, and incidentally a problematic one (Probert 2008, pp. 337, 354, and below), is interesting. The House of Lords, based on the expert opinion provided by the lower court, referred to Roman Catholic Canon law and found that marriages not celebrated before a priest in the face of the Church were discouraged but nonetheless valid, and in this finding the House of Lords referred to Robert Joseph Pothier (1699–1772) in particular.[13] The House of Lords also established that even the Council of Trent (1563, session 24) did not make the religious ceremony a prerequisite for the validity of marriage. In that context the House of Lords referred to the treatise (*Lehrbuch des Kirchenrechts*) by the then contemporary professor of Canon Law in Bonn, Ferdinand Walter (1794–1879),[14] that discusses the current Roman Catholic Canon law of marriage: a priest has to be present but even his opposition to the marriage cannot prevent the validity of the marriage (Walter 1836, pp. 573–574).[15] When ascertaining the Protestant, and in particular the Anglican Church law, the House of Lords also resorted to Pothier first and considered his discussion of the edicts by French kings of the sixteenth and seventeenth centuries (Henry III, Henry IV, Louis XIII) which ordered, in a departure from Canon law, the requirement of a celebration in Church by a priest consenting to the marriage as a requirement for the validity of the marriage.[16] This formality rule introduced by the French kings and reported by the French jurist Pothier effectively formed the basis of the House of Lords' finding that the same formality requirement were to apply in Anglican Canon law and also English Common law of marriage. It was held that this rule was already contained in the precedent of the House of Lords in *The Queen v. Millis* (1844) by which the deciding House of Lords in *Beamish v. Beamish* felt bound, despite considerable misgivings.[17]

Thus an authoritative text by a French jurist who reported legal interventions by French lawmakers—the French kings who altered the then Roman Catholic Canon law—was used by the highest court of the Protestant-Anglican United Kingdom to support the truthfulness, despite significant doubts, of an existing older decision of the same court which was regarded as a binding precedent. This older decision of *The Queen v. Millis* (1844) was, however, a questionable one. The classical English legal historians of the nineteenth century considered the case as having been wrongly decided (Probert 2008, p. 338). Modern research has, however, shown that *The Queen v. Millis* was generally misunderstood and actually decided something else: whether a second marriage that was voidable could be annulled after the spouses' death because of claimed bigamy. The court found (though most clearly expressed only by one judge who did not start from a mistaken premise) that it could not be (Probert (2008, pp. 343, 349). The case of *Queen v. Millis* (1844) was of little

[13] *Beamish v. Beamish* (1861), at pp. 306–308.
[14] *Beamish v. Beamish* (1861), at pp. 319–320.
[15] *Beamish v. Beamish* (1861), at p. 320, cites and paraphrases this passage in English.
[16] *Beamish v. Beamish* (1861), at pp. 322–323.
[17] *Beamish v. Beamish* (1861), at pp. 337–338, 349, 353.

relevance even then because since the Clandestine Marriage Act of 1753, which put marriage law on a statutory footing in England, Canon Law could only apply when special loopholes arose, for example when marriages in Ireland were concerned. One of the few later cases where *Millis* had an impact was the decision of *Beamish v. Beamish* (also concerning a marriage in Ireland), but subsequent legislation, like the Marriage (Ireland) Act 1844, and the Marriage Act 1836 for non-Anglicans who could marry in register offices from then on (Probert 2021, pp. 47–53), made Canon law and its interpretation completely redundant before the secular courts in Britain.

Nevertheless, irrelevant as *Beamish v. Beamish* really is in the greater perspective of English legal history, it is a good depiction of the scenic structuring of legal time according to Legendre. A closer look into some examples of the text of the judgment reveal in more detail the longitudinal warp of the dogmatic time and the horizontal weft of the historical time which form, interwoven, the textile or fabric on which this court decision is based. It starts with the arguments of the parties before the court: the Appellant argued that a priest cannot conclude a valid marriage in his own case; (arguably) binding authority for this rule were four past cases and a persuasive authority, the law of the United States. The respondent distinguished the cases presented, as they arguably depended on the insufficiency not of the marriage ceremony, but of the evidence of the marriage, and therefore have no applicability; furthermore, a person can act in two capacities at the same time in some cases (trustee, partner of a partnership).[18] We see the combination of historical time in England (case law) and outside (USA) as time-dependent processes of law-making which become condensed in a suggested rule, a product of time, but itself seemingly timeless, that is, dogmatic time. It is the typical scene before a court where the two parties compete for recognition of their respective, but contradictory, rule as the true one by the court. The court then confers on the disinterested and passive historical description of rules and processes of rule-making a partial, active and normative, ahistorical and foundational quality: an ought. Historical time is the ingredient of dogmatic time, but the exact focus on specific elements of historical time is provoked by dogmatic time. In this way, these two forms of time are interwoven. In the discourse before the court, there is, however, also an ahistorical scholastic element (Legendre 1988, p. 120), that of logic. The respondent seeks to undermine the quality of proposed cases as precedents ('distinguishing') with logical arguments. This logical-scholastic element is particularly dominant in the classical academic legal treatises of the Middle Ages and the Early Modern Age[19]: historical cases, after their selection on logical grounds, become building blocks for a dogmatic institutional edifice (Legendre 1988, p. 117). The interaction of the parties, appellant and respondent, before the court are merely an instance of the scene or the *mise en scène* (theatrical production) of the court proceedings, the theatrical element of the ritual of finding justice (Legendre 1988, p. 403).

While the parties in *Beamish v. Beamish* acted in a usual manner before a Common Law court, the court itself resorted in its findings to an unusually great extent to

[18] *Beamish v. Beamish* (1861), at pp. 276–278, 280, 282.

[19] See below under 'Academic legal or institutional writers of the 17th and 18th centuries'.

legal, social and religious history, that of the institution of marriage, another product of historical time. For solving the legal question, whether the common law requires the presence of a priest for the validity of marriage and whether that priest could also be the bridegroom at the same time, the House of Lords said: 'First, whether the history of the law relating to the marriage of the clergy points to any and what distinction in this respect between the clergy and the laity', so that the marriage of the clergy may be different to that of the laity. 'Secondly, whether the history of the laws requir[es] the presence of a clergyman' in such a way that his duties prevent him from acting in his own case.[20] It is noteworthy that legal history ('the history of the law(s)')—a consequence and depiction of historical time—has expressly been named as a source of law by the court: the law is found and made with legal history that thereby gains authoritative force through its implicit genealogy, historical time turning into (apparently) ahistorical institutional dogmatic time. The noteworthy aspect is not so much that this happens—in decisions in the Common Law system this happens regularly—but that a court openly states 'legal history' (made by historical time) as the foundation for rules that are elements of a legal institution: marriage as a category of emblematic time through a historical tale (*récit historique*) (Legendre 1988, p. 117). However, not all elements of legal history matter: the exact focus on specific elements of historical time is incited by dogmatic time. This is demonstrated, for example, by the following passage[21]:

> Such was the state of the law of marriage in France up to the time of Pothier; and in this discussion it makes an equipoise with the Council of Trent.
> It is not necessary that we should notice the more modern laws by which marriage is treated purely as a civil contract, and required to be in a prescribed form. The validity of a marriage under such laws must depend upon the express language of the legislator.

The more modern positivist and literal approach ('express language of the legislator') to legal interpretation cuts off the consideration of legal history ('not necessary') as a source for dogmatic time, at the behest of dogmatic time. Common Law courts are more open about historical processes: the principle of *stare decisis* could not remain operative if this were otherwise. Therefore, also the publication of dissenting opinions is possible which, together with a historical study of law, reveals (inadvertently) the arbitrary and accidental development of foundational rules. Civil Law courts keep their cards much closer to the chest, with very little express reference to legal history, with (particularly in France) the compression of a judgment into one legal rule detached from any history, similar to that in a statute or code,[22] and with an aversion to an admission to, and publication of, dissenting opinions.

The approach in *The Queen v. Millis* (1844),[23] the case the House of Lords followed in *Beamish v. Beamish*, is similar, and although the role of legal history in

[20] *Beamish v. Beamish* (1861), at pp. 285–286.
[21] *Beamish v. Beamish* (1861), at p. 324.
[22] On the characteristics of French thinking, see also Legendre (1990, pp. 12–13).
[23] *The Queen v. Millis*, *R. v. Millis* (1844) X Clark & Finnelly 534 (also: 8 E.R. 844), HL.

finding the decision is emphasised less expressly, the very long case (373 pages in the case report) makes abundant reference to legal history, in particular to the Canon Law and its similarities and differences with the Anglicans, Presbyterians, Quakers, Catholics in Britain and Ireland, and in the colonies.[24] The reason for the judges' prodigious interest in the development and relevance of Canon Law perhaps also lies in the social and political importance of the legal institution of marriage, because a significant amount of the historical discussion is not really relevant for the actual decision. However, the historic-political-juristic dimension of institutional time deriving from historical time becomes apparent (Legendre 1988, p. 120). And historical time is indeed a principal device for conferring authority: for example, when determining the answer to the question whether or not in English law a contract of marriage is concluded by the exchange of vows in words of the present tense (*per verba de praesenti*) alone, the earliest guiding decision referred to is assessed as to its validity by the constitutional position of the historical body issuing that decision, the *Curia Regis* (recorded in Coke, Littleton, 33a, n. 10), which was, in the time of Edward I (1272–1307),[25]

> a tribunal of appeal in cases of difficulty, and to have consisted at that time of the Chancellor, the Treasurer and Barons of the Exchequer … and various references to and extracts from its proceedings are to be found in the learned Introduction to the *Rotuli Litterarum Clausarum*, lately published by the Record Commissioners. The judgment, therefore, of such a Court …, is of the highest weight.

The actual role of this decision in the case of *The Queen v. Millis* is not the point of discussion here. Of interest is the dogmatic-normative authority conferred by a notion of time that is deduced from historical time. However, it is not only the efflux-ion of time only, but also the tradition of an institutional and authoritative force in the past that keeps being recognised with these qualities ('of the highest weight'). A legal authority of the Middle Ages was 'telescoped' into the nineteenth century as a normative rule (maker) and institution. Dogmatic time becomes emblematic: the emblem or sign fills the intangible, the supposed (or created) line between the medieval institution's decision and the present one, in fact a ritual of discovering justice—or, put differently, the image of a regal medieval authority is imposed as a source of authority within the present law (Legendre 1988, p. 86).

Thus in order to find the *substantia veritatis*, the court in *Beamish v. Beamish* constructed two scenes, the (initially) Catholic Canon law of marriage, and the statutory law of marriage deriving from that, both reported by a jurist whose work—through the court's use—became essentially the text of an institutional writer[26] for the decision in question. The institutional text and opinion were absorbed in an earlier binding court decision, a precedent—an application of *stare decisis*, even if this earlier decision was in part the result of misinterpretations by some of the judges.

[24] *The Queen v. Millis*, *R. v. Millis* (1844), pp. 543–566 (raised in argument at the judges' instance).
[25] *The Queen v. Millis*, *R. v. Millis* (1844), pp. 658–659.
[26] See below under 'Academic legal or institutional writers of the 17th and 18th centuries'.

Here we see the making of emblematic or dogmatic, or inaugural time: a foundational justification of a legal rule has been created, embedded in the grand structures of the Common Law and Equity from (almost) time immemorial, static and true, but at the same time the result of a long period of chronological time which produces the rule's legal genealogy through earlier precedents.

This emblematic or dogmatic time invariably derives from processes of historical time: the development of Canon law from early Christianity to the Middle Ages, its consolidation and reinterpretation by the Council of Trent, the statutory interventions by the Kings that were based on the history and evolution of Canon law, but interfered with it and altered its course. These events of chronological time are telescoped into an inaugural, structural time ('*un temps sans usure*') of an almost spatial quality that can be moved like an object in space ('*le temps déménagé*') and applied to new cases to be decided. A mythological montage of the inaugural time and the chronological time has taken place which reveals the intangible: in the present case it is the *true* answer as to whether a marriage performed by a priest being the husband at the same time is valid. The intangible is not so much the content and outcome of the decision but the perceived truth of the decision, the *substantia veritatis*. This perceived truth gives the pronouncement the force of law and commands obedience of the people (Legendre 1988, pp. 117–118, 119–120, 122).

Academic Legal or Institutional Writers of the 17th and 18th Centuries

How could it be possible that simple historical time could be transformed into inaugural or mythological time? The scientific rationality of the Western world does not make this very apparent, but Legendre suggests that one can nevertheless observe that modification: by changing the level of time one also changes the status of the institutional fabric. Time becomes something moveable, something local and spatial, a thought that one can also encounter in René Magritte's painting 'Time transfixed' (or: 'Ongoing Time Stabbed by a Dagger', a translation Magritte preferred). The locomotive that unexpectedly comes out of an ordinary mantelpiece with a clock standing on it and a mirror above it in a simple apartment room is a magical object which represents the destruction of old notions of time and space with the rise of industrialisation (Legendre 1988, pp. 119, 125): a shattering of the duality of time and place or space by different forms of time, for example the two different types of time of law.

Legendre alludes to interpretations of Magritte's painting but does not follow them through ('*Méditez cette plaisanterie provocante*.') The most obvious observation would be that a painting showing a moving thing (the steam coming out, slanting, of the locomotive's smokestack indicates that) invariably freezes the flow of time to a notional and spatial fixed event, so time evaporates with its visual depiction and becomes emblematic, or even inaugural, time. Time becomes a moveable object of space ('*Le temps peut être déménagé*') (Legendre 1988, p. 119). Furthermore, the clock on the mantelpiece symbolises time, but is not time, neither in its pictorial representation, nor in real life where there is an elapse of time. For the movement of

the clock's clockwork and its hands only symbolise the time, as much as any moving machine or a growing plant would do, but they are not the time. However, these symbols refer to the intangible phenomenon and so help making it apparent. As an analogy, one could say, legal institutions and juristic reference points ('equity', '*stare decisis*') are the product of frozen historical time that thereby has been rendered emblematic or dogmatic and becomes foundational, or inaugural, for these legal institutions. When the doctrine of precedent is applied by an (English) court, the historical time, symbolised by the sequence of past court decisions as precedents, interacts with this inaugural time to form a judgment. Here the two times of the law come together. The same processes seem to apply to learned writings of the jurists, for example from the seventeenth and eighteenth centuries.

Legendre gives as examples for the dogmatic fiction in relation to time particularly Nicolas Delamare's *Traité de la Police* (1710) and Philipp Knipschildt's *Tractatus-politico-historico-juridicus* (2nd ed., 1687). Both the *Traité de la Police* ('police' in the original meaning as referring to domestic state administration as whole) and the *Tractatus* share a similar textual construction that uses the two functions of juridical time: the origin of the laws is explained by (re)producing a legendary, mythical history of legal and social evolution to justify the legitimacy of the (administrative) law of the present. In the title of Knipschildt's book, the historical time is wedged between politics and power on one side and the law on the other. Time, in its inaugural version, but presented on the basis of its historical version, is used to justify and secure a genealogic legality (Legendre 2010, p. 83). Every construction of a scene of origin considers itself singular: any alternative and competing narrative of a genealogy is therefore regarded as a deadly threat, and a fight to the death ensues: the scene of origin, made apparent and built by inaugural and emblematic time, of one culture or dogmatic system can never be shared with any other. Hence for example the murderous fights in religious wars between two dogmatic systems (Legendre 1988, pp. 119–121).

Time as a concept is characterised by relativity as a prerequisite of its usability—here time as a malleable concept becomes apparent: the mythological time represents the fiction of eternal time. The mythological or structural time is the foundation and constructing element of the legal institutions and juristic reference points. It is the ingredient of the construction of dogmatic systems, and it stages the institutional order in a scene of its origin, based on the principles of causality and reason. But this fictional origin is constructed, and it is that kind of concept of relative time which makes the fictional nature and the construct visible. For we can change the level of the time form: by means of telescoping the historical or chronological time into an institutional, foundational, mystical time to explain or rather construct an origin of the institution we want to justify. With this mythological montage we are able to perceive the existence of an institutional system (Legendre 1988, pp. 121–123).

This mythological montage, the telescoping from chronological time to institutional time, has a Freudian connotation, not surprising if one remembers Legendre's psychoanalytical training. As Freud describes, the dream represents causal connections in two ways, either with a 'pre-dream' (symbolising 'because of that') followed by the main dream (symbolising 'therefore that had to happen in this or that way'), or the image of the cause transforms into the image of the effect, but both versions

are only variants of a sequence (Freud 2015, pp. 313–314). In the dream the logical connection is one of simultaneousness, or as Freud explains, the dream operates like a painter who depicts all philosophers of different epochs in one picture in a School of Athens (Raphael's *School of Athens* of 1511 was clearly the model here) (Freud 2015, p. 312). The dreamwork ('*Traumarbeit*'), that is, the operation that transposes the latent dream (the contents, thoughts or problems underlying the dream) into the manifest dream (what has actually been dreamt)—the finding of the latent dream in the manifest one is the work of the interpretation of the dream ('*Traumdeutung*')—, operates particularly with the device of concentration ('*Verdichtung*') whereby elements of the latent dream are either omitted, or are only adopted in part or, if they have a common core, are amalgamated into a new whole (Freud 2015, pp. 280, 282; Freud 1930, pp. 176–178). In this way, the extent of the manifest dream is only a fraction of the latent dream, and the manifest dream typically elapses very quickly. Complexities in the story line of the dream become condensed in a very short period of time, much faster than would ever be possible in a state of being awake (Freud 2015, pp. 52, 86, 476–477, with the example of Maury's 'guillotine dream').

The telescoping of historical into institutional time of the law is no dream, but it has features similar to those of the dreamwork. The historical process gets concentrated or condensed into a fictional time which is characterised by the paradox of being eternal, static, foundational and mythological, and, by the same token, *time*, that is, necessarily not static, but a process, effluxion. The elements of developments in historical time get partly absorbed and amalgamated, partly omitted, and effectively enormously accelerated and condensed in institutional time. A logical connection and causality, an 'if A, then B', becomes simultaneousness, a static tableau or montage which concentrates different processes and developments of the law as underpinned by historical time, in one fixed, seemingly eternal, legal institution: *La Dureé poignardée* (Legendre 1988, p. 119). From this foundational dogmatic role of eternal time, the ingredient for dogmatic and eternal truth, religions seek to derive their unquestionable authority, as well as laws. The historical time is used to confirm tradition that confers authority, and at the same time is condensed into a timeless static institution. The scientific examination of the development of the concept of the unique Judaeo-Christian God (Römer 2017, pp. 268–274, 285–290, 294–296, 299–303), for example, as a cultural and historical process based on historical time, is therefore necessarily heretic; there must not be alternatives and external influences, as historical time would reveal them (hence also the various wars of religion, Legendre 1988, p. 121). God and his supposed laws, represented, *inter alia*, by the temporal or secular laws of mankind, are in essence eternal and therefore to be obeyed.

The workings of inaugural or foundational time through telescoping chronological time to create and justify legal institutions can be illustrated well by the example of the most important Institutional Writer of Scots Law, Stair (James Dalrymple, Viscount of Stair, 1619–1695). Scots law is a separate body of law beside English law and, as far as private law is concerned, a mixed legal system that contains a Civil Law or Roman Law-based component and an English Common Law element. Particularly in property law the Roman law root is predominant, in the law of obligations the Common Law element is much stronger. However, there is no codification

of the law, the system is based on statutes and case law as in England (Dewart 2019, pp. 130–131). Beside these sources of law, statutes (Acts of Parliament and since 1999 also Acts of the Scottish Parliament) and case law (precedents), as it is known from England, Scots law also recognises a third, subsidiary source of law, the books of institutional writers from the late seventeenth to the early nineteenth centuries, above all the first and most significant of them, *The Institutions of the Law of Scotland* (1st ed. 1681, 2nd ed. 1693) by Stair. Stair's *Institutions* are in the continental European tradition of the *usus modernus pandectarum*, represented for example by Georg Adam Struve (1670) and Samuel Stryk (1690) (Wieacker 1995, pp. 170–171). Stair's organisation of the *Institutions* is nevertheless different from these authors: desiring to place Scots law on a more philosophical basis, Stair started with a section on common principles of law ('Law is the Dictate of Reason, determining every Rational Being to that which is congruous and convenient for its Nature and Condition', Stair 1981, p. 73, *Institutions* I, 1, 1) and sources and forms of law (immutable Divine Law or Law of Nature or Equity or Moral Law, and mutable, man-made Positive Law), followed by a section on liberty ('Liberty is that Natural Power which man hath of his own person, whence a Free Man is said to be *suae potestatis*, in his own power, and it is defined in the Law, to be a Natural Faculty, to do that which every man pleaseth, unless he be hindered by Law or Force.', Stair 1981, p. 96, *Institutions* I, 2, 1). Stair then proceeds to Obligations (with his characteristic distinction between Contractual Obligations and Natural or Obediential Obligations—'these, which are put upon men by the will of God' (Stair 1981, p. 100, *Institutions*, I, 3, 3—and that includes extra-contractual obligations of reparation). This is followed by property, prescription, succession and so on.

The *Institutions* are considered, at least by many Scots lawyers, as having for the first time made 'Scots law a complete and coherent rational system' (Hutton 1981a, p. 1). This assessment is, however, rather ahistoric. Stair may have had in mind a certain preservation of Scots law in the light of the experience of the Cromwellian Union between England and Scotland (Hutton 1981b, p. 82). However, the idea that Stair's *Institutions* were a foundational, authoritative and preserving text of Scots law came much later, probably only in the nineteenth century (Blackie 1981, p. 210), when Scotland was in a Union with England since 1707 for a hundred years, with a separate legal system but without its own law-making Parliament. Had Scotland remained independent, Stair could have had a role similar to Domat and Pothier for the making of the French Code Civil, or Bernhard Windscheid for the German Civil Code in the nineteenth century. Thoughts of legal and political independence of Scotland from England also promoted strongly the idea of institutional writing on Scots law by Scottish Legal Nationalism from the 1950s and 1960s onwards. The institutional writers, above all Stair, became a foundational source of Scots, non-English, national law, to some extent to the present day (Rahmatian 2018, pp. 57–58, with further discussion and references).

Stair also has authoritative recognition by the Scottish courts, and one could argue that it is that which truly makes Stair an institutional writer (Rahmatian 2018, p. 47). Generally, one cannot historically go back further than Stair to ascertain the law in Scotland—this is in contrast to Blackstone in England who does not have this authoritative status in English law (Lawson 1977, p. 74). A simple practical

reason for this is that reports of English case law of the seventeenth century and further back are much better preserved than reports of Scots case law (Ford 2007, pp. 398–400). Furthermore, Stair's opinion, if not contradicted, is considered as ascertaining the law of Scotland.[27]

Stair's *Institutions* are an example of Legendre's explanation of telescoping chronological time to a mythical time, an institutional, inaugural time without a lapse of time ('*le temps sans usure*') (Legendre 1988, p. 122). Although not really intended for that, the *Institutions* became a foundation myth for Scots law particularly since the second half of the twentieth century. Nobody asserts that Scots law was founded by this work, but it is rather claimed that this work concentrates and crystallises centuries-old Scots law which obtains its legitimacy through this mythical past, its inaugural time: a point containing genealogical legality from a long historical time period that has become mythical, and the time itself has become fictitious. This inaugural time is also dogmatic time, because the *Institutions* are authoritative and normative. The inaugural, mythological time represents the fiction of eternal time. Although the *Institutions* are the product of past historical processes of the law (jurists' opinions and court decisions over centuries), the chronological element of time is condensed to the point of a mythological or structural time as the foundation and constructing element of the Scottish legal institutions and juristic reference points. The dogmatic time embodied in the *Institutions* of the late seventeenth century remains an ingredient of major parts of the construction of the dogmatic system of modern Scots law.

The Relationship between Time and Structure

The two forms of legal time (and perhaps there are sometimes more), the inaugural, dogmatic, foundational time of the legal institutions and the historical or chronological time of history and legal history are the two layers that provide a legal genealogy, a mythological time, and stage-manage the emblematic legal institutions and historic reference points of the law (Legendre 1988, pp. 119, 124). Historical time may sometimes appear conditional upon inaugural, structural time, which emphasises the foundational purpose of structural time. But in fact, historical time generates structural, institutional time, being the result of telescoping or concentration that creates a concept of 'time immemorial', a distant, seemingly static past that never existed. However, this non-existence has often been covered up by an emblem or image (and truly pictorially particularly in the Early Modern period) that confers on that actual void the impression of legitimacy (Goodrich 2013, pp. 50, 89–97).

This complicated construct also reflects the problem the law has with time in general, both in relation to its own nature and in relation to the recognition of time-bound phenomena. As far as its own nature is concerned, law is on the one hand meant to be permanent, immutable and eternal that provides it with its authority. This dogmatic and emblematic time—a paradox of metamorphosing in time forever

[27] E.g. *Drew v. Drew* (1870) 9 M. 163, per Lord Benholme at 167.

and simultaneously not changing at all—provides the structure of the law and its institutions. The principle of *stare decisis* reflects this idea: the law as it always was ('inaugural time') is found for, and applied to, the present case. On the other hand, this line of precedents is nothing but a line of decisions which constitute developments and changes of the law ('chronological time'). The chronological aspect of legal time also nurtures the potentially subversive quality of legal history. Doctrinal law is dogmatic, seemingly permanent and eternal, which also invited the creation of a religious 'divine law', but legal history is a diachronic discussion of law instead: there were different legal rules in the past, and the present one is not the result of a well-meaning and wise, divine or rational lawgiver but the outcome of haphazard historical developments and accidents. Comparative law, equally subversive, is the synchronic discussion of the laws in the world, thus less strongly relating to (chronological) time. However, both legal history and comparative law undermine the fixed perpetual appearance of law and its normative power (Rahmatian 2013, p. 429).

When it comes to the recognition of time-bound phenomena by the law, the struggle of the law to protect works of music by copyright, a property right, is an instructive example. Music is fashioned time only, an art form that has no spatial elements, while copyright is a static property right. To capture the fleeting art form of music, law resorts to several devices to which it attaches property protection (musical score, recordings etc.) which are not the music itself but serve as representatives of the music (or, in law, the 'musical work') that enable the protection mechanism to function (Rahmatian 2015, pp. 88–91). If law were as fleeting as music and were able to follow the flow of time, it would undermine its authority it derives from its stability. Copyright is much more suitable for the protection of the static visual arts which have a problem with the depiction of time themselves. There are, however, a few works that make movement and time the topic of a graphical representation, for example, Marcel Duchamp's *Nu descendant un éscalier No. 2* (1912), or René Magritte's *La Durée poignardée* (1938) that Legendre mentions. It is the arts which are able to show us the structures that exercise a mythological function of time (Legendre 1988, pp. 124–125).

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