The Affective Force of Law

Mandatory Vaccination after a Derridean Perspective

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Case: Covid-19 and Mandatory Vaccination in Austria

Where the possibility of mandatory vaccination was only theoretical for a long time, this has recently become reality with the introduction of the Austrian Covid-19 Vaccine mandate (Druml & Czech, 2022; Bell, 2022). Within the EU, Austria is the first country to implement such a drastic measure. Over the course of the pandemic, other measures have been adopted ranging from social distancing or a curfew, to the closure of complete sectors. Also, a 'green pass' has been imposed in the country with the initial (3G) aim to facilitate proof of vaccination, recovery, and testing (Toth, 2022). Not much later however the requirement for this green pass was tightened to '2G', meaning that the population that has neither been vaccinated or recently recovered from Covid-19 were excluded. For this same part of the population a 'lockdown for the unvaccinated' was of force from November 2021 until January 2022. As such, Austria has provided lots of incentives to get vaccinated. Still, a significant part of the population refuses to take the vaccine. At the time of writing, 76.16% of the total population has received at least one dose of a vaccine, and 69.89% has a valid Covid certificate (Crego, Dumbrava, de Groot, Kotanidis & Mentzelopoulou, 2022). In light of this, the Covid-19 Vaccine Mandate Law entered into force on February 5th, 2022, with the expectation to be of force until 31 January 2024. The law is of force in the public domain, meaning that as soon as people leave their houses, they can be asked to show their Covid-19 vaccination certificate. If people refuse to do so, or if they are not fully vaccinated (including booster shots) they can be given fines ranging from 600 to 3600 euros every 2 months (Jones, 2022; Miller, 2022). The aim is to reach sufficient immunity in the general population, but some inconsistencies were pointed out, like the fact that the law is in force while traveling to the workplace but not after having arrived. Also, exemptions exist for pregnant women, people who are unable to get vaccinated for

medical reasons, and for people who have an infection with Covid-19 in the past 180 days (Druml & Czech, 2022).

The earlier measures like the lockdown for the unvaccinated already gave rise to social unrest and the formation of two opposing camps in society (Maciuszek, Polak, Stasiuk, Doliński, 2021; Toth, 2022). After the mandatory vaccination legislation was presented in Vienna, however, large-scale protests occurred in several Austrian cities like Salzburg, Bregenz and St. Pölten (Kurmayer, 2022). During these protests, crowds took the streets chanting slogans such as "The government must go!" ("Thousands protest in Vienna against mandatory vaccination", 2022). Remarkably, the crowds did not solely contain anti-vaxxers, but also people who are "pleased to be vaccinated, but against mandatory jabs" (Bell, 2022). This time, a broad public of people seemed to be frustrated with the legislation. In fact, a Statista survey of February 2022 showed that 69% of the Austrian population was less satisfied or dissatisfied with how the government was handling the pandemic (Statista, 2022). Similarly, in their sample of participants, Schmelz and Bowles (2022) pointed out that resistance had increased significantly since the introduction of the mandate, by a factor of five. The reason for the previously unparalleled magnitude of the resistance and social turbulence can be found in the claim that the vaccine mandate puts individual liberty and bodily integrity at stake.

From a legal view, national laws mandating vaccination against Covid-19 could indeed possibly raise problems when the mandate becomes a requirement to exercise fundamental rights that are stipulated in the European Convention of the Human Rights (ECHR). Examples of such fundamental rights are the right to integrity (Article 3 ECHR), the right to education (Article 2 of Protocol No 1 to the ECHR), and the right of association (Article 11(1) ECHR). Also, if an individual refuses vaccination for religious beliefs, the obligation may be contrary to the freedom of thought, conscience, and religion (Article 9 ECHR). None of these fundamental rights however is absolute; according to Article 52(1) of the EU Charter they can

all be limited by law if the objectives pursued are *legitimate* and the measures are *necessary* and *proportionate* (Crego et al., 2022). To determine whether a national law is contrary to EU law, the treaties adopted within the council of Europe can serve as a guide for interpretation (Crego et al., 2022).

The objective of mandatory vaccination is generally to obtain "a high level of human health protection**",** as stated in Article 35 EU Charter. National governments are obliged to guarantee the right of everyone to the best possible health (Article 12 International Covenant on Economic, Social and Cultural Right) and have the obligation to adopt the measures needed to "prevent as far as possible epidemic, endemic and other diseases" (Article 11(3) of the European Social Charter). In 2011, this clause is interpreted by the European Council as requiring "states to ensure high immunization levels" (European Committee of Social Rights, 2011; Crego et al., 2022). Even though European legislation seems to provide reasons for government to take action in the name of public health during times of a pandemic, the specific measure of mandating vaccination can however be seen as limiting the right to integrity, which requires the "free and informed consent" of those undergoing medical treatment (Article 3(2) EU Charter). Since the European Committee of Social Rights never treated the question whether the immunization levels can be reached through compulsory vaccination, the convention on Human Rights and Biomedicine provides guidance on this (Crego et al., 2022). Article 5 of this Convention again explicitly states that interventions in the health field are only allowed to take place under free and informed consent. An exemption to this can be found in Article 26; no consent is needed if the compulsory health interventions are '*prescribed by law and necessary in a democratic society'* for reasons that include the protection of public health or rights of others. Similarly, the European Court of Human Rights (ECtHR) provides certain conditions in their articles (3 and 8) on involuntary medical treatments. Even though Article 3 ECHR stipulates a prohibition of torture and degrading treatments, it only applies to medical

treatments of a certain level of severity like mandatory sterilization. Mandatory vaccination, like the Austrian vaccine mandate, has been considered by the ECtHR under Article 8 which respects the right to private life and hence protects the physical integrity of a person (Nilsson, 2021). In another case, mandatory vaccination satisfied Article 8 ECHR only if the measure was provided by law, serves a legitimate objective, and is proportionate (ECHR, 2021).

The line of reasoning is the following: the implementation of a vaccine mandate imposes a minimum risk on the population in exchange to protect the health of the entire population, including those who cannot be vaccinated. As such, the measure can be seen as enveloping the value of social solidarity by putting the health of the collective over individual choice. Also, the ECtHR pointed to a consensus among all parties that vaccination is the most successfully cost-effective health intervention for government to serve their obligation to protect the health of their citizens (Nilsson, 2021). All in all, the ECtHR has provided a wide margin of appreciation for states in determining whether they deemed necessary to use obligatory vaccination to protect public health (Crego et al., 2022). They have established a framework of EU norms based on proportionality against which national legislation on mandatory vaccination should be assessed, addressing the following elements: i) vaccine safety and effectiveness, and whether they are continuously monitored by authorities; ii) the existence of exemptions to vaccination; iii) possibility of forcible administration; iv) the type of sanctions that can be imposed; v) the coverage of vaccination costs by public insurance; and lastly vi) whether compensation for health damage as a result from the compulsory vaccine exists.

The legal consequences of the introduction of a vaccine mandate within an EU Member state do not stop at the border of the country in question. In fact, the Austrian vaccine mandate would also have consequences relating to the right of EU citizens to move and reside feely in the EU (Article 21(1) Treaty of the Functioning of the European Union (TFEU)) and the principle of non-discrimination because of nationality (Article 18 TFEU). As this thesis limits

itself to an analysis on national level, these are not considered in this thesis. Also, additional concerns regarding the privacy and data protection stipulated in Article 7 and 8 EU Charter could arise depending on the national legislation regarding data storage and the way compliance with the obligation is monitored. These privacy and data protection issues are also important in discussing a vaccine mandate, but just like the cross-border issues out of the scope of this thesis.

As far as fundamental rights are concerned, we see that European legislation offers exceptions in the name of public health. The fundamental rights are not absolute and can be circumvented, albeit under certain conditions such as the framework based on the principle of proportionality (WHO, 2022). Although public opinion is divided, from a legal point of view, the introduction of a vaccination requirement has not resulted in a real violation of the abovementioned human rights. Nevertheless, the scale of the recent protests, the social unrest, and the broad public of people opposing the law raise some questions. It seems that legal validity is not sufficient for a subject to comply with the law. If this is the case, what is sufficient?

Structure of the Thesis

The core problem in this case, about what forces subjects to obey law, is twofold. This thesis is going to explore two main routes, the first being the idea that subjects obey the law because the law is of a different order that is so powerful and great that it must always be obeyed. In order words, this is the idea that the law is somehow 'grounded' by means of a foundation in some higher order. The second option that is going to be explored is the idea that subjects obey the law because it is grounded in a collective sense of justice. As philosopher Jacques Derrida practices these two aspects interchangeably in his works, he will be the starting point to this thesis. By analyzing his "*Force of Law: The Mystical Foundation of Authority"* the first part of this thesis attempts to shed more light on why these two routes are so intertwined. Concepts like deconstruction, law, and justice guide this part of the quest for a foundation of law, and

thus will be the building blocks of Chapter 1. Since Derrida is notorious for his richly ambiguous terminology, we will discover that many foundational concepts in his work are interwoven. When it comes to the question why subjects obey the law, Derrida is rather explicit in following Montaigne and Pascal, proposing a “Mystical Foundation of Authority”. Very briefly, this would mean that subjects obey the law because a mystical foundation underlies the legal order. Remarkably, if a law were enforced purely because it has a mystical foundation, this would mean that it is impossible for subjects to disobey the legally valid covid-19 vaccination mandate. The fundamentalism expressed in Derrida's mystical foundation of authority thus proves incompatible with parts of reality. This discrepancy between his thinking and reality gives rise to a critical analysis of Derrida’s thinking. This forms the basis of Chapter 2.

Derrida’s “solution” to explain the authority of law suggests that Derrida completely supports the idea that the law must be obeyed because it is quasi-supranatural. In his thinking however, traces can be identified that point to the idea that some sort of a *feeling* justice is necessary for subjects to obey the law. This suggests that to think in terms of a mystical foundation of law, reflects a desire for a kind of stable foundation that abstracts from the unpredictability and vicissitudes of the world. As such, the first deficiency in Derrida’s framework that is pointed out, is his deeply rooted fundamentalism when it comes to analyzing the legal order, despite his own explicit denials that this is the case. In this he resembles a thinker named Carl Schmitt with whom Derrida is in implicit debate and who adheres to the theologically supported sovereignty thesis. Considering the fact that the question of justice of God is one of the biggest question marks for many Christians, and considering the discrepancy apparent in the case study, I will come to reject the view of law as being built on a mystical or quasi-divine ground. Then, Derrida's terminology, and more in particular his disregard for the concept of legitimacy will be criticized. Through a dialogue with the case study, this

shortcoming becomes clear, as the case study is the perfect example of a law that is perfectly legal but has lost its legitimacy. After all, in a so-called sharp distinction between law and justice, Derrida unhesitatingly places the concept of legitimacy on the calculable side of law. Here Derrida falls prey to the flaw in Western thought that he himself criticizes: the tendency to think in terms of binary oppositions in which one always unconsciously takes precedence over the other. More specifically, his definition of legitimacy reflects the tendency to prioritize rational grounds over affective ones. Derrida finds refuge in his theory of deconstruction, which often results in concepts mingling with one another. When it comes to an ambiguous concept like justice, such an indeterminacy of definition can be seen as a strength. It emphasizes the idea that justice is something that is not predetermined but is always something that remains to be determined. However, Derrida is trying to combine two things that are incompatible. If you adhere to the idea of a mystical foundation, this vectorizes the future because it makes a limited future possible. At the same time, Derrida's open concept of justice as 'something to be determined' claims that that future is open.

After criticizing both Derrida's fundamentalism and his use of the concept of legitimacy, I will give an alternative definition of the concept of legitimacy that positions it more towards the side of justice by introducing an affective component based on Korsten's (2021) distinction between law and justice. In the definition of legitimacy this affective component will function as a bridge between the empirical and normative component of legitimacy proposed by Bokhorst (2014) and Meyer and Allen (1991). By bringing this new conception of legitimacy into dialogue with the case study, I will argue that this new definition helps to account for the discrepancy between the legal validity of the Austrian Covid-19 vaccine mandate and the (lack of) support it receives in society. In line with this, Chapter 3 will draw primarily on the philosophical tools of Von Jhering (1879) and Huizinga (1938) and present models of struggle that together form an alternative to Derrida's fundamentalism while

simultaneously acknowledging the role of affect in the authority of law. First, Von Jhering's societal model, described in this "Struggle for Law" (1879) will be considered. Pivotal to this part will be his concept of *Rechtsgefühl*—a both individual and collective sense of justice that forms the driver of the societal struggle that makes up the legal order. As such, his theory rejects the idea that the legal order is grounded in some sort of fundament and acknowledges the affective component in legitimacy. Then, Johan Huizinga's take on law introduces two very important drives: play and chance. In his work *Homo Ludens* (1938), Huizinga proposes a view of man as first and foremost playful creatures. Without completely adopting this view, I think his theory shows that humans are not at all completely rational, which supports the affective component in legitimacy.

Unlike Derrida and Schmitt, Huizinga in the core rejects the idea of a (theological) fundament of law. Instead, he claims that each element of a lawsuit is determined by struggle. A lawsuit is dominated by the element of chance, which can go two ways: one can win, and one can lose- even if one is, or claims to be, right. The fundamental point here is that everyone always has a chance, and that is exactly one of the core values of the law. By treating chance, Huizinga introduces an arbitrary component into the playing field of justice. After all, one can never decide in advance what will be the outcome of a lawsuit. In a way, a parallel exists here with Derrida his concept of a legitimate function and his idea that justice is something to be determined. These elements form a small paradox within Derrida, as the (theological) mysticism in his foundation of law implies some determinism.

Through a thorough critique of Derrida, and by connecting it to Schmitt, this thesis rejects the idea that subjects obey the law because the law is of such a powerful higher order that it must always be obeyed. By bringing together the works of Von Jhering and Huizinga while pointing out the importance of affect and struggle, an alternative answer will be put

forward that better fits reality and suits the second route to the question of the authority of law: subjects obeys the law because it is grounded in some sense of individual and collective justice.

Relevance

The relevance of this thesis is not only restricted to the case of the potential return of the Austrian vaccine mandate in the near future (August), but also for future measures taken in other EU and non-EU countries. Moreover, research suggests that it won't be a matter of whether there will be another pandemic in the future but when (Jordà et al., 2020; Broom, 2020). This stresses the importance of understanding the consequences like societal unrest so that it can be considered when deciding on a future containment strategy. As it is very likely that we will have to deal with a similar crisis in the future, we better do anything we can to understand our current situation so that we can anticipate the next one better and thereby limit the impact, and safeguard the legal rights of citizens.

Chapter 1: A Derridean Perspective on the Authority of Law

In his *Force of Law: A Mystical Foundation of Authority,* Derrida considers the appeal of justice that does not coincide with any existing law or fixed morality, and in his quest, he turns to Montaigne and Pascal's notions of a "mystical foundation of all authority". The aim of this chapter is to get a grasp of what Derrida means with this mystical foundation of authority, so that his answer to the question of the authority of law is clear. To do so, the structure of this chapter is as follows: first, Derrida's theory on deconstruction will be set out. As a guide, two crucial figures of thought, being 'différance' and 'supplement' will be discussed. Then, the foundational idiomatic expression of 'enforcing the law' will be discussed, and Derrida's distinction between law and justice will be specified. Lastly, I will turn to Derrida's Mystical Foundation of Authority and try to set out his explanation of why and when the law is borne. Once this is done, the findings of this chapter will be applied to the Austrian case study of mandatory Covid-19 vaccination. From this, a critical reflection will follow that will serve as the basis for the second chapter.

Deconstruction and Legal Theory

Over the years, Derrida's theory of deconstruction has known a lot of definitions. One of them can be understood as a critique of the "Platonism" that inhabits Western metaphysical thought (Lawlor, 2021). This becomes clear when we acknowledge that every thought or idea derives its meaning from the relation to its opposite (everything is figuratively black and white). Deconstructive analysis tries to show that in Western thought one of these terms is always subconsciously favored over another. A well-known movement that has called for attention to this is the feminist movement, that raises awareness for the fact that for a long time in history men have been prioritized over women. The first stage of deconstruction is to show that these prioritizations often boil down to some kind of "decision" in history that has been made on the

hierarchy of terms (Derrida, 2013, p.51). The second phase is to then *re-inscribe* the previously inferior term as the origin of the opposition of the two terms (Lawlor, 2021). According to Derrida, it will then become clear that the opposition is not only non-dualistic but also undecidable. For this, he uses the terms "différance" and "supplement". From this it follows that deconstruction can be understood as a logical technique that tries to reverse traditional subconscious prioritizations. By encouraging one to challenge traditional assumptions and prejudices, deconstruction opens up multiple interpretations. Besides a critique of "Platonism", deconstruction can also be seen as a reaction to structuralism. Derrida questions the presence of meaning in itself (objective) or for itself (subjective), and thus is advocating that language cannot be a closed system as its elements do not have one single absolute meaning. Instead, he takes another approach to textual meaning in which again the terms 'deconstruction' and 'différance' play a central role.

Although the concept of deconstruction originally arose in the context of language it is equally applicable to the study of law. With the publication of "*Force of Law: The Mystical Foundation of Authority*," Derrida made an interesting connection between his concept of deconstruction and legal theory. If everything that exists in terms of conceptions, attitudes, and beliefs is subject to an unstoppable process of deconstruction, what is left of ethics and justice? In *Force of Law,* Derrida provides a less metaphysical and a more political definition of deconstruction. He distinguishes two forms that deconstruction can take on: the seemingly demonstrative ahistorical formal-logical paradox and a more historical form that unfolds via textual readings, meticulous interpretation, and genealogies (Derrida, 2013, p.71). The latter includes an analysis of the historical use of a concept or theme, in the case of this book the history of justice. Derrida also demonstrates the former style of deconstruction in his *Force of Law* when he discusses the problematic relation between law and justice which will be explored in the section on "Law, Justice, Deconstruction and Decision".

Following Sneller (2013), the two figures of thought *différance* and *supplement* will be explored to better understand Derrida's approach to textual meaning which is necessary to get into his take on law and justice/ legitimacy.

Différance and Supplement

The first figure of thought crucial to understand Derrida's philosophy is *différance*: a neologism constituted by the two meanings of the verb *différer* - 'to differ' and 'to postpone' (Derrida, 2013, p. 8). The word aims to express an 'original' 'movement' by virtue of which everything that exists can only do so in a context with other elements. This endorses the idea that no underlying independent positivity exists. Instead, the attribution of meaning happens only in differing from the other elements of the context, which causes the true meaning of the thing itself to be continuously postponed. As the context is never constant and continuously changing, the number of meanings is unbounded (Derrida, 2013, p.9). In the texts composing the Force of Law, Derrida brings this concept to life by repeatedly raising rigid conceptual oppositions, and critically questioning the purity of such oppositions.-Even though the notion of *différance* is of importance to the texts, Derrida uses it in '*Right to Justice*' without any explanation in a passage in which he tries to challenge the difference between positive law and natural law (Derrida, 2013, p.51). In '*Benjamin's First Name*', *différance* is used to characterize that which happens to every so-called law-founding violence: the violence inherent in every (at that time still illegitimate) inaugural formation of law subsequently falls into oblivion as a result of la *différance;* that makes the established law *differ* from an ultimate justice so that that justice is subject to a fading *postponement* on an ongoing basis (Derrida, 2013, p. 13).

The second figure of thought that Derrida uses in Force of Law is that of *supplement and* can be understood as an extension of *différance.* Etymologically, this word is derived from the verb *suppléer* that can mean both 'to add' and 'to replace' (Derrida, 2013, p. 14). The aim of this concept is to refer to an original shortcoming with which every transcendental signified

is confronted because of which it cannot exist or speak independently; it needs the *supplement* that must mask the deficiency and therefore in fact replace the absence of a transcendental signified (Derrida, 2013, p. 14). In ‘Right to Justice’ we encounter the *supplement* in the passage in which the assumption is made that precisely the "absence of a natural right" may well have triggered the "supplement of a historical or positive right." (Derrida, 2013, p. 57). The concept also arises when Derrida designates all "juridico-political transformations" as "supplements" to a justice that never takes adequate shape in them (Derrida, 2013, p. 70). Moreover, in Derrida’s discussion about the Mystical foundation offered by Pascal, he discusses how a legitimate fiction is necessary as a *supplement* to laws, on which they base their justness. More on this in section ‘The Mystical Foundation of Authority’.

When we consider Derrida’s ideas on the attribution of meaning, which are reflected in his constructs *différance* and *supplement*, it becomes clear why Derrida is often regarded as part of the school of hermeneutics. Most of his works are entangled with untranslatable phrases or with idiomatic, language-specific expressions. With this, Derrida shows that there is no abstract meta-language in which philosophical problems can be treated in a neutral and pure way (Derrida, 2013, p. 22). Also, by demonstrating these language specific idiomatic peculiarities Derrida usually makes sure that the analysis multiple meanings contribute to the overall content of the text. In ‘Force of Law’ for instance, the English, French and German language peculiarities already arise in the very first sentence (Derrida, 2013, p.22), or when he turns to the expression of “enforcing the law” (Derrida, 2013, p. 24).

Force, to Enforce, Enforceability

A significant idiomatic peculiarity that Derrida brings out in the English language is that of the expression “to enforce the law”. During his preparation of his contribution to an English conference, Derrida was confronted with the translation of his original French works. He noticed that the English idiom “to enforce the law” has a particular meaning to it that is

impossible to translate into French. This idiom implicitly suggests a violence in the nature of law (Derrida, 2013, p. 6). Remarkably, this violence gets lost in the French translation "*appliquer la loi*" as there is no strict equivalent in French (Derrida, p. 5). This violence however is very relevant as there is no such thing as a law that does not imply the possibility of being enforced (Derrida, 2013, p. 24). In the history of thought, this application of violence is required from the very outset, namely when the institutions were set up. These institutions, like the institution of law or politics, could be seen as a compartmentalization of what can be called the "ambiguity of the ought" (Derrida, 2013, p. 23). For Derrida, that which passes for 'ethics' does not seem to be a pure and independent domain, but rather something included in the indistinct, ambiguous sphere of an all-encompassing relation to that which does not 'exist'. In the institutionalization of 'ethics', the application of 'force' or 'violence' has been required from the very outset (namely from the moment that the institution is set up) to the continuation of the institution (if the work or the law has to be maintained after its foundation). This force, this violence, continues to accompany the institutions, since otherwise their presumed legitimacy would be gone soon. Any law requires that it possesses this 'force of law'; after all, what is a law that cannot be coerced, or that is unenforceable? A law without force is not a law, a right without coercion or violence is not a right. It is precisely this violence or force that keeps law, justice, and in fact every institutional embodiment of the ought, in an (indirectly violent) relation to a dimension they attempt to incarnate; that which is not there but which ought to be; Derrida in the Force of Law refers to as 'justice' (Derrida, 2013, p. 24).

Law, Justice, Deconstruction and Decision

Based on the criterion of calculability, Derrida makes a sharp distinction between law and justice. In legal reasoning, he considers the element of calculation to be crucial. When a rule is directly applied, the generality of laws become clear: in principle the laws should apply to everyone. Whereas law (*droit*) comes about through calculation, justice does not. In fact, justice

rebels against the rule, is heteronomous and is foreign from symmetry (Derrida, 2013, p. 71). Also, its incalculability points precisely to the resistance to generality. Still, *droit* claims to exercise itself in the name of justice, while justice commands to embody itself in a law that can be enforced (Derrida, 2013, p. 72). This paradox becomes clear when he writes "*Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable."* (Derrida, 2013, p. 63). It is in the midst of this paradox, that deconstruction can be situated (Derrida, 2013, p.72). Derrida points out that the deconstructability of law offers a political chance for historical progress. It is the term 'justice by *droit*/law' that allows for deconstruction (and as such is able to be deconstructed, i.e. deconstruct*able*). Still, justice in itself, that is to say outside the law, is not deconstructable. Here, a paradox arises. In this passage, he states: "Deconstruction is justice" (p. 61). How is it possible for deconstruction to be justice if justice itself is not deconstructable? To better understand this seeming contradiction, we need the concept of decision. The direct application of a general rule is right but can never be considered just. This is because a decision needs to take place for justice to occur. A decision in turn requires an *aporia* to be present, meaning that no infallible rules or standards are present to decide on the basis of them. Instead, a singular, specific situation, or (group of) people has to be considered in its uniqueness for justice to be possible.

Even though the incalculability of such decisions and the calculability of law seem contradictory, Derrida notes that law is still the most *just* way of dealing with these incalculable decisive moments (Derrida, 2013, p. 82). In the very intrinsic structure of the founding moment that institutes law as described above, law becomes deconstructable. In defining justice as that which "exceeds law and calculation" (1992, p. 28), Derrida opens a mediating space, fluctuating between justice and law, in which deconstructive theory proves its practical worth for contemporary legal theory. Deconstruction was not to be seen merely as a practice that

promised a sharper advance of critical thinking, but as the *necessary turn of justice* in its relation to law. Even though justice is impossible, the best we can approach this incalculable justice is by calculating (Derrida, 2013, p. 82). The tricky thing is that by bringing out the notion of "force" or "violence", however, Derrida not only suggests that law requires force or violence, but also that this violence always risks being a violation of the justice that law seeks to embody. According to Derrida, this holds for both natural law and positive law. Then what is it exactly that distinguishes the force of law from unjust violence/ force (Derrida, 2013, p. 48)?

As a response to this question Derrida turns to a decontextualized interpretation of one of Pascal's fragments/ideas/pensée in which Pascal relates justice to force. Pascal claims that it is just that what is just must be followed, and that it is necessary that the most forceful thing must be followed. Force and justice must be brought together as "justice without power is inefficient", and "power without justice is tyranny" (Derrida, 2013, p. 54-55). By this, Pascal makes force an essential predicate of justice (justice as *droit*) (Derrida, 2013, p. 58). Since according to him that what is just cannot be made powerful, it must be the case that what is powerful, is just. This line of reasoning that Pascal has borrowed from Montaigne is reinterpreted in Derrida's notion of the Mystical Foundation of Authority.

The Mystical Foundation of Authority

The first one who introduces the expression of the "mystical foundation of authority" is Montaigne, when he points out that it is wrong to think that laws are obeyed simply because they are just. Instead, he argues that laws are obeyed for the very fact that they are laws, meaning that they have authority (Derrida, 2013, p.57). At first, this seems like a circular argument. But Montaigne continues by saying that while some think that laws have authority because of the legislator or the king, the authority is more closely connected to current custom. The first options are ruled out because, "*simple reason tells us that nothing is just in itself; everything crumbles with time*". The analogy of the authority of law with current custom as

such is to be found in the fact that it is received; it is the mystical foundation of its authority, and if one tracks it to its source, he destroys it.

Even more than Derrida, Montaigne clearly distinguishes between laws (*droit*) and justice. As we have seen above, one does not obey the law because it is just but because it has authority. In fact, the justice of law (justice as law) is no justice, and "*Anyone who obeys them because they are just is not obeying them the way he ought to*" (Derrida, 2013, p. 57). The authority of laws rests only on the extent to which laws are given credit: people believe in it, that is their only foundation (Derrida, 2013, p. 57). While this might sound as a matter of majority opinion, Derrida points out that the foundation of this act of belief is not ontological nor rational. Instead, he points to Montaigne's notion of a "legitimate fiction" that he uses to explain truth of justice of laws (Derrida, 2013, p. 57). To explain this concept, Montaigne offered an analogy between this *supplement* of a legitimate fiction to law and the artificial supplement that is evoked by a deficiency in nature. In particular, he refers to women who use artificial means to conform to ideals of beauty at the very moment when that is not the case by itself, such as the use of ivory teeth when real ones are missing. Similarly, a legitimate fiction is necessary to account for a deficiency in law. The meaning attributed to a legitimate fiction here is thus 'something necessary' to substantiate the truth of justice.

The etymological origin of the term "fiction" can be found in the Latin word *fingere,* which means "to shape, form, devise", or originally "to knead, form out of clay" (*fiction*, 2014). From this, it becomes clear that the term is used to refer to a situation where something is created that was not there before. This bears a lot of resemblance to the notion of a legal fiction, which in the contemporary legal system refers to a fact invented or assumed by judges to function as a tool for making a decision or applying a rule. Until now, two aspects have become clear: a fiction is something necessary that is created. From such a fiction Derrida moves on to a kind of mysticism. This mysticism refers to an intrinsic structure of the founding and

justifying moment that institutes law. Derrida takes the ideas of Montaigne and links it to Pascal's idea that brings together justice and force and makes force an essential predicate of (justice through) law. He however reinterprets Pascal, by disconnecting it from Christian Pessimism (Derrida, 2013, p. 58).

According to Derrida, the intrinsic structure of when the law is founded or institutionalized implies a performative force which is always interpretive (Derrida, 2013, p. 58). This performative force must not be understood as a docile instrument in the service of force, but rather as a more complex internal relation of law with violence. Justice as *droit* would never let itself be bended by an external authority, but instead it is in the very moment of making the law that consists of a *coup de force,* which is neither just or unjust. This coup the force is the performative or interpretative power and could never be guaranteed or invalidated by for instance a previous law (Derrida, 2013, p. 59). Instead, the foundation of authority is to be found in itself, and as such becomes a "violence without ground" (Derrida, 2013, p. 60). This is what Derrida calls the mystical. Here, Derrida stresses that this is not to say that this ground is illegal [illegitimate], as he claims that they exceed the distinction of foundationalism/ anti-foundationalism (Derrida, 2013, p. 60). Also, he continues that this structure of law implies that law is deconstructable. This, according to Derrida, is good news for politics as it allows for a moment of suspense (*epochè*), in which the revolutions can take place that drive historical progress.

Application to The Case Study

Building on the works of Montaigne and Pascal, Derrida has arrived at a mystical foundation of authority. But what does this mean for reality? If a mystical foundation of authority is responsible for a law being carried, then how does Derrida explain the fact that sometimes subjects refuse to obey the law?

In the case study on the Austrian vaccine mandate, we have seen that upon introduction, opposition of the law grew significantly (Statista, 2022; 2022; Bell, 2022). Many people took the streets, chanting slogans like “The government must go!”. Also, people held banners claiming that their fundamental rights were infringed upon. The legal analysis of the case study demonstrated that friction exists with a wide range of human rights and fundamental rights, such as the right to integrity (Article 3 ECHR), the right to education (Article 2 of Protocol No 1 to the ECHR), and the right to association (Article 11(1) ECHR). Also, the right to private life (including the right to social contacts), and the right to property (for example, of entrepreneurs who have to close their businesses) are often said to be at stake. However, these rights and freedoms are not absolute rights (WHO, 2022). On top of that, some human rights provisions require the government to act. Article 11 (3) of the European Social Charter for instance stipulates that governments must prevent epidemics as much as possible, and article 12 of the International Covenant on Economics, Social and Cultural rights stipulate the duty to guarantee the right of everyone to the best possible health. In the name of the protection of public health, the articles in which human rights are laid down can be restricted. As described in the introduction, it can thus be concluded that the legal basis for a valid law is in place. The European provisions are clear; there is no concrete legality problem in the case of the vaccine mandate if the guidelines which have been issued are met. According to Derrida, if the law is legally valid it must find its ground in a mystical foundation of authority. Consequently, subjects must obey the law, and the law must be carried in public as Derrida describes that the mystical fundament must already be present through the creation, institution, and enforcement of the law. The large protests and civil disobedience that occurred as a reaction to the Austrian vaccine mandate are incompatible with this. The law is legal, but it is not obeyed, suggesting that its mystical foundation is not accepted or does not exist. The case the Austrian vaccine

mandate is thus an example of a situation in which thinking in terms of a mystical foundation becomes problematic because its consequences seem inconceivable with reality.

The discrepancy apparent in the case study gives rise to a critical analysis of the Derridean perspective of authority of law. will come to reject the view of law as being built on a mystical or quasi-divine ground. Therefore, the next chapter will point to two deficiencies in Derrida's thinking. First, a hidden fundamentalism will be pointed out, arising from the feeling that Derrida's mystical foundation seems to be a result from an innate desire for a stable foundation that escapes the unpredictability and vicissitudes of the world/life. The second deficiency in Derrida is his neglect of the concept of legitimacy- a concept that is central in the case study of the Austrian vaccine mandate, which is an example in which a law is perfectly legal but has lost its legitimacy.

Chapter 2: A Twofold Critique of Derrida

Following from the discrepancy between Derrida's Force of Law and the case study of the Austrian vaccine mandate, this chapter will point out two deficiencies in Derrida's framework that could account for this discrepancy. The first one is a general tendency towards fundamentalism that is rooted in Derrida's view of the legal order. If, as Derrida claims, all laws were grounded by a (mystical) foundation then this would leave no room for exceptions like the case study in which subjects disobey the law. Therefore, his fundamentalism will be reinterpreted as a refuge from the vicissitudes of life into a stable foundation. Also, similarities with Carl Schmitt will be pointed out.

The second part of this chapter puts a critical note on Derrida's use of the concept of legitimacy. Interestingly, Derrida circumvents the concept of legitimacy in his quest for the foundational force of law, by reducing it to the concept of legality. It is in his use of legitimacy that Derrida's framework falls short. Therefore, the concept of legitimacy will be brought to attention and redefined in terms of a rational and an affective component. The affective component better fits reality as will follow from application to the case study.

PART I: Derridean Fundamentalism

The first deficiency in Derrida's framework is his deeply rooted fundamentalism when it comes to analyzing the legal order. As has become clear from his *Force of Law: A Mystical Foundation of Authority,* Derrida's view of the legal order is one that is grounded in a mystical (or quasi-divine) Foundation of Authority. If all laws were founded in such a fundament, then this would leave no room for exceptions in which subjects disobey the law. After all, this mystical foundation grants the law its authority and therefore is the very reason that subjects obey it. Still, practice shows that there are situations in which certain laws are the cause of social upheaval, like in the case of the Austrian Covid-19 Vaccine Mandate. With this, Derrida's

mystical foundation is irreconcilable. The search for a (mystical) foundation is likely to stem from the desire for a kind of stable foundation that endeavors to be free from the unpredictability and volatility of the world. It must be noted however that Derrida himself claims that his Mystical Foundation of Authority "exceeds the notions of foundationalism/ anti-foundationalism" (Derrida, 2013, p. 60). Here, Derrida takes a kind of mystical loophole to avoid criticism of this kind. Still, it is a fact that Derrida keeps referring to a complex fundament of law (he refers to as a fiction) that is neither just nor unjust, but also not purely arbitrary as it has a mystical necessity. As such, I would like to suggest that Derrida tries to justify his refuge into the mystical by explicitly denying any relation to foundationalism.

In his thinking about the authority of law, Derrida draws largely from Montaigne. In Chapter 1, I described how Derrida uses Montaigne's notion of a legitimate fiction to account for a law's truth of justice. From this legitimate fiction however, Derrida moves to mysticism. This next step that Derrida takes can be seen as a 'leap' from fiction to mysticism. While the legitimate fiction can be traced back to responding to some deficiency in law, the mystical foundation has lost this connection. As such, I suggest that this does not really add to the idea of a legitimate function and is one step too far.

Schmitt's Sovereignty Thesis

As shown, Derrida first explicitly goes back to Montaigne and Pascal, after which he makes the step from a legitimate fiction to mysticism. Remarkably, Derrida never mentions the thinker Carl Schmitt, with which he is in implicit debate. In his desire for fundament of law, Derrida clearly resembles Schmitt who adheres to the theologically supported sovereignty thesis (Vinx, 2019). The concept of sovereignty is pivotal to Schmitt's work and includes the question of the place and nature of the constituent power of a political system. In the first sentence of his work "*Political Theology*": "Sovereign is he who decides on the state of exception" (Schmitt, 2005, p.5). Due to its ambiguous nature, this sentence is often associated with his idea that what

happens in exceptional situations is not predetermined. In other words, there is no absolute rule that can be used to decide in exceptional situations (Schmitt, 2005, p.13). According to Schmitt, this exception reveals the true nature of sovereignty precisely: the exception is not only determined by the sovereign, but also defines his power. This idea that the exception brings to light the sovereign, shows some parallel with Derrida. Firstly, Derrida recognizes that the direct application of a general rule often is right, but it can never be just (Derrida, 2013, p. 63). The reason for this, as pointed out in the section of "Law, Justice, Deconstruction and Decision", is that a decision must be made for there to be justice. A decision in turn requires that an aporia be present, meaning that there be no infallible rules or norms present to decide on that basis. This idea of an aporia resembles Schmitt's notion of the exceptional situations.

Both Schmitt and Derrida introduce some form of quasi-divine authority that decides in these kinds of situations. Derrida, as we saw, uses the legitimate fiction that he borrows from Montaigne to fill up this blank space of an aporia. This idea of a legitimate fiction suggest that something is created that wasn't there before as explained in Chapter 1's section "The Mystical Foundation of Authority". Derrida then makes a leap from the concept of a legitimate fiction to the concept of mysticism. By drawing on Pascal's notion of violence, Derrida introduces a complex internal relation of law with violence (Derrida, 2013, p. 59). Justice as law would never let itself be bended by an external authority, but instead it is in the very moment of making the law that consists of a *coup de force,* which is neither just or unjust. This coup de force is the performative power that could never be guaranteed or invalidated by, say, a previous law (Derrida, 2013, p. 59). Instead, the basis of authority is found within itself, and as such becomes a "violence without ground" (Derrida, 2013, p. 60). This is what Derrida calls the mystical.

Schmitt on the other hand, introduces a Sovereign that makes his own decision independent of the law. His sovereignty thesis could be formulated as: "The political entity is by its very nature the decisive entity" (Schmitt, 1996, p. 43). For Schmitt, the whole fact of the

exception precisely reveals the humanity of the law: an exception is only an exception in relation to the law. To make an exception is thus on the one hand to affirm the law, but on the other hand to declare that this law is merely a human construct and can therefore be transcended. With the exception, the sovereign makes his own decision independent of this law. As such, Sovereignty constitutes for Schmitt a boundary between what is and what is not covered by the law. He recognizes that a purely legal interpretation of sovereignty does not suffice, because it elucidates only one side of the story. In a parable with Max Weber, Schmitt observes that there has been a disenchantment of the modern world: the metaphysical and theological has given way to the secular and rational (Vinx, 2019). He deduces this from the observation that transcendent ideas no longer have a hold on people. Still, Schmitt believes that to preserve the unity of a nation, one must look for an alternative common ground. This can possibly be found in an immanent criterion, and such a criterion, according to Schmitt, lies in the sovereign.

Both Derrida and Schmitt appeal to a (quasi-)divine authority that decides in situations of ambiguity. For Millenia, this divine foundation has been pivotal in answering the question of legitimacy. For a very long time, legitimacy is interpreted as a god who justifies. From a Christian tradition however this becomes rather problematic, as the Old Testament offers numerous examples of stories that most people will consider unjust. Take the Flood, for example, in which a small number of people do things that God does not want, and therefore all life on earth must be destroyed. In of view of justice, this is very remarkable. The question of the justice of God also bothers many religious people because there is a lot of suffering in the world that (an omnipotent) God could fix. This is one of the very biggest core problems that religious people face. Why is there evil and if there is evil why doesn't God do anything about it? For many this is an unsolvable conundrum, because either you believe that God is just but then very crazy things happen, or you think that it is not possible. God is not righteous at all, he just does something, he does what he wants and therefore he is sovereign. Because God as

sovereign embodies a kind of arbitrariness, the theological basis of justice is problematic. Considering the fact that the question of justice of God is one of the biggest question marks for many Christians, and considering the discrepancy apparent in the case study, I will come to reject the view of law as being built on a mystical or quasi-divine ground.

PART II: Derridean Terminology—The Neglect of Legitimacy

Derrida more or less ignores the meaning of the concept of legitimacy in his works. After all, he is mainly concerned with the concepts of law and justice and places the concept of legitimacy without question on the side of law. Legitimacy, according to him, belongs to the domain of the calculable and is thus identical to legality (Derrida, 2013, p. 61). Remarkably, in doing so he seems to fall prey to his own critique of Western thought that formed the basis for his theory of deconstruction.

Deconstruction, Justice, Law, and Legitimacy

Derrida's theory of deconstruction arises from the observation that in Western historiographic thought is always structured in binary opposites. Within this opposition, one term is always subconsciously favored over another. In the case of man and woman, the male has been dominating in history, and in the case of affect and rationality, the Western tradition has shown to have favored rationality. This tendency to over rationalize things comes to the fore in Derrida when we turn to his usage of the concept of legitimacy. In light of the case study, this concept is very relevant since the whole search for the foundation of authority, or, in other words the question of what causes a certain law to be carried **is** in essence a question of legitimacy. Derrida, however, haphazardly places legitimacy on the side of “calculables” and thereby overlooks the possible affective component in legitimacy. The tendency to prioritize rational grounds over affective ones seems to be projected onto his definition of legitimacy. Here, one

could say that he falls prey to his own critique of the Platonism that inhabits Western thought and that has prompted him to develop his theory of deconstruction.

Using the concept of deconstruction, Derrida later tries to reconcile the terms of law and justice. According to him, law is deconstructable, whereas justice isn't. On the other hand, "deconstruction is justice" (Derrida, 2013, p. 61). Here, the initial strict demarcation of these terms becomes rather vague. He writes:

"Because deconstruction is justice, and because justice is impossible, deconstruction is impossible. However, the undeconstructability of justice and the deconstructability of law make deconstruction possible. Hence deconstruction is both possible and impossible."

As demonstrated by the earlier sections in Chapter 1 on deconstruction, différance, and supplement, a large portion of Derrida's philosophy boils down to his take on (and use of) language. Derrida is notorious for constantly conflating the concepts of law, justice, and deconstruction. He stresses their interconnectedness and the fact that although they are opposing, they are also inseparable (Derrida, 2013, p. 82). The interconnectedness of these terms follows from the notion of différance, which describes that things only derive their meaning in relation to others. On the one hand, this boundlessness and the blending of one concept into another contribute to the broad interpretation of certain concepts that are difficult to define, such as justice. What Derrida emphasizes by saying for example that deconstruction is equivalent to justice is that in justice, a space is always left open and it is important to never come to a definitive decision. This is a valuable contribution and endorses why law and justice are distinct. On the other hand, this overflowing of concepts can also be seen as a deficiency in Derrida's work. The mixing up of the notions of legality and legitimacy for instance might have caused Derrida to overlook the importance of affect in his question to authority. Without further

ado, Derrida simply puts legitimacy on the incalculable side of legality, but legitimacy, in my dealing with the concept is actually much more in the realm of justice. Instead of going into this, Derrida turns to this fictive notion of a Mystical Foundation of Authority. Of course, one could argue that the Mystical Foundation of Authority is per definition affective, but then Derrida still fails to account for the fact that the legally valid law is sometimes not 'carried', as demonstrated in the case study. The case study of the Austrian vaccine mandate is the real-life situation in which a law is perfectly legal but has lost its legitimacy.

(Re)Defining Legitimacy

Going forward, first a sharp distinction between law and justice has to be made. While these terms are often used interchangeably, they are distinct in origin (Korsten, 2021). This distinction is rooted in the fact that justice is what people consider or *feel* to be just or unjust, while law concerns the predetermined set of officially acknowledged rights/ obligations that people are supposed to *live by* (Korsten, 2021, p.1). These two terms are connected by the term of legitimacy. The concept of legitimacy does not have an outstanding long history in philosophy. Its roots could arguably be found in a treatise originally attributed to Thomas Aquinas, in which a distinction is made between "legitimate power" (*legitima potestas*) and tyranny (Reichberg, 2016). With this, the author of the treatise makes a distinction between the way in which the law is imposed upon people in a kingdom and the way in which this is done by a tyrant. In the first case, the force used to make its citizens obey the law is a legitimate force, while in the second case the force used is illegitimate. From this traditional use of the concept of legitimacy it already becomes clear that it has the function of justifying the violence that comes to enforcing the law upon people.

In the more recent academic literature, the concept of legitimacy is split into a normative and an empirical component. The empirical component assumes public trust and support (Bokhorst, 2014; Meyer & Allen, 1991), while the normative component assumes conformity

with certain norms and values, including legislation (Meyer & Allen, 1991). When there is a high degree of legitimacy, citizens are more likely to comply with the laws that are put upon them (Marien & Hooghe, 2011). But what determines this connection between legislation and support? Whereas Derrida suggests a so-called Mystical Foundation of the Force of Law, I will propose that this is the case when the normative component resonates with human affect.

Application to The Case Study

In the case of the Austrian vaccine mandate, the normative component is the rational justification that according to the law, exceptions can be made to certain (fundamental) human rights to safeguard public health. The normative component of the law is not problematic as the law is in conformity with the norms and values that are expressed in the clauses of European legislation. It becomes problematic however when we turn to the empirical component that entails public trust and support. Several studies indicated that public trust was poor, and that opposition against the government had grown with a factor of five (Schmelz and Bowles, 2022). In the media, a sharp distinction is frequently made between the two camps in society based on whether they are, or whether they are not vaccinated against Covid-19. Chances are high that this distinction is largely made by the media, and perhaps later adopted by some of the people themselves. By doing this, the media has easily framed the two sides as opposites and has put a value label to them that polarizes. A scholar that recognizes the effect of the media on law is Greta Olson. As mentioned above, this thesis will not go into this due to its limited scope. Still, it is relevant to mention as in the case of the vaccine mandate, part of the media also documented that the audience was very diverse and included people from both camps. Besides the stereotypical anti-vaxxers, the crowd also included people who are “pleased to be vaccinated, but against mandatory jabs” (Bell, 2022). Apparently, the vaccine mandate appealed to the affect of people regardless of whether they were for or against vaccination. Along with this, a Statista survey of February 2022 showed that 69% of the Austrian population was less satisfied

or dissatisfied with how the government was handling the pandemic (Statista, 2022). This survey took place in the month of the vaccine mandate, and therefore is likely to reflect the general opinion on this newly established law. The fact that many protesters supported the Covid-19 vaccination but opposed the mandate suggests that there is something fundamental going on here and that such a mandatory measure appeals directly to the affect of subjects because it goes against sentiment. From this, the discrepancy between empirical and rational legitimacy could possibly be found in an affective component. Therefore, my suggestion is that the linking factor between the rational legitimacy and the empirical legitimacy (public obedience and support) is affective.

The negative response to enforcement has also been pointed out by Schmelz (2020). Schmelz pointed out that effective states govern by a combination of enforcement and voluntary compliance. For some Covid-19 measures more than others, she found a negative response to enforcement that she calls 'control aversion'. This finding is in line with the affective component that is suggested by the case study. From the perspective Affect Theory, this phenomenon can be better understood. According to Affect Theory, affect can be understood as the primary motivator of human behavior that is even more innate than emotion. Tomkins (1984) describes affect as "the primary innate biological motivating mechanism, more urgent than deprivation and pleasure, and more urgent even than physical pain" (Tomkins, 1984, p. 163). As an example, he uses sexual pleasure. He writes that a man becomes excited and breathes hard in his chest, nose, and mouth when he is sexually aroused. Such excitement however is in no way peculiar to sexual pleasure. In fact, Tomkins (1984) writes that one could also experience this feeling of excitement when confronted with beauty, poetry, or a win in the casino. The drive of sexuality, to become possible, needs to get its potency from the *affect* of excitement. In the relation between the affect system and the drive system the affect thus works as a potential amplifier that increases or decreases the potential gain in a message or structure

(Tomkins, p. 164). Even though human beings do not have control on their affects, they try to control it by controlling the circumstances. By innate activation, external stimuli, and learning human beings start to control the circumstances that evoke certain affects, so that they will try to be in an ideal state (Tomkins, 1984, p. 178). This ideal state often involves the maximization of positive affects and the minimization of negative affects. If we apply Tomkins' affect theory to the case study, the protest to the Austrian vaccine mandate could be interpreted as an attempt of individuals to control the circumstances that evoke certain affects, in order to maintain their ideal state. In the case of an obligation imposed by law, subjects lose their ability to influence those circumstances. The universal obligatory character of this law might explain why even people who are pleased to be vaccinated are opposing the mandate: because it takes away people their ability to regulate the environment, which they in turn do to maintain an ideal state of their affects.

In the next chapter the philosophical tools of Von Jhering (1879) and Huizinga (1938) will be used to present models of struggle that together form an alternative to Derrida's fundamentalism while simultaneously acknowledging the role of affect in the authority of law.

Chapter 3: The Affective Force of Law

This chapter will bring together the works of Von Jhering (1879) and Huizinga (1938) to provide an alternative answer to the question of the authority of law that fills in the gaps in Derridean theory identified in the previous chapter and corresponds to the second main route outlined in the introduction: law derives its authority from a collective sense of justice. More specifically, two alternative visions of the legal order will be discussed that reject fundamentalism and take into account an affective component in legitimacy. First, Von Jhering's Struggle for Law (1879) will reinterpret the legal order as an ongoing struggle, similar to the idea of agonism. In this model, the legal order at the societal level is presented as an ongoing mutual persuasion that does not take place on purely rational grounds. His notion of an individual sense of justice, *Rechtsgefühl*, will serve as a concretization of the affective component of legitimacy and will prove accurate in relation to the case study. Next, Huizinga's focus on play (in his *Homo Ludens*) will be related to this, as it supports the idea that humans are not purely rational beings, as is often suggested. Crucial to Huizinga's work on law is the introduction of an arbitrary component that resonates with Derrida's idea of indeterminate justice. The fact that every individual has a chance in a lawsuit represents the open aspect of justice that is one of the core values of law. This may seem less stable than the universal mystical foundation of law proposed by Derrida, but it offers a theory that is more imaginable with the vicissitudes of reality, as shown by its connection to the case study of the Austrian vaccine mandate. Moreover, the analysis in this chapter will reveal some elements that parallel parts of Derridean thought, suggesting that Derrida was not so rigid in his thinking after all.

Von Jhering's Struggle for Law

"The end of the law is peace. The means to that end is war. So long as the law is compelled to hold itself in readiness to resist the attacks of wrong [...] it cannot dispense with war. The life

of the law is a struggle, a struggle of nations, of the state power, of classes, of individuals" (Von Jhering, 1879, p. 1).

In the passage above, Rudolf von Jhering (1879) describes law as a struggle. He emphasizes that all law in the world has come to existence via a struggle. Like Pascal, Von Jhering describes how justice, and an executional force must come together in order for (legitimate) law to come to existence (Derrida, 2013, p.55). Interestingly however, Von Jhering describes law as an uninterrupted labor "of the entire people" instead of a labor of the sovereign alone (Von Jhering, 1879, p. 2). It is exactly this struggle that causes progress in law. This idea of historical progress through law, was also expressed by Derrida (Derrida, 2013, p. 69).

According to Von Jhering (1879): "the existing law is backed by interests" (p. 11). These interests do not entail a simple rational money-interest calculation. Instead, a person whose right have been invaded is also motivated to start legal proceedings from a moral pain that is experienced (p. 26). This pain arises when an individual gets confronted with its own feeling of legal right, or, its "*Rechtsgefühl*". Man has the moral duty towards himself to follow and act based on this *Rechtsgefühl*. In this, he refers to Kant and the relation of the moral duty and human dignity (Von Jhering, 1879, p. xi). By ignoring his feeling of legal right an individual puts at stake his personality and self-respect, and as such it becomes a question of character (p. 26). From this, he derives the resistance of injustice to be a moral duty of all, both for himself and for the commonwealth (p. 27-28). Von Jhering argues that every being is concerned with its self-preservation. Besides physical life, man also has a moral existence, of which the precondition is right/law. Von Jhering's feeling of right introduces an affective component of legitimacy. Through a collective struggle that consist of people defending their feeling of right, the law comes to existence. The law thus must derive its strength from a cultivation of mind that the feeling of right is constantly exercised, making the law "not mere theory, but living force" (Von Jhering, 1879, p. vii).

Von Jhering writes in the 19th century situation in which people stand up for their rights in relation to their legal system. Accordingly, Von Jhering (1879) therefore assumes citizenship that harbors a kind of integrity in his analysis. This, he says, stems from the moral duty that citizens have to themselves and their society to vigorously assert their "*Rechtsgefühl*" (Von Jhering, 1879, p. 40). This *Rechtsgefühl* informs an individual in his/her conflicts with others as well as in his/her relation to the state. As such, this affective ground leads to different subjective stances toward law. With this, Jhering replaces the rational grounds of law by insisting that law is grounded in passionate feelings. Even though Von Jhering lived in a different time, the general idea of his theory is clear: the workings of law arise from a kind of feeling and the bundling of these individuals seeking justice through their rights leads to a collective feeling of justice that is of great importance to the Rule of Law. Central to his work thus are two theses: the connection between feeling and law, and the connection between law and solidarity. A critical note arises from the fact that Von Jhering has written in a time in which the ubiquity of technology was not present yet. In today's capitalist digital age, people get distracted by all the technologies and the dominant sound in the media is imposed on people unwittingly. It is conceivable that this influences people's legal feeling and in turn the struggle for law. Even though this is a very important addition, this is out of the scope of this thesis.

Another problematic aspect of the idea that laws are grounded in passionate feelings rather than a rational ground (as in legal positivism) can be illustrated by the cruelties of Nazi Germany. During that time a so-called "gesundes Volksempfinden" (a healthy feeling by the people) was used to criminalize those who were seen as unfit. Thereby, a claim to an affective ground for law had functioned to legitimate criminal sanctions and thereby give rise to massive human right violations (Grimm, 1838).

A more recent scholar, Greta Olson (2016), reads Von Jhering's '*Rechtgefühl'* as a kind of affect of law/justice (Olson, 2016, p. 345). Remarkably, she writes that this feeling of law

"resides through the body just like love; reason cannot replace the lack of feeling, and the feeling can involve pain if it is violated" (Olson, 2016, p. 345). Also, this feeling is not the same for everyone and as such reflects the particularity of the human. Because people differ in their *Rechtsgefühl*, opposing opinions can exist, which then again forms the basis of the struggle for law.

Application to The Case Study

Von Jhering's (1879) take on the legal order and the way in which law comes to existence can be successfully applied to the case study of the Covid-19 Vaccine Mandate. The societal unrest and the bifurcation in society could be explained by the differing *Rechtsgefühle* people have. Also, the protests would suggest that people are in fact acting out of a moral duty that citizens have to themselves and their society to vigorously assert their legal *Rechtsgefühl*. The two camps that have come to existence in society might reflect two groups with a different feeling of legal right. Whereas the one believes it is 'immoral' to not get vaccinated, the other group believes that the infringement of bodily integrity weighs more heavily. Alternatively, one could also argue that the two groups of people that stand up against the law are the only ones who do justice to their feeling of legal right, while the other group is just blindly following the government. In his text, Von Jhering (1879) namely describes how not everyone will have the courage to give sacrifices in their fight for justice.

With the omicron variant taking over, the Austrian government perceived the vaccine mandate as a disproportionate measure to the risk of infection. Therefore, the law got suspended one month after it took effect (Bell, 2021). Other reasons that might have played a role in the decision to suspend the law include existing discrepancies in public and occupational measures, the fact that critics were recently pointing to the diminished protection offered by the vaccines to the Omicron variant, and the rise of disruptive protests. The latter would accord with Von Jhering's analysis of the struggle for law. If we consider the disruptive protests to be a

significant determinant of the decision of the Austrian government to suspend the law, this would confirm that what is and is not law truly stems from a collective struggle of people standing up for their individual *Rechtsgefühl*.

Another aspect of Von Jhering's conception of the rule of law that could be applied to this case is the idea that any law, before it is enacted, must undergo a struggle to be situated in the world. He describes that the birth of law must have occurred by force, much like childbirth. The relationship of nations to their law is therefore similar to the bond of a mother to a child. Therefore, the struggle necessary to form law is a blessing and not a curse (Von Jhering, 1879, p. 18). In this line of reasoning, the friction that a law creates is the very thing that binds a subject so strongly to their laws. This application would suggest that a conception of the legal order as struggle corresponds better to reality than Derrida's idea that the law is founded on a Mystical Authority ground, because it allows for rebellion against some laws. In this way, we enter a force field in which rational law and a more abstract sense of justice can be in tension with each other, rather than always aligned because of a singular foundation. To describe these dynamics, the next section will be guided by Huizinga's *Homo Ludens* and the idea of man as an intrinsically playful being.

Huizinga's *Homo Ludens*

Von Jhering's conception of law as a continuous struggle, waged by individuals with different Rechtgefühl, has been used above to explain what happened to the Austrian vaccination mandate. This idea of law as a continuous struggle is very similar to that of Johan Huizinga, who is quite radical in his assertion that litigation is a matter of "pure agonism" (Huizinga, 1938). In his work *Homo Ludens* (1938), Huizinga examined the original relationship between law, play, and chance. As the title indicates, *Homo Ludens* (literally: Man the Player) is about the importance of (the) play(ful element) for culture and society. In fact, Huizinga has a view

of man in which man is first and foremost a creature that plays. From this he develops the thesis that everything we humans do together is play. Although culture and politics are essentially a form of play, this does not mean that they are childish. Rather, Huizinga described and criticized an uncivilized and reprehensible childishness (*puerilism*) that he observed in politics and contrasted it with his idealized seriousness in the play of politics and culture.

Huizinga's idea of play generally takes the form of a contest subject to certain fixed rules that must be followed despite their arbitrariness (Huizinga, 1938). In his chapter "Play and Jurisdiction," he considers a lawsuit from the perspective of play. As pointed out by Korsten (2022), Huizinga describes the lawsuit as a struggle between two opposing parties in which a judge assumes the role of arbitrator. He emphasizes that in every moment of the judicial battle, winning is the goal. In this battle, however, there are some rules that must be followed. First, the battle must take place in a specific space (a court), and dress codes, such as wigs, are prescribed (Korsten, 2022). All parties are also expected to follow the rules in good faith (Korsten, 2022, pp. 114-115).

Unlike Derrida or Von Jhering, Huizinga does not address the foundations of law or the legal order as a whole. Rather, he considers "how the law speaks" in trials or processes. This is reflected in the fact that when Huizinga talks about law, he refers to the more specific lawsuit which is more of a legal conversation than the law as such (Korsten, 2022). This makes explicit that his analysis is not about the origin and basis of the force of law, but rather about its implementation – that is, the process that determines by which those rules are enforced.

Therefore, his view does not constitute an alternative response to Derrida's search for the basis of law/legal order. Nonetheless, his idea that a lawsuit is in its origin a play fits with the idea that there is an affective, living element to law, not that it is purely rational. If we adhere to affect theory, a major driver of human behavior is affect-like play. Since this experience comes before rationality, we are not aware of it. Moreover, the analysis of the

lawsuit from the perspective of play reveals an element of chance inherent in any litigation, which will be discussed in more detail in the next section.

An Arbitrary Component to Law

Huizinga's theory suggests that humans are not primarily rational, but rather playful beings. By recognizing affect-like play as the engine of human behavior, he gives ground to the existence of an affective component in legitimacy. Unlike Derrida and Schmitt, Huizinga rejects the idea of a fundamental (theological) basis of law. Instead, he argues that each element of a lawsuit is determined by a playful struggle, which is always partly under the influence of an element of chance. Indeed, the battle can go either way: one can win and one can lose - even if one is right. The fundamental point, however, is that *everyone always has a chance*, and this constitutes precisely one of the core values of law. By pointing to this ever-present chance, Huizinga introduces an arbitrary component into the playing field of law. After all, one can never determine in advance what the outcome of a lawsuit will be.

Huizinga can be connected with Derrida through the work of Carl Schmitt. In the first part of Chapter 2, it became clear that taken most fundamentally, Derrida falls back to a quasi-divine (theologically/ mystically grounded) foundation of law, like Schmitt. Huizinga on the other hand in the core rejects the idea of a theological fundament. He argues that one can never decide in advance what is just, because of the arbitrary component of a lawsuit. In a way, a parallel exists here with Derrida his concept of a legitimate function and his idea that justice is something to be determined. The notion of a legitimate fiction is in a certain sense related to Huizinga's thinking from the perspective of play, because fiction is about creating something that was not there before, which necessarily has an arbitrary component to it. Moreover, Derrida acknowledges even though he thinks that law is calculable, for justice to take place a decision needs to be taken which requires an aporia. This needs to be determined case by case, and can never be predicted (Derrida, 2013, p. 82). These elements point to an indeterminacy of justice

that could be said to be paradoxical to Derrida's foundation of law, as his mysticism (God) implies some determinism. Also, the elements of indeterminacy in Derrida can be linked to the arbitrary component by Huizinga. These parts in Derrida that shows resemblance with Huizinga might suggest that Derrida wasn't so rigid in his thinking after all, and that, instead, he also saw the importance of some indeterminate and irrational aspects to the authority of law.

Application to The Case Study

With Huizinga we again find the idea of litigation as a struggle or fight. In this sense he is in line with Von Jhering and therefore this part of his theory is equally applicable to the case study. To complement Von Jhering, however, Huizinga points out the importance of play in human behavior. With play comes a certain competitiveness. Combining this image of man as a playful being with the idea that each individual possesses an individual sense of justice, this could explain the firmness and willpower of the people who take the trouble to take to the streets to stand up for their sense of justice. Thus, instead of explaining this from an individual moral duty, it could be explained from the idea that each individual is competitive in nature and wants to win the games in which he participates. Furthermore, Huizinga's introduction of an arbitrary component to the legal order may explain why people continue to fight in cases and situations that would be classified as "a losing game," after all: there is always that chance to win, no matter how small.

Conclusion

The case study of the Austrian vaccination mandate showed that a legal basis alone is not enough to induce people to comply with the law. All the uproar and protests in a time of crisis raised the question of what then gives the law its authority. The introduction formulated two possible routes to answer this question: subjects obey the law because the law is of a powerful higher that must always be obeyed, or subjects obey the law because it is grounded in a collective sense of justice. Because the philosopher Jacques Derrida uses these two aspects interchangeably in his work, his perspective formed the starting point of this thesis. In the first chapter, I set out Derrida's perspective on the authority of law and demonstrated an incompatibility with the case study. This apparent discrepancy gave rise to a critical analysis of Derrida's thinking and formed the basis of Chapter 2, in which the idea that subjects obey the law because the law is of a powerful higher was rejected and two deficiencies in Derrida's work were pointed out. First, Derrida's mystical foundation of authority was a deeply rooted fundamentalism, despite the fact that Derrida explicitly denies this. Then, I pointed out some similarities between this mystical foundation and Carl Schmitt's sovereignty thesis on the basis that both adopt a view of law as being built on a mystical or quasi-divine ground. The tendency to think in terms of a (mystical) foundation reflects a desire for a kind of stable foundation that abstracts from the unpredictability and vicissitudes of the world. Moreover, I argued that this seemingly stable ground still wavers because it has to deal with the question of the justice of God, which for many Christians is one of the biggest questions left unresolved after all these centuries.

The second flaw in Derrida's work has become apparent through a dialogue with the case, as it offers the perfect example of a law that is perfectly legal but has lost its legitimacy. Derrida has failed to recognize this because he falls prey to the flaw in Western thought called Platonism, which he himself criticizes. In fact, I argued that his definition of legitimacy reflects

a tendency to think in opposites and to place one thing above another, that is, rational over affective grounds. As an alternative to Derrida's narrow conception of legitimacy, I proposed a new definition that leans more toward the side of justice. By introducing an affective component of legitimacy based on Korsten's (2021) distinction between law and justice the gap between the normative and empirical component was bridged.

In the final chapter, I presented two models of struggle that help to ground the affective component of legitimacy that I proposed. The significance of Von Jhering's conception of the rule of law as an ongoing struggle was demonstrated by the fact that his theory provides an explanation or the dynamics observed in the case study from both an individual and a societal perspective. More specifically, his notion of *Rechtsgefühl* provides an explanation for the fact that people can differ on what they feel is just and what not. He adds to this that people have a moral duty to acct according to their sense of justice (*Rechtsgefühl*), which explains why people for instance go to protests. Huizinga's playful view of man and the introduction of the necessary element of chance into the lawsuit are valuable additions to this. They provide additional ground for an affective component of human behavior and show some parallels with traces from Derrida's work. The final chapter thus shows that the affective component is found not only in Von Jhering's *Rechtsgefühl* and Huizinga's *Homo Ludens*, but also in Derrida's open-ended notion of justice and his idea of legitimate fiction. As such, it will become clear that even though Derrida's final "solution" to explain the authority of law seems to completely support the idea that the authority of law lies in something quasi-supranatural, traces in his thinking can be found that point to the idea that some collective sense of justice is necessary for subjects to obey the law.

All in all, I have outlined Derrida's answer to the question of the authority of the law and formulated a twofold critique of it. Then, through dialogue with the case study, I offered an alternative *affective* 'force of law' that fits into the second route to the question of the

authority of law: subjects obey the law because it is grounded in a certain sense of justice. Using the philosophical tools of Von Jhering and Huizinga, I then provided a theoretical foundation for this alternative, namely the affective component of legitimacy. Through dialogue with the case study, I demonstrated that this alternative explanation, which is more in line with the second route outlined in the introduction, is more in line with reality. As such, this thesis contributes to a movement initiated by Olson (2016) that urges us to relate law more to that which makes us human: affect.

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