PUBLISH, PERISH, OR (SELF)-PLAGIARISE?

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Most scholars have at some point during their undergrad studies sat in on a mandatory information session about plagiarism. Depending on the specific programme, it probably contained one or more horror stories of people banished from the university (forever) and never allowed to graduate because they had forgotten to include quotation marks when citing work in their student essays. Armed thus with a healthy fear of stealing other people's work, undergraduate students become graduates. Most then go on to work in practice or in other so-called 'real world' jobs where they discover that copy-and-pasting is a fundamental skill that is both unquestioned and necessary in their daily work. In the legal field this is doubly true, due not only to the references to precedent, but also to established and emerging doctrines and principles which often take the form of phrases repeated verbatim. Indeed, if one was to run most judgments through a plagiarism detection software, one would discover that very little beyond the names of the parties is truly original. As it should be, to safeguard equality before the law. Even separate opinions annexed to cases are often repetitive. For example, at the European Court of Human Rights, judges Khanlar Hajiyev and Dmitry Dedov issued word-for-word identical dissenting opinions in *Sabanchiyeva and others v. Russia* and *Maskhadova and others v. Russia.*[1]

Be that as it may, those that go on to do graduate programmes must sit in on the anti-plagiarism information session once again. This time around, since graduate students have already written a fair bit, the session includes the topic of self- or double plagiarism. This too is completely banned for

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[1] *Sabanchiyeva and others v. Russia* App No 38450/05 (European Court of Human Rights 6 June 2013); *Maskhadova and Others v. Russia* App No 18071/05 (European Court of Human Rights 7 October 2013).

 doi: 10.2924/EJLS.2024.001

graduate students. Handing in what is essentially the same essay for two different courses is considered a form of cheating, and what is more, the students are warned that it is academically unethical and would render your work unpublishable.

Why is it unethical? Most importantly because readers and journals, reasonably, expect published work to be original and to contain new ideas and information. Additionally, as most editorial work and peer review is unpaid,[2] self-plagiarism wastes the precious time of other scholars to review something that has already been published. This has only become more important over time since the number of yearly publications continues to increase. Globally, more than five million academic articles are published every year, 75 percent of which are in English and thus expected to be read by an international audience.[3] Keeping abreast with publications in any field in these conditions is daunting, and the fields within the scope of the EJLS are no exception. Taking international law as an example, John Louth of Oxford University Press did a survey in 2015 of the number of books published per year in international law, taking into account only those in English, German, or French and still found more than 400 titles.[4] Scholars trying to deal with this avalanche of information do not benefit from authors repeating themselves or salami-slicing their findings. And finally, of course, self-plagiarism can represent a problem with regard to copyright, as authors often sign away their copyrights when publishing the first time round.

And why is it unpublishable? In addition to the potential problem with copyright, self-plagiarism is likely to slow down the publication process or

[2] As discussed at length in a previous editorial: Helga Molbæk-Steensig, 'Maieutic or Meddlesome?: Reflections on the Roles of the Journal and the Author' (2023) 15 European journal of legal studies 1.

[3] Dimitrije Curcic, 'Number of Academic Papers Published Per Year' (Words Rated, June 1 2023) <https://wordsrated.com/number-of-academic-papers-published-per-year/> accessed 26.11.2023.

[4] John Louth, 'How Many International Law Books are Published in a Year?' (Opinio Juris, April 8 2015) <https://opiniojuris.org/2015/04/08/guest-post-how-many-international-law-books-are-published-in-a-year/> accessed 30.10.2023.

lead to rejection.[5] This is especially true with the advent of anti-plagiarism software, but also when peer reviewers are simply well-read: there is every risk that self-plagiarism could be mistaken for its far more serious older sister, plagiarism. When self-plagiarism is flagged as potential plagiarism, it can lead to breaking the double-blindness of peer review,[6] to the journal having to search for new (often less well-versed) reviewers, or simply to the rejection of the article.

As academic sins go, plagiarism and self-plagiarism are not the same: plagiarism is stealing the work of others, self-plagiarism is merely copying one's own previously submitted work.[7] Self-plagiarism is nonetheless a very troubling practice. It wastes the valuable, and often unpaid, time of academic colleagues acting as editors and reviewers, and it wastes the time of the readers authors are trying to convince. Additionally, as for the student handing in the same essay twice, it is dishonest to tenure boards and others who require scholars to have published a certain number of original publications and conducted a certain amount of original research.

Despite these compelling reasons not to engage in self-plagiarism, the practice is extremely common. Some reasons for self-plagiarism are more suspect, such as beefing up one's publication record, but there are also legitimate reasons related to the intellectual process of social science and humanistic research and pace of publication. Despite what it sometimes seems like in academic chatter, publications are not actually research but rather the communication of research conducted. The research itself consists of data collected, caselaw studies completed, analyses conducted, ideas cultivated, and arguments clarified. Among other products, all of this results

[5] The importance of publication speed has also been discussed in this journal before: Helga Molbæk-Steensig and Alexander Gilder, 'Editorial: Some Thoughts on Academic Publishing for Early Career Researchers' (2023) 14 European Journal of Legal Studies 1.

[6] More on this here: Anna Krisztián and Olga Ceran, 'The "New Normal" in Academia: What Covid-19 Reveals about (Legal) Publishing and Online Scholarly Communication' (2020) 12 European Journal of Legal Studies 1.

[7] N.B. self-plagiarism becomes more serious if the copyright of a previous publisher is infringed.

in text written and oral presentations given. The text of most published articles started out as conference or workshop papers which have since been worked and reworked, sometimes with a middle station as working papers, sometimes abandoned and forgotten for a while in some digital version of the desk drawer, then rediscovered and reused together with other bits and pieces of writing, all of which represent the same research undertaken.

Additionally, as we know from reading the greats, ideas develop over time. Hans Kelsen effectively rewrote and republished his Pure Theory of Law on at least three occasions, the two (quite) different versions of his monograph in German in 1934 and 1960,[8] plus a much-shortened version in English for Harvard Law Review in 1941.[9] Additionally, his *General Theory of Law and State*, published in English in 1945, was essentially the Pure Theory of Law for an American audience. As noted by Josef L. Kunz who reviewed it at the time,

> [t]he book […] gives the latest and, so to speak, definitive version of the 'Pure Theory of Law' by its creator. It is written as an exposition of the author's ideas, almost without footnotes, references, and quotations […] It reads, indeed, more easily than Kelsen's works in his mother tongue. Purely philosophical discussions have been avoided; it is significant that in the whole work the name of Kant is mentioned only once. Examples from Continental European law and references to or polemics with Continental European literature are wholly excluded. Instead, examples are taken from the American Constitution; a few American cases are quoted and theoretically analyzed.[10]

[8] Hans Kelsen, *Reine Rechtslehre: Einleitung in Die Rechtswissenschaftliche Problematik* (Mohr Siebeck 1934); Hans Kelsen, *Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit.* (Mohr Siebeck 1960); Hans Kelsen, *Reine Rechtslehre: Einleitung in Die Rechtswissenschaftliche Problematik* (Mohr Siebeck 1934) The second version was subsequently translated into English: Hans Kelsen, *Pure Theory of Law* (Univ of California Press 1967).

[9] Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 Harvard Law Review 44.

[10] Josef L Kunz, 'Review of General Theory of Law and State by Hans Kelsen' (1946) 13 University of Chicago Law Review 211.

Is Kelsen's *General Theory of Law and State* a case of self-plagiarism and the author aiming to beef up his CV in a quest to land a professorship in the United States?[11] Hardly. Although *General Theory of Law and State* contained a lot of repetitions of ideas and to some extent formulations taken directly from the Pure Theory of Law in its various versions, it certainly did add something to the field and cannot reasonably be considered an instance of self-plagiarism, even though it was almost devoid of references. Readers have happily read the book and gained something from it that they would not gain from reading his other works, even in translated form – not least getting examples from another jurisdiction and not having to read about Kant.

So, what is the difference? Does Kelsen get away with it because he is Kelsen, and if so, can you get away with it? An important difference is the format. The *General Theory of Law and State* was a book. It was not subject to double-blind peer review, and as such none of the editors involved likely had any doubt about who the author was. Additionally, the book format lends itself well to elaboration, clarification, and further development on previously published ideas. Readers may not necessarily expect entirely new work when picking up a book in the same way as they do when opening up a journal. It is still the case today that the peer or editor review of many books is not double-blind, meaning that reviewers know who the author is, even if the author does not necessarily know who the reviewers are. Academic publishing works generally with the dialectic idea that academic work is improved by being questioned by peers,[12] but it is not always the case that this questioning must be anonymous.

At the EJLS we have pondered this problem for some time. We require authors to adhere to the European Code of Conduct for Research Integrity, which lists self-plagiarism among unacceptable practices in academic

[11] Which was not as easy as one might think – we know from Kelsen's correspondence with University of Chicago Professor Quincy Wright of 7 July 1940: 'You know very well, dear Professor Wright, how difficult it is now for a European scholar to get a professorship at an American University'.

[12] Again, we have covered this in previous editorials: Molbæk-Steensig (n. 2).

research.[13] However, we also allow scholars to submit articles that were previously made public in databases of theses, as working or conference papers, or where substantive parts were previously published in another language. When articles have previously been made public in one of these ways, the previous work must be duly acknowledged, and in cases where the article was previously published (for example in another language) we also require that the original publisher has agreed to the parallel publishing. When pieces have previously been made public as working papers, we require that they are removed upon publication of the article in the EJLS to limit the amount of double publishing as much as possible. In any of the cases mentioned above, we require that the cover letter includes a statement detailing how the piece might previously have been made public, while the footnotes referencing the previously published versions must initially be redacted to protect the blindness of review.

Accepting such submissions does occasionally create problems for the blindness of peer review which are not easily resolved. Many of our reviewers are very well versed in the literature in their field in more than one language and it is not uncommon that they pick up plagiarism or self-plagiarism across languages which existing anti-plagiarism software would have a very hard time catching. When we have decided to accept such submissions, it has been for compelling reasons: either because re-publishing in other languages allows ideas to reach a wider audience, or in acknowledgement that conference and working papers are sometimes made public for the author to stake a claim to an idea while continuing work to mature it. Working papers and conference papers and not-really-papers-yet-but-still-shared-on-SRRN-papers are part of how our field works. Additionally, international law and European law in particular have a thriving industry of legal blogs where many scholars choose to give new ideas or treatments of new cases a preliminary airing, only later developing them into full articles. In many ways this is something that keeps our field

[13] ALLEA, *The European Code of Conduct for Research Integrity – Revised Edition 2023.* (ALLEA | All European Academies 2023) para 3.1.

alive and interesting; it is also something that makes it very hard to safeguard the double-blindness of peer review.

In conclusion, self-plagiarism is a type of academic misconduct, so don't do it,[14] and definitely do not send it to us. At the same time, it must be recognised that publications are not the research conducted, but a communication of it, which can be improved and elaborated over time.

IN THIS ISSUE

In this issue we are very excited to present not one but two special sections. The first is entitled **How Do We Know What Is True in the Field of Law?** It concerns legal epistemologies, examining some of the most foundational questions related to how we know what the law is. As a legal journal charged with determining the quality of incoming submissions, this is of course a topic close to our hearts. In recent years, the field of law has been on the receiving end of vicious criticism from both social sciences and from within the field of law itself with regards to its scientific credentials. In short, is legal scholarship conducting (social) scientific research? And if so, is it any good at it? These questions have been the topic of intense debate in American law reviews for at least two decades, but have only more recently received attention in European scholarship. As the *European* Journal of Legal Studies (emphasis added!), we are excited to present a special section advancing this discussion. This is the second time the EJLS dedicates particular attention to empirical legal studies and to the empirical turn in legal scholarship, the first being the special issue published in cooperation with the Network of Empirical Legal Scholars in 2019.[15] While this special section continues discussions started in that issue, it takes a different tack, beginning the investigation in doctrinal legal scholarship and working outwards from there.

The section includes four pieces. **Jakob v. H. Holtermann** starts out with an editorial introducing the reader to the *Methodenstreit* in the field and

[14] (Unless maybe sometimes in books).

[15] Urška Šadl, 'Editorial: A Method of (Free) Choice' (2019) NoLesLaw Special Issue European Journal of Legal Studies 1.

presenting a taxonomy of positions in the conflict between doctrinal and empirical research. He then goes on to categorise each of the three articles in the section according to this taxonomy, discussing their positions, merits, and weaknesses based on it. The editorial is followed by three articles by Jesse Claassen, Helga Molbæk-Steensig and Léon Dijkman. **Jesse Claassen**'s piece stresses the need for legal scholars to understand both empirical and doctrinal legal research and accept their co-existence. Meanwhile, **Helga Molbæk-Steensig** makes a case in favour of eclecticism, treating doctrinal legal scholarship as empirical, arguing that most epistemological disagreement between doctrinal and empirical research emerge from methodical critique. Finally, **Léon Dijkman** uses American Legal realism to highlight the continued importance of doctrinal research in legal scholarship. The section would not have been possible without the assistance of the European University Institute's Working Group on Human and Fundamental Rights and the Working Group on Legal and Political Theory, in particular Jasmine Sommardal and Azizjon Bagadirov, who graciously co-hosted the EJLS's workshop on the problem of truth in the field of law.

The second special section is on **Constitutional Imaginaries** and takes the form of a book symposium on **Jan Komàrek's** edited volume *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023). For this section too, we are grateful for the support of a European University Institute working group, in this case the Working Group on Constitutional Law and Politics, in particular Susi Forderer, who chaired the event on the book. The event took on a large variety of topics for debates both on Constitutional Law in practice and more epistemological questions, creating a nice bridge to our other special section, on what it means to study constitutional law today. The four pieces in the section reflect this wide debate. The section starts out with **Maximillian Reymann**'s essay, 'National imaginaries for a transnational EU?' which reviews the volume in relation to Reymann's own journey through the legal discipline of EU Law. It then turns to **Marciej Krogel**'s piece, 'Constitutional Imaginaries: The Story of the Rise and Fall of Intellectual Enchantment' which questions whether the language and metaphors used to describe EU Constitutionalism are still helpful. The third piece in the section is written by **Hagen Schulz-**

Forberg and is entitled 'Constitutionalism as Practice'. In this piece the author suggests a Marxist understanding of ideology to describe European Constitutionalism. The section finishes off with a response essay by **Jan Komàrek** in which he explores what it means to engage in scholarship, reflecting on concerns raised in the review essays and his own academic journey.

In addition to these special sections, the issue consists of two general articles. **Giovanna Gilleri** offers a reinterpretation of Article 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women in a bid to avoid gender stereotyping. Meanwhile, **Jeffrey Miller** conducts a critical analysis of the protection of disabled individuals against disability discrimination offered by the European Union and suggests that the EU's Horizontal Directive Proposal could be an effective way for Member States to meet accessibility obligations under international law. The issue is brought to a close with **Nozizwe Dube**'s compelling book review of Folúké Adébísí's *Decolonisation and Legal Knowledge: Reflections On Power And Possibility* (Bristol University Press, 2023).

CHANGING OF THE GUARD

This issue marks a major turning point for the EJLS, as we say thank you and farewell to many of our current Executive Board Members, including our outgoing Heads of Section **Jaka Kukavica** (European Law), **Niklas Reetz** (International Law), **Flips Schöyen** (Comparative Law) and **Alexander Lazovic** (Legal Theory), Executive Editor **Sophie Berner-Eyde**, Managing Editor **Raghavi Viswanath**, and Editor-in-Chief **Helga Molbæk-Steensig**. Many of these members have been part of the EJLS for a considerable length of time and their work has been pivotal in making our publications a reality. We thus thank them for their years of service and wish them all the very best going forward. In their place we welcome our new Heads of Section, **Niels Hoek** (European Law), **Lukas Schaupp** (Comparative Law), and **Dimitrios Panousos** (International Law). We are also delighted to welcome **Carolina Paulesu** as Managing Editor, and **Sebastian von Massow**, **Sara Guidi**, and **Cielia Eckardt** as Executive Editors. Our former Executive Editor, **Michael Widdowson** is now taking

the helm as Editor-in-Chief. As always, the issue would not be possible without our pool of dedicated peer reviewers. We thank them for their dedication, enabling the EJLS to continue to publish high quality articles. Finally, we would also like to offer a warm welcome to our new team of Junior Editors and look forward to their new perspectives on forthcoming submissions.