# ALEŠ NOVAK AND MARIJAN PAVČNIK (EDS.), SODNIŠKO PRAVO (ENG. JUDGE-MADE LAW), LEXPERA, GV ZALOŽBA, LJUBLJANA, 2023, 417 STR. ISBN: 978-961-247-529-1

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The concept of legal normativity is inherently ambiguous. What qualifies as law, and by which criterion do we define it? The ongoing debate has for a long time revolved around its typologies. Yet, delving into the intricacies of the various players, their roles, and content creation within the legal game remains a formidable undertaking. Despite the consideration of various perspectives by the contemporary legal theory, the discourse sometimes remains superficial. Why does a segment of legal scholarship continue to assert that laws enacted by the legislature are the only convincingly viable source of legal norms? This paradigm, which one could connect with the allure of legal sentences as general and abstract norms contained within a legal code, may have a deeper and more complex epistemic origin than we imagine. There is something peculiar about our European-Continental legal culture, it seems. "Oh, a rule we shall follow? Write it down, pass it as law and I might consider it." The persistent preoccupation with an abstract, all-encompassing system of knowledge highlights the serious attention given to this form of legal normativity. Despite the vast efficacy of such an approach, however, there will always be at least one critical step separating it from completely seizing our reality. As the numerous Slovenian authors of the here reviewed and recently published work *Judge-made law* have convincingly argued: It is none other than the judge whom the privilege of this very step belongs to. With the arising complexity of our social orders and various predicaments regarding applicable law, only the judge both can and must intervene in the equilibrium-establishing process, framed by the ever so

persistent proliferation of legal regulation on one front while effectively resolving a (legal) dispute on the other.

A similar sentiment is expressed in the introductory sentence of the foreword by the book's editors, Novak and Pavčnik:

> "We are living in an era of judge-made law."[1]

In doing so, they introduce a thesis that undergoes further exploration and scrutiny by the contributing authors throughout the book. Not only has the "enlightened conception" of the strict separation of powers failed to withstand the necessity for a creative application of the abstract to the concrete. The judge herself is, moreover, evolving into the *spiritus agens* of the modern law.[2] Precisely for this reason, the editors emphasise the need to differentiate between *law created by the judges*, i.e. judge-made law (cro. *sudačko pravo*, slov. *sodniško pravo*, ger. *Richterrecht*), and the broader domain of *judicial decision-making*, i.e. judicial law (cro. *sudsko pravo*, slov. *sodno pravo*, ger. *Gerichtsrecht*). The book does not primarily address the latter. Consequently, it does not deal with the very process and methodology of the judicial interpretative practice; this subject matter has already received excessive treatment in the preceding work within the series, titled *Legal disciplines and methodology of legal interpretation* (*Pravne panoge in metodologija razlage* prava).[3] *Judge-made law* rather focuses on the former: It poses the question whether at all and under which criteria judicial interpretation itself can and shall be considered (new) law. In doing so, it contributes a significant layer to the ongoing legacy of the Slovenian legal scholarship. In this article, I will endeavour to offer an overview of the book's contents and evaluate its significance both in the practical and the scholarly contexts. Due to limitations in time and space, not all chapters will be given equal attention, for which I apologise in advance.

*Judge-made law* comprises eleven chapters authored by renowned Slovenian legal scholars, professors, and judges. For the sake of simplicity, they can be divided into two parts. Firstly, there are chapters dealing mainly with the gene-

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1 Novak, A., Pavčnik, M. (foreword), *Sodniško pravo*, Lexpera – GV Založba, Ljubljana, 2023, p. 5.

2 *Ibid.*, p. 6.

3 As with *Judge-made law*, the publication of *Legal disciplines and the methodology of legal interpretation* also followed an annual national conference, organised by the Faculty of Law in Ljubljana and the Slovenian Academy of Sciences and Arts (*SAZU*) in 2022. In January 2024, a conference on the *Exercise and abuse of a right* will be held, once again aiming to complement the existing work and enrich the Slovenian legal landscape.

ral aspects of judge-made law, which will be briefly discussed in the following section. Secondly, there are also chapters that focus on some of its more specific instances in the national and international legal sphere, which I will discuss afterwards.

In his "Commentaries to judge-made law" (*Glose ob sodniškem pravu*) Marijan Pavčnik addresses the importance and omnipresence of judge-made law, "the one rejuvenating the statute if necessary". He emphasises the need for consideration of various other obstacles that arise along the way, including making use of the methodology of legal valuation, the meaning of headnotes in judicial practice, finding a solution typical for the auditorium of the statute and the importance of a persuasive substantiation of a legal decision. Pavčnik concludes by calling for a methodological approach to creating judge-made law, especially concerning the so-called settled case-law.

Tilen Štajnpihler Božič and Samo Bardutzky approach the phenomenon of judge-made law from a different perspective; they uncover a rather common yet conceptually complex judicial practice of a broader epistemic importance. In their "Judicial cosmopolitanism? References to foreign case law in Slovenian constitutional adjudication" (*Sodniški kozmopolitizem? Sklicevanje na tuje sodniško pravo v slovenski ustavnosodni presoji*), they start off with the premise that courts from different legal systems not only communicate and refer to each other, but also participate in the complex process of mutual transfer of ideas among a variety of cultural contexts. The authors proceed to provide a detailed empirical analysis of the Constitutional Court of the Republic of Slovenia's decisions, outlining the main elements of the described tendency.

Matej Accetto addresses the dichotomy of "Strategic litigation and strategic adjudication?" (*Strateško pravdanje in strateško razsojanje?*). By referring to and sourcing from the transnational legal context, he explores various attempts to bring about social or political change by way of judicial redress and concrete judicial proceedings. Departing from this idea, he examines the broader societal relevance of judges acting as "strategic actors".

Miro Cerar, on the other hand, deals with "*Exceptio illegalis* and (non)binding force of regulations and other general legal acts on a judge" (*Sodnikova (ne) vezanost na podzakonske splošne akte in exceptio illegalis*) within the Slovenian legal order. He argues that judges are bound not only by the Constitution and the statute, but, unless certain circumstances occur, also by executive regulations and other non-statutory general legal acts. The use of *exceptio illegalis* therefore acts as an exceptional legal argument and is also only relevant among *inter partes* legal relations.

The here artificially constructed scheme of chapters on the general aspects of judges' law-making ends with the contribution by Aleš Novak. He deals with several legal-philosophical aspects of the "The concept and occurrences of judge-made law" (*Pojem in pojavnosti sodniškega prava*) and provides a two-fold argument regarding the phenomenon in question. First, Novak takes a nuanced position on its nature: by distancing himself both from the Enlightenment and the American Realist view on judges' creative activity, he proposes that although paramount to the legal discourse, not every judicial decision creates a new law. To meet such status, the judicial decision must, according to Novak, introduce both a substantially new rule in the normative landscape as well as be adopted as a legal standard for evaluating the behaviour in general. The article then proceeds to identify and discuss certain traits of the judge-made law in the Western legal culture, especially emphasising its flexibility and altered nature of authoritativeness.

In addition to the more theoretically oriented debate, several authors of the reviewed book deal with more specific and practical aspects of the judge-made law's incidence. Maja Brkan brings light to the genealogy of the European Union's legal order. In her "The Court of Justice as a (co)creator of the EU law" (*Sodišče EU kot (so)ustvarjalec prava EU*), she illustrates how vastly crucial judge-made law is for the whole of the Europe, provides an analysis of the Court of Justice's main historical legal decisions and emphasises the importance of judicial activism – environmental matters being upfront.

Aleš Galič deals with "Requirements concerning consistency of case law as an element of the right to a fair trial" (*Jamstva glede enotne sodne prakse kot del pravice do poštenega sojenja*), where he provides an in-depth analysis of the Constitutional Court of the Republic of Slovenia's and European Court of Human Rights' decisions. Special attention is paid to the (nuances of) precedential nature of these institutions' legal decisions and their contribution to a fair trial, where, according to Galič, one must be careful of an excessive and suffocating constitutionalisation.

A special consideration of the implications stemming out of concrete cases is, furthermore, provided by Janez Kranjc. Although sourcing from a distant past, Kranjc in his "Praetor's creation of new law in litigation" (*Pretorjevo ustvarjanje novega prava v postopku*) provides an insightful account of this Roman justice administrating body. He pays special attention to the typology of praetor's activity, who had to dissect from cases brought upon him whether an existing legal formula was to be used or a new one (an action *ad* hoc) was to be created.

Tomaž Pavčnik also deals with the relevance of judge-made law in civil proceedings. In "Institutes of civil law and constitution as a source of judicial law" (*Civilnopravni instituti in ustava kot vir sodniškega prava*) he builds on the idea that contemporary Civil codifications are but an intermediate stage of legal development and civil law thus an ongoing historical process. Moreover, he also develops the thesis that the Constitution crucially co-determines the content of civil law, but also gives judge-made law the nature of a binding legal source.

Although Primož Gorkič's "The court as (co)creator of the rules of criminal procedure law" (*Sodišče kot (so)oblikovalec pravil kazenskega procesnega prava*) is the only contribution concerning criminal (procedure) law, he manages to efficaciously illustrate the conceptual deformations of judge-made law within this legal field. His overarching thesis argues that judges' interpretative (or law-making) flexibility depends on the requirements laid down by the principle of legality, largely depending on the object of regulation. After providing an analysis of the said issue, Gorkič also addresses the law-making scope of various interpretative methods.

Finally, Nina Betetto examines the parameters of the so called "Soft judicial law" (*Mehko sodniško pravo*), largely sourcing from the European Court of Human Rights' practice. She addresses both the factors affecting compliance with soft judge-made law as well as its categories and functions, thus providing a broad account of its relationship to the "hard rules". She concludes with the call for the use of soft judge-made law by the Court, which could deem beneficial in multiple ways.

Concluding from the overview of all eleven chapters, the work discloses various facets of the phenomenon judge-made law. Since a more in-depth analysis of its segments was never the goal of my review, I kindly direct you to the work itself. Multiple crucial implications for its practical and scientific relevance could be identified, however.

Firstly, judge-made law is not a self-explanatory (by-)product of the judges' work; not every judicial activity automatically creates a new law. When interpreting a legal norm, judges are typically bound by a range of legal sources, the Constitution, the statute, and even non-statutory general legal acts, albeit with varying degrees of binding force. Their decisions, furthermore, also reflect the very spectral nature of normativity; based on their type (e.g. sourcing from "soft" or "hard" legal rules) and interpretative enterprise (e.g. inference by an analogy or teleological reduction), they provide varying accounts of the judge-made law's scope and range. The object of judges' enquiry (e.g. civil, international, or criminal law) additionally significantly co-determines the pa-

rameters of the phenomenon. Judge-made law can be, on the other hand, also used to (strategically) address certain social and political issues. Such an activity may even turn into "judicial activism". What is more, in many of these cases' argumentative structure there is an international element present. When uncovering and dealing with delicate topics, (especially constitutional) judges oftentimes seek to their foreign colleagues. All the stated conclusions, and even more of the unstated ones, point to the fact that judge-made law plays (better: has always played) a crucial role within the legal normative structure.

However, the book offers more than this straightforward observation. Although the editors modestly proclaim that it is in no way a pioneering work, room can be made for accentuating its significance, first and foremost for the Slovenian legal culture, but also in a geographically wider context. There are three theses that I would like to end the article with:

1. The Slovenian legal discourse is observant of the multifaceted normative structure of the legal system; judge-made law deserves proper attention as a viable source of law and the reviewed work both seeks and succeeds to provide it.
2. What judges reckon with is not a one-answer interpretative scheme of major and minor premises as the syllogistic formula suggests, but a complex set of hypotheses, resorting now in the causal, now in the normative world; affirming the concept of judge-made law therefore only reflects the very (re)cognition of the society and judges' activity as inherently intricate occurrences.
3. The work provides an additional constituent to the architectonics of a nuanced understanding of legal phenomena, especially regarding the subject, the object as well as the method of both using and understanding (a) law[4]; the "Slovenian school of legal thought" therefore certainly exhibits certain specific traits, with judge-made law being one of them.[5]

It is a labyrinthine and ruthless world in which we live. Only through constant inquiry and knowledge accumulation on the one hand and the affirmation of certain values on the other can we aspire to forge a better one. Law, its rule and most certainly people responsible for applying it – judges – must be a major part of this progress. And, as Pitamic famously put it:

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[4] These observations were already made by Leonid Pitamic. See Pitamic, L., *Pravo in revolucija*, Lexpera – GV Založba, Ljubljana, 2019 (1920), p. 23 *f.*

[5] For an important conceptual elaboration on this topic see: Novak, A., *Interpretativni pluralizem*, in: A. Novak, M. Pavčnik, *Pravne panoge in metodologija razlage prava*, GV Založba – Lexpera, Ljubljana, 2022, pp. 275-304.

"We will not create, we will not share, and we will not find justice, if there is no justice within us!"[6]

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[6] Pitamic L., *op. cit.* fn. 4, p. 46.

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