

LAW AND TIME

GENERAL INTRODUCTION EU LAW AND BEYOND

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OVERVIEW

LAW AND TIME

1. Law and other disciplines | import of knowledge
2. Law lags behind | ethics and values
3. Scientific uncertainty | precautionary principle
4. Law and progress of public opinion
5. Normal procedure to enact or change law

Law and time

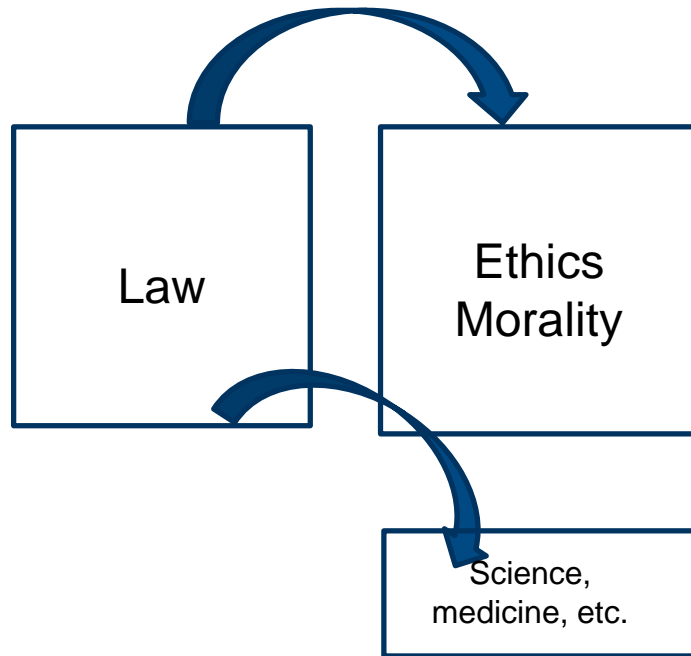
GUIDING QUESTIONS



- Which questions can arise if one discipline (e.g. law) refers to another discipline (e.g. science)?
- Since it often takes some time for legislation to be adopted, what approach should be taken in the case of rapidly evolving technologies?
- Which decisions should be taken in case of scientific uncertainty?
- How can law change over time?

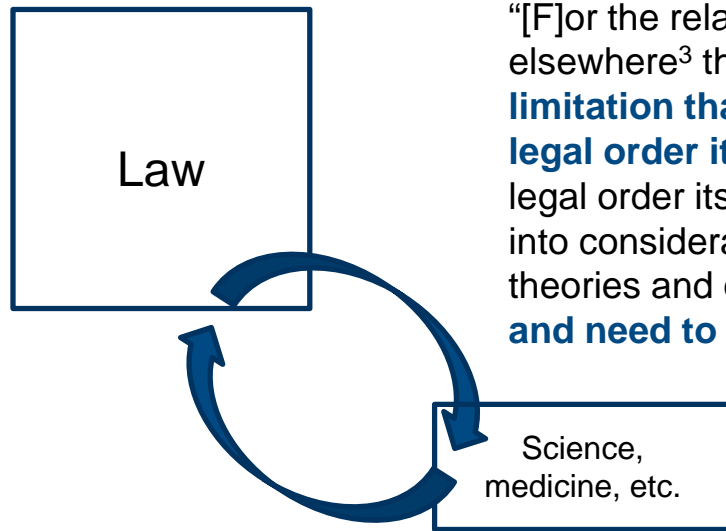
Law and time

Law and other disciplines



Law and time

Law and science



“[F]or the relation of **law and science**, a relative approach has been preferred.² I have argued elsewhere³ that references in legal texts to ethics and morality have to be seen within the **limitation that those philosophical concepts necessarily have to be reflected within the legal order itself**.⁴ In other words, concepts that cannot, in one way or another be traced in the legal order itself (and which therefore are alien to this legal order), consequently cannot come into consideration. The same argumentation is also upheld in this book; hence, these normative theories and other philosophical concepts [i.e. **ethics**] have to be **imported in a relative way and need to be reflected in the EU legal order**.”

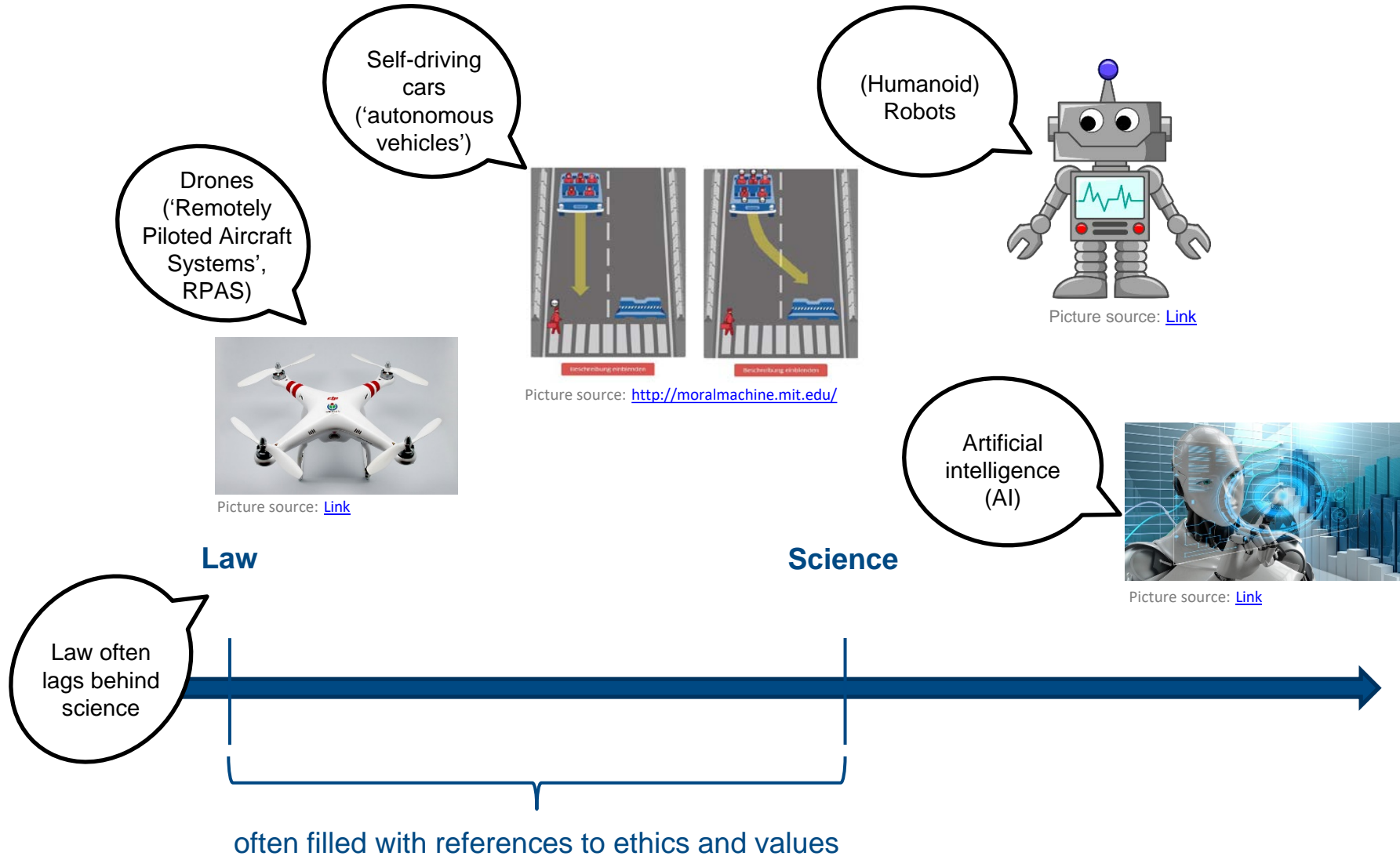
Source: Frischhut, 2019, p. 123

Relative, not an absolute **import**:

- Law & science: Wahlberg & Persson, 2017; Wahlberg, 2017, p. 63; Wahlberg, 2010, pp. 208, 213
- Law (Austria) & morality: OGH, 2012, pt. 4.6.1 (*N.B. Austrian Supreme Court in civil and criminal law issues*)
- EU law & ethics: Frischhut, 2019, p. 123

Law and time

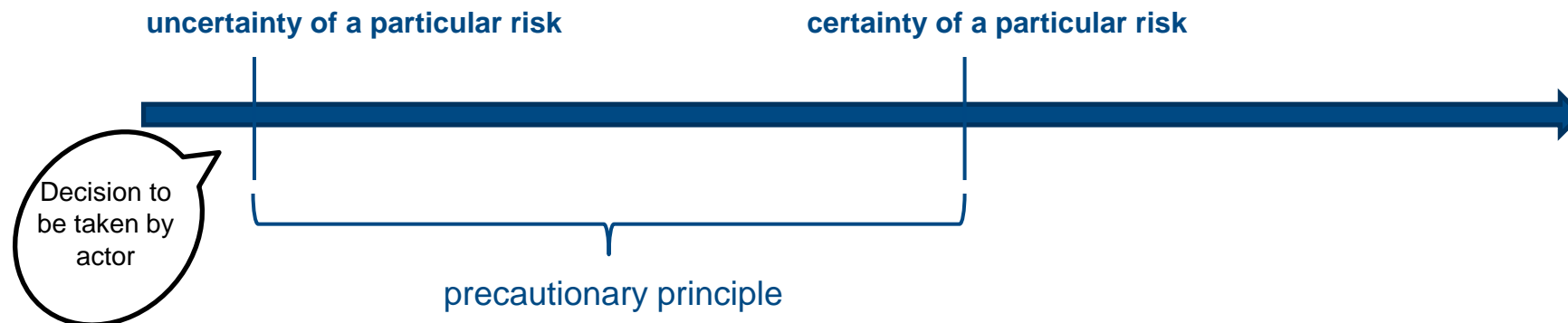
Law and science | where law lags behind



Law and science | precautionary principle

Precautionary principle:

- **Definition:** “to take **protective measures without having to wait** until the reality and seriousness of those risks become fully apparent or until the adverse health effects materialise”
(General Court judgment of 17 May 2018, T-584/13, *BASF Agro (fipronil & bees)*, para. 59)
- **Where:** in EU environmental law, in EU food law, in EU law on communicable diseases, EU fundamental freedoms, etc.
- **By whom:** EU legislator (EP and Council of Ministers), EU Commission, EU Member States, undertakings
- **Requires:** “first, **identification** of the potentially adverse effects arising from a phenomenon; second, **assessment** of the risks to public health, safety and the environment which are related to that phenomenon; and, third, when the potential risks identified exceed the **threshold of what is acceptable for society, risk management** by the adoption of appropriate protective measures.” (Gen. Court judgment of 17 May 2018, T-584/13, *BASF Agro (fipronil & bees)*, para. 60)



Law and time

Law and development due to external factors

How has public opinion changed over the times with regard to the following questions:

- Same sex-relationships (partnership and marriage)
- Abortion
- Cannabis

old external factors
(e.g. attitude of society)

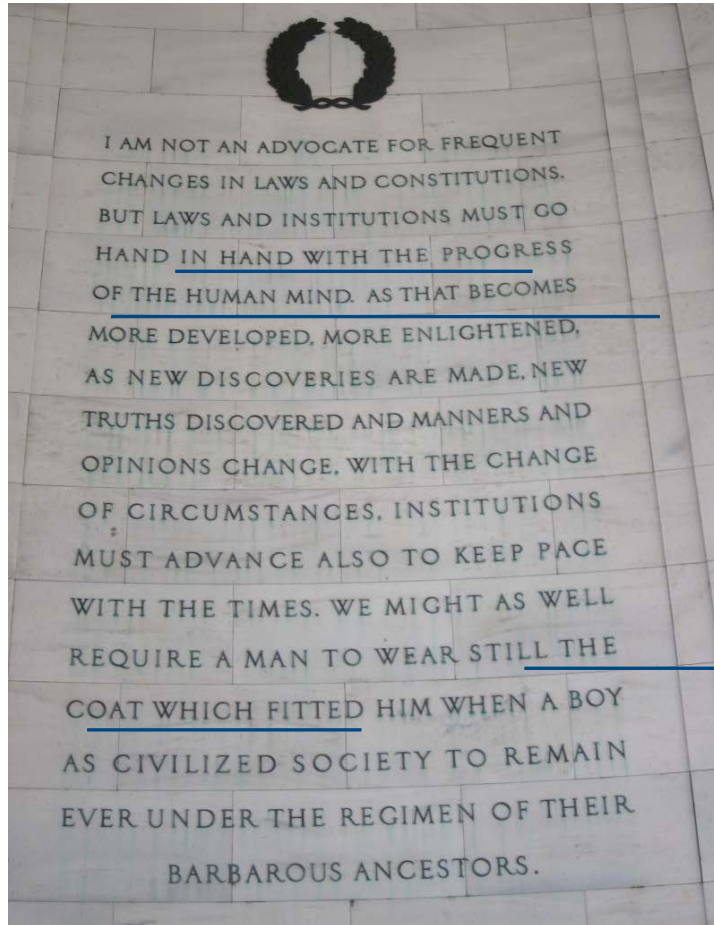
new external factors
(e.g. attitude of
society)



law

Law and time

Law and progress



Source:

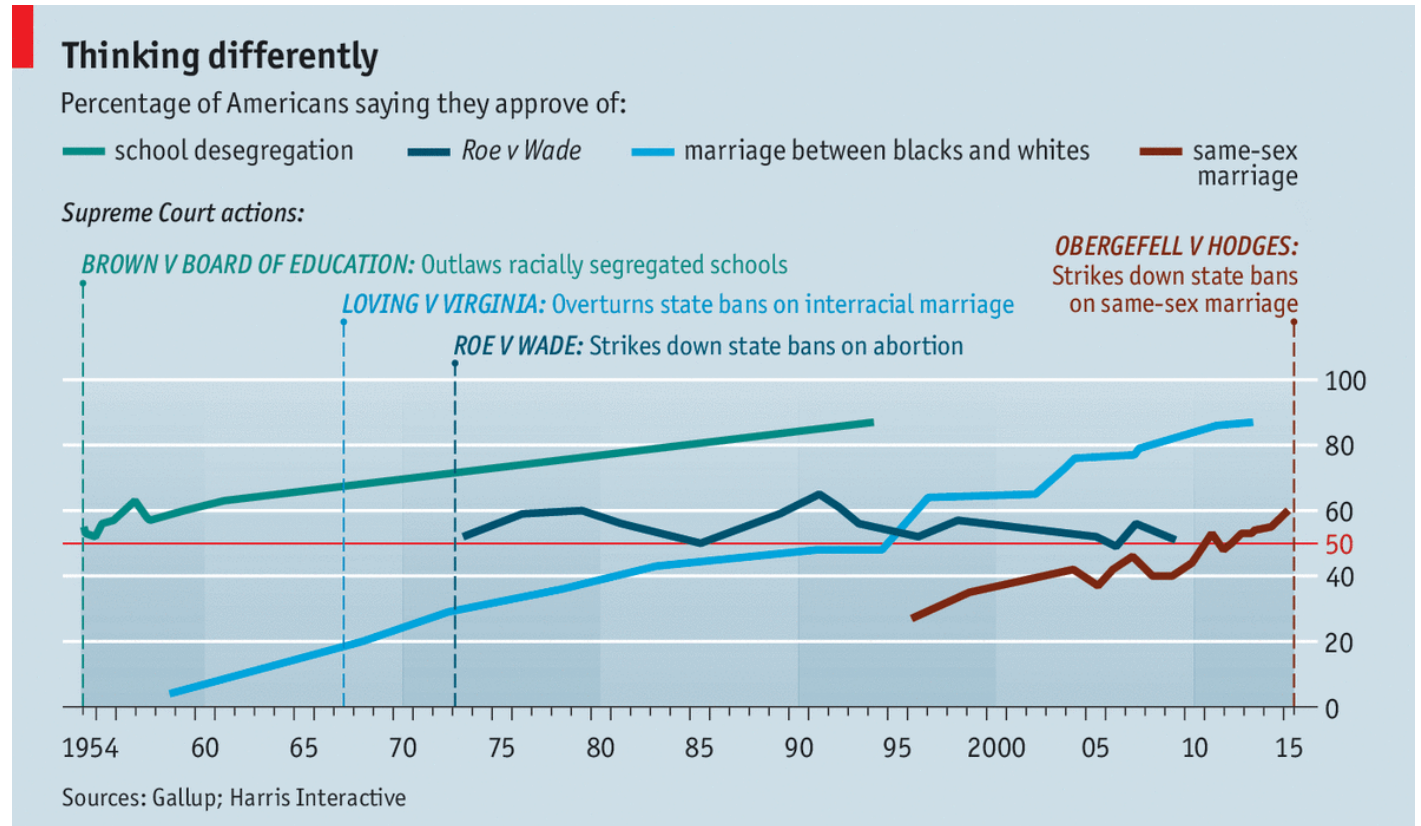
<https://www.youtube.com/watch?v=S3AVcCggRnU>

Jefferson Memorial, Washington D.C.
 (3rd president of the USA; co-author of the "Declaration of Independence")
 (Picture credit: Frischhut)

Law and time

Courts and progress

“The Supreme Court rarely likes to get very far ahead of public opinion. Before issuing rulings giving rise to a major social change like the **desegregation** of public schools (*Brown v Board of Education* in 1954), the legalisation of **interracial marriage** (*Loving v Virginia* in 1967), or **abortion** (*Roe v Wade* in 1973) the justices seem to like at least half of Americans to be on board. In this light, the justices’ tones in the *Obergefell* opinions owe much to the environment into which they were released.”

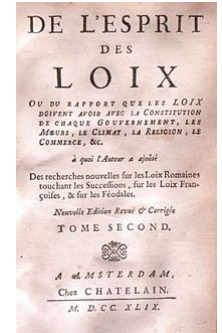
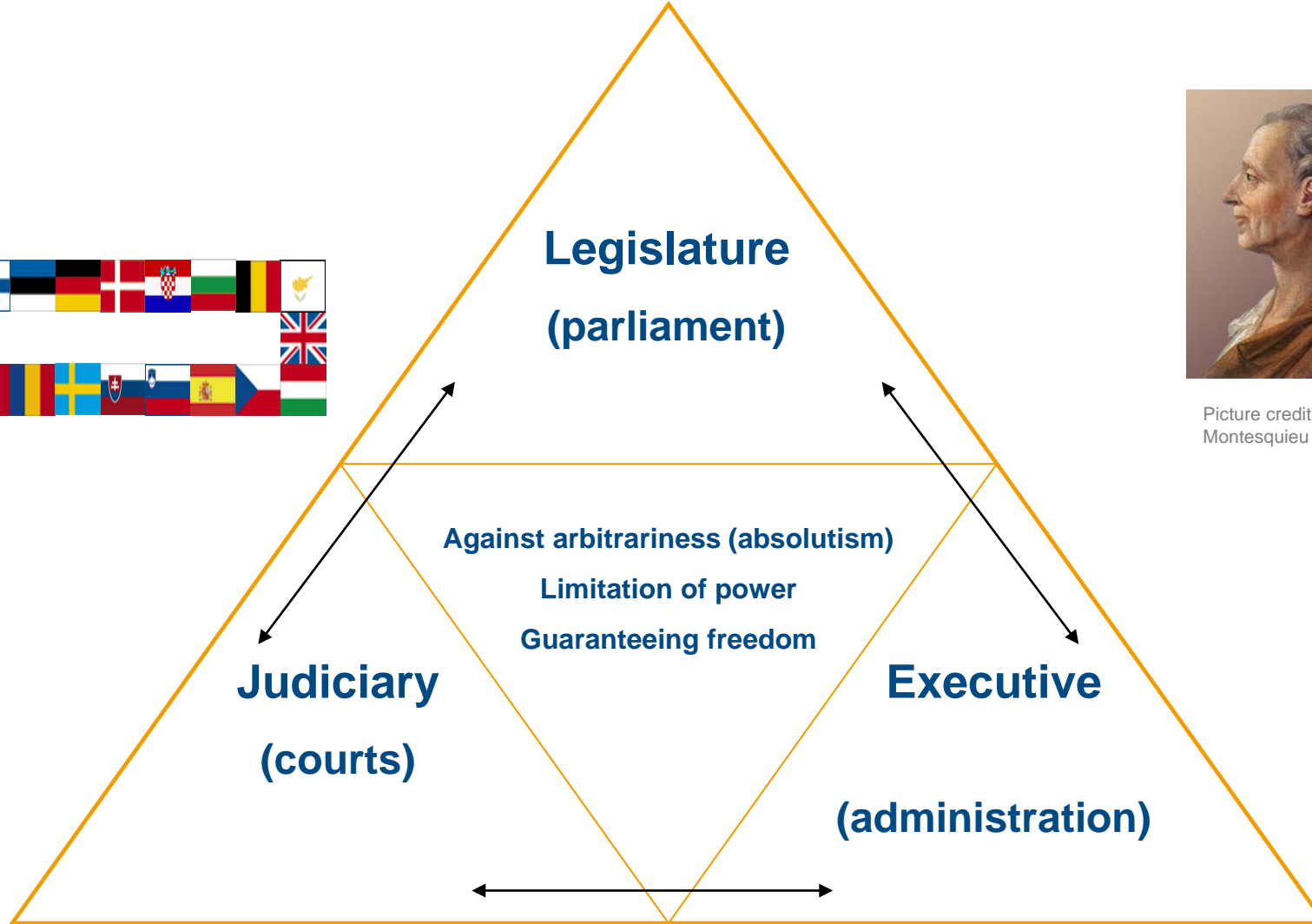


Economist.com

Source: The Economist (2015, July 9). Change is gonna come: The Supreme Court.

Law and time

Normal procedure to enact or change law



Picture credit: <https://en.wikipedia.org/wiki/Montesquieu>

Law and time

Normal procedure to enact or change law

Primary law | all (!) Member States



Secondary law | European Parliament and Council of Ministers



National law | National parliaments



Legislature
(parliament)

Literature mentioned on slides



- Frischhut, M. (2019). *The Ethical Spirit of EU Law*. Springer International Publishing.
- Montesquieu, Charles de Secondat, Baron de. (1927). *De L'esprit des Loix: Avec des notes de Voltaire, de Crevier, de Mably, de la Harpe, etc.* Nouvelle édition entièrement refondue. Tome premier. Librairie Garnier Frères.
- Wahlberg, L. (2010). *Legal Questions and Scientific Answers: Ontological Differences and Epistemic Gaps in the Assessment of Causal Relations*. Media-Tryck.
- Wahlberg, L. (2017). Legal Ontology, Scientific Expertise and The Factual World. *Journal of Social Ontology*, 3(1), 49–65.
- Wahlberg, L., & Persson, J. (2017). Importing Notions in Health Law: Science and Proven Experience. *European Journal of Health Law*, 24(5), 565–590.



- ❑ Which questions can arise if one discipline (e.g. law) refers to another discipline (e.g. science)?
 - ✓ The question of whether these concepts should be imported unaltered (i.e. absolute approach) or only to the extent that they find an equivalent in law (i.e. relative approach).
- ❑ Since it often takes some time for legislation to be adopted, what approach should be taken in the case of rapidly evolving technologies?
 - ✓ Problem statement: it often takes a lot of time until law is changed, both due to legal (time of the decision-making process itself) and also due to political reasons (no political consensus, i.e. no majority).
 - ✓ Often we can find references to ethics or morality, respectively to ethics and values, such as currently in the field of digitalization.



- Which decisions should be taken in case of scientific uncertainty?
 - ✓ EU law allows for precautionary measures.
- How can law change over time?
 - ✓ The legislator is of course basically always free to amend laws and adapt them to new situations.
 - ✓ However, as we have seen, also changes in public opinion can lead to different case-law (important: this against the background of an unchanged constitutional situation)