

## ■ ARTICLES

*Joseph Marko/Meinrad Handstanger\**

### **The interdependence of law and political science: About the "essence and value" of a "Juristenpolitologie"-approach**

### **Wolfgang Mantl to his 70<sup>th</sup> Birthday**

#### **1. A SCIENTIFIC-HISTORICAL FLASHBACK**

Even a cursory look on the self-perception of lawyers and political scientists in Austria shows how great the divide between these two academic disciplines has remained since 1945. Anton Pelinka wrote more than ten years ago: "In Austria, there dominates a style of legal thinking that helps to obscure political implications behind an allegedly value-neutral approach ... lawyers, for example, use a legal fiction of the legislative power – as if free of interests, especially free from the interweavings with bureaucracy, political parties and vested economic interests. The job of the political scientist is to oppose these fictions, which are disguising the truth, by the persistent search for reality ... political science must be useful, must be in demand as a rival to the aforementioned naïve form of flat, positivistic legal doctrine."<sup>1</sup> Even today, many political scientists in Austria lament the dominance of jurisprudence and believe therefore that they still need to fight for academic and societal recognition, for more influence on the market of interest and politics and – through the academic "nobility" – to gain legitimacy as an independent discipline. Hence, the entire history of political science as an academic discipline in Austria can – in particular when looking at the university education of political scientists of the first generation – be seen as a breakaway process from jurisprudence in order to establish itself as an "independent" field of science on the market. It is therefore an either – or: either political scientist or lawyer. Any claim that law and political science can go together, or even more so, any person who wants to do both, is extremely suspect. Seen from this background, a scholarly article about Austrian political science, which also empirically studies the academic institutionalization, only stated Vienna, Salzburg and Innsbruck as universities with comprehensive political science curricula and respective academic organizational units in the tabular form, while Graz is mentioned only laconically in the text: "Political science does not exist as an

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1 Cf. Pelinka, Fluch und Segen der Normalität. Zur Situation der Politikwissenschaft in Österreich, in Bundesministerium für Wissenschaft/UNESCO-Kommission Österreich (ed.), Von der Notwendigkeit des Überflüssigen. Sozialwissenschaften in Österreich, Wien o.J., p 27.

independent department, although there are specialists within the departments of public law teaching and optional courses for law and economics students."<sup>2</sup>

This finding about the situation of political science in Austria is only a Déjà-vu experience. In the debate – not only, but also – between Hans Kelsen and Max Weber about the definition of the term "state", the former claimed to have deconstructed this term as a senseless "fiction"<sup>3</sup>, whereas the latter persistently defended it as a "meaningful" category according to his methodological credo of sociology as an empirical science based on the "understanding" of the motives of social and political actors (*verstehende Soziologie*).<sup>4</sup> This debate was conducted already at the beginning of the 20<sup>th</sup> century about the "emancipation" of law from politics and therefore about the establishment of new scientific fields at universities and – finally – about resources, power and influence. Against this background it is conceivable today that the emancipation and establishment of new scientific disciplines not only requires dissociation, but – with the postulate of scientific "purity" – also leads to exclusionary politics. But Kelsen's killer argument of "methodological syncretism"<sup>5</sup> is used until this very day against career aspirations at law faculties.

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- 2 Karlhofer/Pelinka, Austrian political science: the state of the art, in: *European Journal of Political Research* 20 (1991), p 404. This "evaluation" is based on the method of discourse-analysis with reference to the terms "independent" and "specialists" in contrast to "full professors" in the table.
  - 3 Cf. Kelsen, *Das Verhältnis von Staat und Recht im Lichte der Erkenntniskritik*, in: *Zeitschrift für öffentliches Recht* 1921, 453 – 510, reprinted in Klecatsky et al. (ed.), *Die Wiener rechtstheoretische Schule*, Wien 1968, pp 95 – 169.
  - 4 Cf. Weber, *Über einige Kategorien der verstehenden Soziologie*, in Winkelmann (ed.), *Max Weber. Soziologie – Universalgeschichtliche Analysen – Politik*, Stuttgart, 1973, pp 97 – 150. Kelsen, *Das Verhältnis*, footnote 3, refuses the concept of state as „person-fiction" because of the „reification" of state contrary to his theoretical concept of "identity of state and unity of legal order." Thereby he consequently constructs the oxymoron of a "science of the law of state without a state", (at page 101). In contrast, Weber, *Kategorien*, 110, insists on an "empirical validity" of human action besides the "normative validity" as methodological basis of legal doctrine: "Concepts like <state> ... and similar ones describe for Sociology, generally speaking, categories for certain types of human interactions... Sociology has, as far as <law> as an object comes into consideration, nothing to do with the analysis of the logically correct >objective< meaning of a >legal rule<, but with *human actions* whereby, among other factors, *perceptions* of human beings about the >meaning< and >validity< of certain legal rules play an important role ... . ..., that certain empirical perceptions about the >meaning< of a >legal rule< which is thought to be effective, are prevailing in the heads of certain people, has under certain assignable circumstances the consequence, that the action can be rationally geared to certain >expectations<. Thereby certain <chances> are given to concrete individuals which can considerably influence their behavior. This is the specific sociological concept of the empirical >validity< of a >legal rule<. For sociological considerations, there stands therefore also behind the word >state< – if it is used at all – *only* a course of human action in a special way." (emphasis in the original, translated from German by JM).
  - 5 Cf. for instance Kelsen, *Über Grenzen zwischen juristischer und soziologischer Methode*, in Klecatsky et al. (ed.), *Wiener rechtstheoretische Schule* (fn 3), pp 4 and 10. The accusation of methodological syncretism is mainly made in context with the accusation of metaphysical justifications instead of the analysis of legal structures or incorrect value judgments out of the hybrid mixture of law and politics in order to be able to legitimize political goals ("Interessen-jurisprudenz"). Hence, in order to give legal positivism an axiomatic basis, Kelsen, *Die Rechtswissenschaft als Norm- oder als Kulturwissenschaft*, in Klecatsky et al. (ed.), *Wiener rechtstheoretische Schule* (fn 3), p 56 differentiated between „objective value judgments" ("objek-

It is not an irony of the history of social sciences that these central European debates repeated themselves in the sixties with the behaviorist revolution in Anglo-Saxon political science (and with that became also the methodological foundation for the establishment of political science in Austria). In turn, the dissociation from older normative-ontological approaches and the establishment of the empirical-analytic approach following the example of natural sciences as the only "hard sciences" model, became a story of exclusion and devaluation of political scientists, who continued to be interested in norms and institutions. After God had been declared dead by the Neo-Marxists, the state was also pronounced dead and all "social behavior" was reduced to actors and processes to be "understood" only by causal explanation. The formalization of empirical studies led to a mathematization so that contributions in the American Political Science Review could have easily been published in scientific journals of mathematics. These articles consisted mostly of "symbols": the texts were composed less of words than of mathematical formulae.<sup>6</sup>

## 2. WOLFGANG MANTL'S POLITICAL SCIENCE AND LAW ŒUVRE

W. Mantl's seminal volume "Politikanalysen. Untersuchungen zur pluralistischen Demokratie", published by the Böhlau publishing house in Vienna in 2007 (Political analyses. Investigations into pluralistic democracy) can be called the "summa" of his scientific research. His epistemological commitment in the preface – where he makes the reader aware of his immense curiosity, his marvel and his joy "on the inspection of political phenomena in description, analysis and interpretation" when working on the interfaces of history, culture, politics and law – must be seen in light of the history elaborated above.

K. Poier already revealed on the occasion of the presentation of a liber amicorum for his 65<sup>th</sup> birthday that W. Mantl is also a mystic of numbers. The volume under review here contains again – harmonically rounded – twenty scientific articles from over forty years of his scientific career, bound by the subheading "Untersuchungen zur pluralistischen Demokratie" (Investigations into pluralistic democracy). The oldest article, "Plädoyer für Parteienfinanzierung" (Plea for party financing) appeared in the journal "Forum", edited by Günther Nennung, in 1967. The most recent article – apart from the articles especially written for this volume – is an essay with the title, "Spezifische Partizipation: das geistliche Lied in volksskirchlicher Modernität" (Specific Participation: the sacred song in clerical modernity), published in 2006 in the Festschrift "Schwendenwein zum 80. Geburtstag" (Liber amicorum Schwendenwein to his 80<sup>th</sup> Birthday).

The eighteen other articles – not chronologically ordered – cover W. Mantl's whole thematic spectrum:

- the history of the political ideas of liberalism, conservatism, Christian democracy and the debate on "fascism in its era" (E. Nolte);

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tives Werturteil") in the application of the law which has to be based on the text of legal rules and the „subjective statement of the judge" ("subjektive Stellungnahme des Wertenden") when the legal text is interpreted beyond the >original intent< of the law-maker.

6 Cf. for this story Bell, Die Sozialwissenschaften seit 1945, Frankfurt/M. 1986.

- (representative) democracy, parliament, electoral law and political parties, rule of law, human rights and various forms of control mechanisms, in which he struggles to translate these overarching constitutional principles – not only of the Austrian constitution – into concrete legal-institutional arrangements. The "basso ostinato" of all of these investigations is the principle of democracy as a normative value and not the search for its "essence";
- built into the results of research in the science of communication and the critique of ideologies is a contribution about the relationship between language and politics;
- and finally the "large realm" of religion, society and politics that is broken down into several articles.

It is also no coincidence that these twenty articles, as studies of pluralistic democracy, involve different literary genres: essays giving policy advice for legislation, and dictionary entries or scholarly articles in scientific journals and edited volumes. This also reflects the "differentiated", therefore pluralistic, modernized role of a university professor in the second half of the twentieth century.

It is not possible for the purpose of this essay to give a comprehensive overview of this very wide and dense thematic oeuvre. It can therefore only be attempted, in a sketchy way and through setting highlights, to uncover the basic structure of Mantl's scientific achievements and to present and assess them in the context of the development of political science as an academic discipline – not only in Austria.

It becomes obvious not only through his studies on the history of ideas in the entries about Burke, Montesquieu and Tocqueville in the "Katholische Soziallexikon" (Dictionary of Catholic Social Thought), second edition, 1980, which are reprinted in the volume under review, but also through his constantly repeated reference to the authors Max Weber and Hans Kelsen – in this order (!) – that W. Mantl is firmly anchored in the old European tradition of "Allgemeine Staatslehre" (General Theory of Law and State). If we are allowed to take over and reformulate a definition in his essay on "Language and Politics", he understands legal norms and legal systems as linguistic "texts", whose "expression" not only encompasses the text but also the context in order to convey "meaning" through information and normative evaluation. For Mantl this makes the importance of the aforementioned trias – "describe, analyze, interpret" – in the work of every scientist – no matter if natural or social sciences or humanities. In this sense he was and is – when one envisages the scientific history of law and social science in the twentieth century – immune against all "positivistic reductionisms" or "revolts" in law as well as in social sciences. Hence this approach can be found in all of his articles on the history of thoughts and the legal institutional arrangements of guiding values and normative principles, such as freedom, order, equality, solidarity, democracy, the rule of law and human rights.

The question and search for the (ontological) "essence" and (normative) "value of democracy" has not only occupied the philosophy and history of thoughts for two thousand years, but also the First Austrian Republic when declining into the neo-corporate, authoritarian dictatorship from 1933 to 1938. To this period Mantl dedicated an exciting study reconstructing the debate of the subsequent assessment of this time conducted by Joseph Dobretsberger and

August M. Knoll. Democracy – from textbook wisdom – is always representative democracy under the condition of a "modern" nation state. Even Switzerland – still referred to by nostalgic Swiss constitutionalists as a semi-direct democracy – is a parliamentary democracy despite of the existence of its "Landsgemeindekantone" (i.e. the six cantons where the citizens make the regional laws in citizens' assemblies so that no regional parliament as representative body exists). W. Mantl, in his endeavors to introduce modern instruments of direct democracy for constitutional reform in Styria, always devoted his legal and political comparative interest to this "unknown" neighbor. However, W. Mantl proves in his article about the discussion between Karl Kautsky and Moritz v. Rittinghausen at the end of the 19<sup>th</sup> century that today's identification of democracy with representative democracy was by no means predetermined, at least within the ranks of the German Social Democratic Party.

Our cumulative use of the word "modern" requires reflection of this term, as does W. Mantl in all his articles about democracy, rule of law and human rights from the angle of constitutional history and institutional theory in this volume. What is the "signature" of modernity based on a "liberal construction of political systems" ("liberale Systemkonstruktion"), as he searches to coin a specific expression for a democratic constitutional concept?

The recurrent theme through all of these articles are the achievements of enlightenment philosophy and political liberalism: the fundamental freedoms of the individual, the idea of the separation of state and society/economy as well as, finally, the institutional safeguards through a horizontal and vertical separation of powers and – as an Austrian contribution to modern constitutional history – the judicial review of legislation through a specialized Constitutional Court. Admittedly, the assertion of this "liberale Systemkonstruktion" never was nor is it today immune from challenges: Mantl – in his biographical entries on Burke and Montesquieu for the Dictionary on Catholic Social Thought – woos for the hybrid "mixture" of liberal and conservative, but reform-oriented powers, be it persons or parties, and advocates for the Aristotelean tradition of the "middle-ground", that has to defend itself against onedimensional extremes: versus an exaggerated, strictly individualistic liberalism, that wants to abolish social and corporative institutions, and against every form of reactionary conservatism that wants to turn back the wheels of time to the pre-modern era. In this sense Mantl emerges in the mirror of his biographical entries – but also in digressions for the characterization of his likeminded partners at the University of Graz in the sixties and seventies, which are inserted in different articles – as a liberal-minded person, firmly anchored in conservative values, but who is, in his efforts to balance tradition and innovation, immune from every seduction to defend power for its own sake in a structural-conservative way. Childhood experience, the socialization by the family, high school and "ÖCV" (Austrian Cartellverband, an association of Catholic student fraternities) left their marks for the development of his strong opposition against any form of totalitarianism from right and left. This mental disposition was – as he writes and also demonstrates in his critique of Ernst Noltes's book "Theorien über den Faschismus" (Theories about Fascism) in the volume – even more strengthened in the large inter-facultative seminars on "Fascism", "Christian Democracy" and "Socialism", which he supervised as

assistant professor to Gustav E. Kafka together with A. Ableitinger, assistant professor to the historian Alexander Nowotny.

Not only from the perspective of theory of institutions, but also from his research on language and politics, where he comprehends the social "function" of language as "coming to terms", Mantl understands democratic politics as "co-operation, learning from one another and influencing one another" on the foundation of the same freedoms for all. Indeed, he assumes – in opposition to the Austrian tradition of "value neutrality (Wertneutralität)" of many legal positivists – that a pluralistic world needs a "basic consensus" in which also – like he writes – "language and definition lattices" need to be pulled in so that, so to say, a "common language" keeps culture, institutions and processes together like an elastic, but still tear-proof stitching. In this sense, he also postulated at that point the "necessity of compromise as an essential element of democratic politics"<sup>7</sup>.

However, much has changed in this optimistic view since the "Zeitenwende" (turn of an era) – again a term coined by W. Mantl – in 1989. The collapse of the communist states, the wars in the Balkans, ongoing terrorist attacks in Western Europe, the attack on the World Trade Center on the 11<sup>th</sup> of September 2001, the wars in Afghanistan, Iraq, Darfur and Congo, but also the burning suburbs and ghettos in our own cities as well as electoral successes of right-wing populist and right-wing extremist parties, show – in contrast to the postulate of a "triumph of liberalism" as "the end of history" which had been heralded by Francis Fukuyama in the beginning of the 1990s – that a "basic consensus" of democratic politics in order to gain stability and integration, is out of date. When taking due regard of the problems with failed states and divided societies in international relations, or rather the problem of integration of cultural diversity to political unity, which cannot be accomplished anymore by following the classical model of the nation state, the "liberale Systemkonstruktion" has become brittle.

Pluralism, as a "signature" of modernity, means that the older institutions and certainties on which it had been based are no longer self-evident, or rather are – like the traditional churches – under constantly increasing pressure for legitimation against sectional ghettoization or fundamental revolts. In these post-modern times of new complexities and uncertainties, to which the slogan "anything goes" has been given, it is good to be reminded by W. Mantl in his articles that "the state" itself cannot produce the basic values for peaceful living-together and economic prosperity, but needs free citizens who are willing to work for the "public welfare" in a civil society which binds together beyond families, clans, old political networks or ethnic groupings. Hence the article about the "Persistence of antiquity" is not randomly placed at the beginning of the volume under review, but can be seen as W. Mantl's "credo": against the collapse of the value consensus of the "liberale Systemkonstruktion", he insists on the fact that humanistic education, including musical subjects, is not a luxury for an educated

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7 Like Kelsen, *Vom Wesen und Wert der Demokratie*, 2nd ed., 1929, p 61. From the perspective of welfare economics, Arrow, *Social Choice and Individual Values*, 1951, has adduced the mathematical-theoretical proof that it is logically impossible to find a combined, societal choice which brings the conflicting preferences of the single individuals into one single, rational order. If different needs shall be adjusted peacefully, there remains only the possibility of negotiations and compromise, in which certain preferences are waived.

or property owning bourgeoisie, but offers "human finality" to all, as a compass available for orientation in the "unavoidable functionalism" of modern life. Until this very day, renaissance and enlightenment as the foundations of modern and political liberalism, stay bound and inseparable with the definitions city/state/citizen/polis = politics. In the labyrinth of post-modernism – where "anything goes" – we can therefore conclude with W. Mantl that we need not only acknowledge, but also value orientations as well as the necessary balance of cognitive, emotive and normative elements which the classical humanistic education is able to offer.

The "summa" of Mantl's œuvre provokes the instant insight that the initially outlined conflicts of schools and the accusation of "methodological syncretism" have always been "senseless." It is important for him that text *and* context do not represent an either – or, but an intimately-linked as well – as. Hence, text *and* context can only be "understood" by "interpretation" which must follow the analysis of legal rules and facts on the basis of methodological pluralism – in the best case developing a "transdisciplinary" approach.

### **3. "JURISTENPOLITOLOGIE" OR HOW TO KNIT LAW AND POLITICAL SCIENCE TOGETHER AGAIN: PROS AND CONS**

In the following, as students and former assistants to W. Mantl, we would like to analyze the scientific validity and to contribute to the understanding of an approach which he himself labels "Juristenpolitologie", i.e. the interdependence of law and political science, and which he frequently uses in order to characterize his œuvre. Both of us have been working now for many years in law and political science research, but also have gotten to know the approach of legal practitioners serving as judges at highest courts. This gives us the opportunity also to critically reflect on the theoretical and methodological problems elaborated above from this angle.

#### **3.1 Juristenpolitologie in the field of legal doctrine**

First of all, the question arises, if this approach lapses into Kelsen's verdict of methodological syncretism: Is this dual approach for legal practice wrong already from the methodological perspective? If the interpretation of fundamental terms of constitutional law, such as democracy, separation of powers or the rule of law – in which both legal and social science research have an interest – is intermingled with findings from political sciences, this cannot be tolerated. It will happen too easily that these findings will be "imposed" on legal rules – far beyond the literal or contextual meaning of the legal texts themselves.

This charge has, of course, to be taken seriously. An "object" of scientific observation cannot be seen clearly through fogged lenses, if methods are intermingled.<sup>8</sup> Methodological syncretism leaves the picture of the object of

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8 Cf. Schischkoff, *Philosophisches Wörterbuch*, 22nd ed., 1991, p 710.

analysis blurred. Only "methodological purity" provides an undiluted picture which serves the demand of rigorous science.<sup>9</sup> When one says (for instance following Niklas Luhmann<sup>10</sup>) that in the realm of social interaction it is not the "given objects", but the theory which determines the field of scientific research, one can – based on methodological syncretism – attain a common sense-plausible theory. However, such a theory – due to the unclear focussing – will not attain a clear focus on which facts shall be analyzed, does not bring about scientific progress and is therefore useless. Hence, methodological syncretism must be unacceptable for researchers who are convinced that the chosen method determines the field of scientific research and its results.<sup>11</sup> Consequently, a lack of "purity" of methods hinders the correct analysis.

However, a legal text as such "is" not yet the legal norm, which is the concern of legal positivists. The norm "comes into being" only in the form of the specific "meaning" of a text for a specific problem. Hence, the text must – in a fundamental sense – be "interpreted" first, since language is only the "carrier system" of law.<sup>12</sup> The approximation to the terms used in legal norms initially orients itself towards the general understanding of these terms. That goes also for the phenomena that the historical and political scientists analyze. However, with the methods used in these sciences, you get results which go beyond the "mere" everyday knowledge and everyday understanding and thereby convey deepened insights.

Juristenpolitologie, then, does not go the (simple) way to read such findings into the legal text by "constructing" the content of the legal norms according to these findings or rather superimposing them.<sup>13</sup> The content of these norms – their meaning – can only be elaborated with the help of the standard legal methods on the basis of the legal text (normtextgebunden). For instance, the content of one of the fundamental constitutional principles of the Austrian constitution (B-VG), democracy – which is not expressis verbis defined in the B-VG – has to be systematically determined in this sense on the basis of the regulations of the B-VG that apply to the area of democracy.<sup>14</sup> But here comes the point which explains the added value of the "Juristenpolitologie"-approach for the application of law: in order to determine the "meaning" of the constitutional principle of democracy as a fundamental norm, one needs a preliminary understanding of the phenomenon of democracy that allows the identification of

9 Cf. Dreier, Hans Kelsens Wissenschaftsprogramm, in: Schulze-Fielitz (ed.), Staatsrechtslehre als Wissenschaft (Die Verwaltung, Beiheft 7), 2007, pp 81/2.

10 Cf. Luhmann, Die Wissenschaft der Gesellschaft, 1990, p 407; cf. for this Zima, Was ist Theorie, 2004, p 12 ff, s also pp 168/9.

11 Cf. for this Thienel, Kritischer Rationalismus und Jurisprudenz, 1991, pp 122/3 (in debate with Kelsen).

12 See Rütters, Rechtstheorie, 3<sup>rd</sup> ed., 2007, § 5 (Rz 150 ff).

13 Clearly in this direction, for instance, the "new type of legal thought", which Carl Schmitt exemplifies in the extra legal "concrete thought for order and organization", which, in his opinion, can become effective (– in the service of the "national socialist movement in Germany") through legal general clauses, cf. Schmitt, Über die drei Arten des rechtswissenschaftlichen Denkens, 2<sup>nd</sup> ed., 1934 (unmodified version 1993), in particular pp 47/8.

14 Cf. for instance Rill/Schäffer, Art 1 B-VG; idem. (ed.), B-VG Komm Rz 2, 26 (2001); Öhlinger, Verfassungsrecht, 7<sup>th</sup> ed., 2007, Rz 62, p 64.

the provisions in the B-VG with regard to democracy. Hence, this approach does not claim that the pre-understanding of democracy is "the" meaning of the democratic principle, but gives the best knowledge about the phenomenon of democracy that allows therefore to locate all possible legal structures with regard to democracy in the B-VG. What could prepare better to systematically elaborated knowledge than the appropriate science and the preoccupation with it? That political and historical sciences are not relevant for the normative contents of constitutional law (*verfassungrechtliche Regelungsinhalte*) (such as democracy, human rights, rule of law and republic) is a claim no one would seriously make.

The same applies for the legal frame of the political process codified by constitutional law: the results of political science research, e.g. political-strategic rules for the effective construction of regulations for decision-making or voting, or about rules for the cooperation of parliament and government, illustrate the functional context for appropriate legal norms. An analytical deficit concerning these strategies can have the consequence that the application of legal norms becomes dysfunctional. If the knowledge about political phenomena is missing, there is a danger that the functional interdependence of legal norms will not be sufficiently recognized, which leads to a decoupling of these norms from their functional finality.

An approach which does not cut off the knowledge on the "state of the arts" of the mentioned science, but reflects it for the purpose of legal interpretation can thus be made useful for the specification of the content of (rather abstract) constitutional norms, specifically under the aspect of their functional context. Thus, the normativistic approach of the application of law is not abandoned, if the meaning of the studied norm is only elaborated with the help of the standard legal methods of interpretation. A methodological mixture does not result from that, but instead it brings a broader perspective for the significance of a norm.

Finally, there remains the objection, that the scope and complexity of the legal order alone does not allow lawyers a deeper engagement with questions of political science and requires an exclusive concentration on legal questions in a narrower sense, especially those of legal doctrine. However, legal-dogmatic thinking (that has to focus on decisions for concrete legal cases) can only profit, as regards the content of norms, from political science research. To push aside this benefit because of scant resources, means finally an intellectual shortage which does not help the problem of depiction of content and function of law, but instead exacerbates it and moreover can hold everything on a sub-optimal analytical level.

In the areas of legal-dogmatic thought which are not burdened by the necessity to make decisions – that means in particular at universities – it appears to be in the interest of successful explications, systematizations and proposals for the solution of legal questions, to take the "slowness of the law" as a virtue<sup>15</sup> and not to cut off the results of political science and historical research, but to take it into consideration or even to bring it forward yourself for the sake of comprehensive analysis. This contributes to the autonomy of academic legal-

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15 Cf. recently Lege, Was Juristen wirklich tun. Jurisprudential Realism, in: Brugger/Neumann/Kirste (ed.), *Rechtsphilosophie im 21. Jahrhundert*, 2008, pp 207 and 231.

dogmatic research, which, in relationship to other endeavors, gives it a special place.<sup>16</sup> Also the willingness of courts and other authorities to make use of research in their application of the law is not independent from the degree of reflection of research at universities. As a general rule, scientific articles, regardless of whether critical or affirmative, whose level of elaboration clearly exceeds the average standards which can be attained under the restrictions of the daily decision-making processes, are more likely to be taken up in the argumentative, discursive procedures of public authorities than others.

Finally legal norms do not regulate their own interpretation; they do not explain themselves on their own. The interpretation of legal norms is ascertained by the standards of legal argumentation, as they find their expression in the established doctrines of law application. For single norms, their meaning results very decisively from their description through existing legal doctrine<sup>17,18</sup>. A further elaboration – only allowed in the framework of the text of the norm, which is defined by the standard rules of interpretation, – requires a "good reason".

With this, there arise – on the basis of good reasons – open doors to new approaches to the legal-dogmatic discourse on a high degree of continuity. It is significant for the problem-solving capacity of once taken paths at least in the area of constitutional and administrative law, if the approach first chosen allows an adequate understanding of the functional context of the norm. Shortcomings in this respect will probably reduce the "close relatedness" between the "object" and the understanding of the norm and thereby the problem solving capacity. That, on the other hand, affects the effectiveness of law. With constitutional law – the framework for politics – this would become a specific problem.

It is obvious, that the contextual linkage favors the use of the results of political science and historical research for the purpose of norm interpretation. The improvements achieved in the understanding of norms having been coordinated in their finality with other norms will be honored – as a rule – through a higher continuity with less requirements to deviate. This – legally speaking – also strengthens legal security as the basis for the concept of democratic constitutionalism (demokratischer Verfassungsstaat). The "Juristenpolitologie"-approach leads to an – as far as the text of a norm supports it – institutional understanding of norms, which comprehends norm and facts within the scope of regulation as functionally related to each other – that means as a functional unity<sup>19</sup>. Primarily with this approach it is possible to fathom out the

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16 The systematic preoccupation with legal norms and their application represents a core competence of legal science (from the perspective of the legal-dogmatic approach), cf. recently Rühl, *Vom Nutzen der Philosophie für die Rechtswissenschaft*, in: Sandkühler (ed.), *Philosophie, wozu?*, 2008, pp 269/70.

17 Cf. for instance Weinberger, *Die Revolution in der Rechtssatztheorie*, in: Fischer/Koller/Krawietz (ed.), *Aus intellektuellem Gewissen. Aufsätze von Ota Weinberger über Grundlagenprobleme der Rechtswissenschaft und Demokratietheorie*, 2000, pp 199 and 206/7.

18 The "real formation of law" – i.e. the decision in concrete cases – is obvious to the authorities which apply laws, see Dreier, *Kelsen's Wissenschaftsprogramm* (fn 9), with reference to Kelsen.

19 Cf. Weinberger, *Norm und Institution*, 1988, pp 28/9 and 77/9; see also *id.*, *Revolution* (fn 17), p 206.

functional design of a legal source – for instance, the constitution. An approach blinded in this dimension runs the risk of preferring only norm-oriented solutions which are not at the same time problem- or fact-oriented – in extreme cases elaborated on the basis of concepts or definitions with a bias for specific social, economic or political interests (begriffsjuristisch generiert).<sup>20</sup> This will obviously limit the effectiveness of law. Juristenpolitologie is therefore a jurisprudential program to avoid being on this wrong track.

### 3.2. The contribution of Juristenpolitologie to comparative law

But also for the comparative method, especially in public law, the functional context and therefore the approach developed by Niklas Luhman which looks for "functional equivalents", is an indispensable method to reach an added value, as Marko tried to demonstrate in his "Habilitationsschrift" about legal institutions of nationality law from a "functional comparative perspective."<sup>21</sup> Earlier studies of nationality law (Nationalitätenrecht) in the field of public law started – in the tradition of legal positivism – from two ordering schemes for the creation of a "system", which then enabled the comparison. On the one hand, researchers tried to fully capture all legal institutions in state constitutions and to describe their normative content with the help of the legal methods of interpretation by country studies. However, one country study was followed then by the other, but they were never analyzed comparatively in a single volume. On the other hand, the differentiation into various legal disciplines, especially public law and public international law, was used as the basis for a systematic illustration of various legal institutions which were analyzed with regard to their political effectiveness. Thus the protection and promotion of ethnic groups were identified as immanent "value judgments", but – to speak with Weber and Kelsen – could never be "justified" in their "normative" or "empirical validity." This cannot be achieved through the traditional comparison of legal instruments and institutions on the basis of a "normativistic legal positivism."<sup>22</sup> This approach is blind for the level of functional references which are considered to be political value judgments which cannot be explained by jurisprudence.<sup>23</sup> Moreover, the method of differentiation only identifies similarities or differences, but cannot explain them.

Only a systematic reconstruction of the possibilities for legal regulation on the basis of functionalism and system theory and a functional comparison of laws based on concrete legal systems can bring an added value, because norm and institution are mutually related to each other by their functions. Thus, only if the point of departure for every analysis is no longer the "formal-logical basic norm" (formallogische Grundnorm) – which is the epistemological axiom of Kelsen's

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20 Cf. Rüthers, *Rechtstheorie* (fn 12), Rz 205, pp 458/9 and 519/20.

21 Marko, *Autonomie und Integration. Rechtsinstitute des Nationalitätenrechts im funktionalen Vergleich*, 1995.

22 Weinberger, *Norm und Institution* (fn 19), p 73.

23 Kelsen, *Rechtswissenschaft* (fn 5), p 45/6: "If the concept of value is understood in an objective sense instead, i.e. as a shall instead of the being of reality, than is that synthesis of value and reality ... logically impossible."

"Pure Doctrine of Legal Positivism" (Reine Rechtslehre) – , but the law in its function as peace order<sup>24</sup> which recognizes that the "functional basic norm" lies in the steering of social behavior for institutional goal-attainment, can the political level of value judgments be re-integrated as functional reference of normative principles and legal institutions. Only such an approach can thus re-establish the "unity of social sciences"<sup>25</sup> after the schisms outlined above. Hence, a neo-institutional, comparative legal analysis encompasses three fields, in which the results attained with different methods of analyses are not treated separately, also not mixed, but related to each other: the level of fundamental values (political culture) as functional reference for political decision-making processes, which leads to law-making; the legal-dogmatic analysis and, finally, the legal-sociological research on facts: This encompasses not only the question of whether "the will" of the legislature does actually lead to the desired result, but also of whether the institutionalization of conflict through law is, as such, adequate to the problem or whether even legally not formalized functional equivalences might contribute to the resolution of the specific problem.

### 3.3. The contribution of Juristenpolitologie to political science

The initially outlined scientific history of the behaviorist revolt against the traditional ontological-normative approach of political science has to be again the point of departure for the reflexion about the possible contribution of the Juristenpolitologie-approach to overcome this schism.

Given the mentioned fissures of the "liberal construction of political systems", in terms of W. Mantl, it can be seen that the traditional concepts of law with regard to the principle of equality as "formal" equality of individuals before the law or as "substantial" equality through law do not help anymore. Political unity, legal equality and cultural diversity create a new constellation of problems, which require a re-conceptualization and the elaboration of new categories (of thought), in terms of M. Weber. In the binary scheme of Realism versus Idealism, which is a recurrent theme in the history of social and political sciences, all "imagined" models are – from the perspective of empirical positivists, e.g. "realists" – suspect of creating ideologies.<sup>26</sup> In the light of ethnic conflicts, which can be found worldwide, multi- or rather interculturalism is quickly dismissed as an "utopia" of those who think they can cure the world's ills, so that an inevitable "clash of civilizations"<sup>27</sup> is predicted.

Against any one-dimensional behaviorist reductionism with regard to the problem of ethnic conflict one can again fall back on Weber and Kelsen and their critical approach for the purpose of de-construction of reifications or naturalizations

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24 Cf. Koller, Der Begriff des Rechts und seine Konzeptionen, in: Brugger et al. (ed.), Rechtsphilosophie (fn 15), pp 175/6.

25 Cf. Hilgendorf, Zur Lage der juristischen Grundlagenforschung in Deutschland heute, in: Brugger et al. (ed.), Rechtsphilosophie (fn 15), pp 111/2.

26 Cf. Döhn, Nationalismus – Nation und Volk als ideologisches Konstrukt, in: Neumann (ed.), Handbuch Politische Theorien und Ideologien, Opladen 1996, pp 389 – 444.

27 Huntington, The Clash of Civilizations?, in: Foreign Affairs, Nr. 3 1993, pp 22 – 30.

of, for instance, the terms people, nation or state. Almost a hundred years ago, their research proved that conceptual categories must not be reified in the form of "fictions" after the model of physical persons (Personsfiktionen) or even naturalized, i.e. pretended as an unchangeable fact, what had indeed happened with the concept of race. Instead, the "concept of substance" must be traced back to "legal relations" and reified fictions must be de-constructed according to their political functions.<sup>28</sup> Weber and even more so Hermann Heller would remind us that only naive realists assume the possibility of a pre-suppositionless depiction of "objective" facts, hence a "real reality." In contrast, the results of the sociology of knowledge hold that scientific categories "are" not ideological or utopian models, but epistemological requirements<sup>29</sup> and practical means for the "social construction of reality".<sup>30</sup>

Secondly, the de-construction of reifications or naturalizations on the basis of a normative-ontological approach needs an addition through the neo-institutional approach, in which norms and institutions can become again objects of empirical analyses in political science. Marko has recently demonstrated that an effective "diversity management" – seen as the construction of possible courses of action, norms and institutions to achieve political unity<sup>31</sup>, legal equality and cultural diversity at the same time – is only feasible with the methodological instruments of a de-constructive and neo-institutional approach applying the basic functions of autonomy and integration as "categories of objective possibilities (Kategorien der objektiven Möglichkeit)".<sup>32</sup> The de-construction of political theories which reify cultural diversity – from being a structural concept of social relations – into the primary cause of conflicts<sup>33</sup>, can demonstrate that equality and difference are not exclusive, but that a triadic structure of identity – equality – difference can enable the development of norms and institutions for an effective diversity management. On the basis of such a triadic structure and with the two basic functions of autonomy and integration, one can – from the perspective of comparative law and comparative politics – analyze the extent to which legal instruments and institutions contribute to the "goal-attainment" of unity, equality and diversity. In this sense the Juristenpolitologie-approach can contribute a lot, not only to political theory and comparative politics, but also to scientifically-based policy development for legal regulation.

Against the background of the double demarcation of law and political science, the Juristenpolitologie-approach is seen until this very day as a methodological heresy, but only in Austria. The seminal studies of G. Lehmbruch

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28 Kelsen, *Verhältnis* (fn 3), pp 98/9.

29 Cf. instead of all Meidl, *Wissenschaftstheorie für SozialforscherInnen*, 2009.

30 Cf. only Weber, *Objektivität* (fn 4), p 237 and Heller, *Staatslehre*, (1<sup>st</sup> ed. 1934), here after 6<sup>th</sup> ed. 1983, pp 82/3, long before Berger/Luckmann with "Die gesellschaftliche Konstruktion der Wirklichkeit" also elevated this approach to a book title in 1966.

31 Cf. Marko, *The Law and Politics of Diversity Management: A Neo-institutional Approach*, in: *European Yearbook for Minority Issues*, Vol. 6, 2006/07, 2008, pp 251 – 279.

32 Weber, *Objektivität* (fn 4), p 239.

33 As this was done by S. Huntington and long before him already by C. Schmitt.

and especially A. Lijphart about the model of "consociational democracy"<sup>34</sup> or the recent programmatic book title and introductory chapter of S. Choudry "Constitutional Design in Divided Societies: Bridging comparative politics and comparative constitutional law"<sup>35</sup> show that the Juristenpolitologie-approach practiced and promoted by W. Mantl is internationally firmly anchored in the methodological as well as substantive mainstream.

- *Prof. Dr. Joseph Marko is Professor of Public Law and Political Sciences at the University Graz and served from 1997 to 2002 as Judge of the Constitutional Court of Bosnia and Herzegovina.*
- *HR Dr. Meinrad Handstanger graduated from Graz Law School and is Judge at the Administrative Court of Austria.*

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34 Cf. lastly Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries*, 1999.

35 Choudry (ed.), *Constitutional Design for Divided Societies*, 2008.