In law, as in philosophy and literature, and life in general, it goes without saying that a form is capable of inducing a substance and that the substance in many ways induces its proper form. In law this is reflected in the comparison between substantive law, which represents the substance, and procedural law, which is the form. Montesquieu, for example, detested “adjective” law, although he himself was a judge in Bordeaux. In this sense he believed the law to be the substance and the process to serve the sole purpose of converting it from abstract to concrete. The notion of “adjective” law, compared to substantive law, is analogous to the comparison between a noun (substantive) on the one hand and an adjective on the other. From this perspective, therefore, the adjective only qualifies, at best, the nature of a noun without having a decisive effect on its “substance”.

This is a Continental perception of the relationship between substantive and procedural law. However, this perception is entirely reversed in the Anglo-Saxon (common-law) legal system, where procedure is perceived as primary and substantive law as a centuries-old accumulation of case-law, the fruit of individual procedures. Needless to emphasise, it is also in Continental Europe that this perspective is changing radically. Evidently, the precedents of supreme and constitutional courts, as well as of the European Court of Human Rights, are the result of actual procedures. Thus, in this context it is the form which is essential for the development of the substance. In his attentive review of my book, The Owl of Minerva, Mr Duarte d’Almeida polemises, among other things, with the question of the nature of law in its historical origin. Given that neither Mr d’Almeida nor I are legal historians or at least Romanists, it is probably not even worth instigating a polemic on this very question. My foundation is not that of legal history but, rather, is Hobbesian and practical. In any anthropological situation which first calls for the reinstatement of order and peace and subsequently for the rule of law, it is evident that the primitive system of adjudication must commence without any sort of substantive, explicit and articulated basis. A dispute resolution service also exists on Samoa, although it is clear that substantive rules for determining what is fair and what is not fair are not necessarily either written or explicitly conditioned by tradition. Nevertheless, the service must operate.

Thus, if we wished to answer for Mr d’Almeida the question of what the law is, the chicken or the egg, we would of course choose the egg, although the chicken appears much bigger. The remaining question, however, is what this egg actually is. On other occasions I have thoroughly explored this question, which is in essence psychoanalytical. The sense of justice is in fact something that does not derive from substantive acts and codes. It is enshrined in the language as a symbolic order and in law, acting as a subdivision of that symbolic order. Unfortunately, it is beyond the scope of this response to explore the details
of the sense of justice as a notion. Suffice it to mention that the notion was addressed by Freud and is examined, at least indirectly, in Lacan’s Sixteenth seminar. The contention is, thus, that even the most primitive (in the anthropological meaning of the word) ruler possesses this sense, which is, hence, not entirely or for the most part cognitively conditioned. This matter requires a separate discussion. Nonetheless, at this point it is only fair to shed some light on the fundamental premise that justice in law does not originate from laws but rather from something much more primitive, more elementary than any law.

This explains why our view regarding the primacy of the egg not only pertains to legal history, but emerges from a deeper finding that everyone is capable of doing justice – yet, similarly, of also doing injustice. It is furthermore apparent from the perspective of legal theory that, for example, Justinian’s codification was, if truth be told, but a summarised collection of views, which existed before the codification and had been developed for at least one thousand years. This, too, is hard to take issue with.

On the other hand, the origin of the primacy of procedure, meaning procedure as the aspect of law that governed its genesis up to the codifications in the Age of Enlightenment, has to do with legal tradition. The democratic legal tradition does not emanate from the postulate of an all-knowing ruler and legislator who would, like Frederick II, solve all the dilemmas of justice in abstracto. This fundamental and arrogant pretentiousness of the Continental legal tradition is a clear historical and ideological reason for the perseverance of substantive law’s primacy over procedural law in the Continental legal system. However, as already stated, recuperating from this madness occurs by means of the precedent- and legislative activity of modern supreme and constitutional courts. The democratic legal tradition, which is unknown to the Continent, nevertheless presupposes an entirely different basis for both the formation and the functioning of the law itself.

Thus, if the standpoint as to the trustworthiness of the major legal premise is something that can be relative, then it is modesty in contemplation which demands in the first place only a resolution of a dispute and not an apodictic contention that a legislator and a judge are in possession of the truth and justice. Asking ourselves, with a grain of common sense, why they should be in possession of such virtues, we instantaneously realise that the mythologisation of the legislative and judicial functions does nothing but damage justice and the development of law. Thus, as a judge at the ECTHR and a previous Constitutional Court judge, I am empirically convinced that creative legal solutions and the accumulation of precedents take place, with considerable effort, on a case-by-case basis (casuistically), and thus by accumulating the so-called acquis of a Constitutional or European court. Interestingly, however, both Courts started out decades ago with nothing, none of the precedents of the European court being more than 50 years old and none of the Slovenian Constitutional Court’s more than 46 years old. Both Courts began from a tabula rasa.

What, then, guided judges of the ECTHR and the first Constitutional Court judges in democratic Slovenia?

At this point we could start contemplating on the hermeneutical pyramid and similar matters; however, it is evident for anyone who has been assimilated into this hermeneutical process that in the end it all comes down to what we initially called a sense of justice.

Therefore, the democratic legal tradition does not originate from an unconscious assumption that the legislative, or even the judicial authorities are supremely given and in this sense taken for granted as untouchable. The democratic legal tradition is not pretentious even in the inquisitorial sense of the word. Concerning the latter, it goes without saying that it is dependent on its Catholic-authoritarian historical origin, and this is the reason why, as emphasised by Prof. Vladimir Bayer, Giordano Bruno and countless witches were burnt at the stake. Inquisitorial criminal procedure represents an exemplary instance of terrifying abuses and aberrations emanating from the very authoritarian-sadistic supposition that someone, in this case domini canes, is in possession of the divine truth. Thus, it is difficult to agree with Mr d’Almeida’s statement that the European “mixed” legal system is legally acceptable, even if we disregard the fact that Mr d’Almeida elliptically evades the question in the first place.
This leads us to the next question which Mr d’Almeida takes issue with, namely what is the truth within a procedure, especially in criminal procedure. The question concerning the truth is expressly set out in The Owl of Minerva because in the discussions between the Supreme Court Justices in the United States on the requirements of criminal procedure there appears a leitmotif, a dilemma between truth-finding on the one hand and the protection of procedural, constitutional and human rights on the other. This dilemma has been of practical relevance on account of the exclusionary rule, which requires the exclusion of legally relevant evidence even if it could decisively contribute to the determination of the truth in criminal procedure. Since constitutional and procedural rights are sacrificed in the name of the truth it might be convenient to ask what this truth actually means. Here, we do not understand the truth only as it was understood by domini canes, thus as something divinely warranted by God, but rather as something that should be logically inevitable. However, the answer to this question cannot be found with the German and Italian legal theorists cited by Mr d’Almeida, but rather with the Scandinavian legal realist Alf Ross, richly translated for Revus by Andrej Kristan. “Tű-tű” is Ross’s ironic decorative epithet (epiteoton ornans) for nonsense, emanating from the formalistic harmony between the major and minor premises – assuming that we considered this harmony to be the truth. Supposing thus, that the truth in criminal law (substantive and procedural) is something that is a pure adaequatio intellectus et rei, then this truth, for example about the reprehensibility of a particular act, does not count for much, far from being worth sacrificing procedural, constitutional and human rights for. This worthlessness of the truth in criminal law is examined in detail in my book given that it is without doubt essential to decide, in every sense, if the truth is worth sacrificing the above-mentioned rights. However, the thesis, entirely overlooked by Mr d’Almeida, is that this truth is Foucaultian. The truth, postulated by substantive criminal law, and supposedly determined through the above-mentioned violation of rights, is in fact self-sufficient, a fact which Hobbes considered evident when stating: “The civil law ceasing, crimes also cease.” Thus, Hobbes perceived as apparent the fact that this truth is not “something that is objectively true”, but rather a manifestation of State supremacy. This supremacy is capable of transforming the major premise into a formalistic and logical syllogism with an appropriate degree of violence.

The fundamental thesis, entirely unnoticed by Mr d’Almeida, is that the blind postulation of criminal law’s “truth,” demanding the sacrifice of procedural rights, is a circular mechanism in which one form of (procedural) violence legitimates another (that of the substantive legal truth). This is the gist of the logical deconstruction of violence inherent in legal repression, which in its excesses (see the example of Jalloh v. Germany) demonstrates exactly the same absurdity as witnessed in the legacy of the Spanish Catholic Inquisition. From this perspective, it becomes clear that the thesis defended in the book is much more subversive, i.e., deconstructive, than the thesis discussed by Mr d’Almeida.

Mr d’Almeida also tries to open the epistemological question of whether impartial adjudication is even possible in a procedure, which is not entirely adversarial. In the book, this question is examined carefully enough from precisely the epistemological perspective. The position taken is that the notion of impartiality consists of two principal elements. The first one, tangentially mentioned by Mr d’Almeida, is the passivity of whoever is in charge of delivering the verdict. The second element, called the “active ambivalence of the judge”, is, however, an even greater by-product of the adversarial judging process.

A model passive entity, which considers, adjudicates and at the end rules in the matter is the jury in Anglo-Saxon legal procedure. In principle, the jurors must refrain from putting any additional questions. The Supreme Court of Wyoming has in a leading precedent (Shawn Lewis v. The State of Wyoming, judgment of 20 June 2002, no. 00-238) cited my own position supporting the view that, for this very reason, the jurors remain completely inactive. The jurors must therefore not put any additional questions to any of the parties during or after the termination of the proceedings. Adopting this view, the Supreme Court of Wyoming drew on the theory described in the book, which states that the creator of a hypothesis cannot be the one ultimately
considering the validity of the same hypothesis. The explanation drawing a distinction between historical and non-historical events is examined. Empirical science (physics, chemistry etc.) due to the epistemological requirement for any thesis to be falsifiable, deals with repeatable non-historical events from which it derives certain scientific and established assertions (laws). Because events appealing to empirical science are capable of being repeated, they can be the subject of a scientific experiment. A scientific experiment confirms or disproves the objective validity (the truth), thus enabling the objective reality to confirm or disprove, by itself, a scientific hypothesis.

The opposite view is brilliantly expressed in Scout Peter, a work by Fran Milčinski, a superb writer and a juvenile judge in Slovenia. When the teacher calls Scout Peter to appear in front of the class, he asks him about the year the French Revolution took place. Scout Peter answers that according to the history book, the French Revolution took place in 1789. The teacher, displeased at Peter’s implicit scepticism, replies: “Well then, did the revolution happen in 1789 or not?” Scout Peter, however, stubbornly insists on his knowing only that this is what the book says. This is an ingenious way of picturing the difference between the aforementioned and historical events, meaning events incapable of being proven by an experiment. Owing to their non-repeatable nature, they are irretrievably lost in the past. This is the reason why they cannot, unlike scientific experiment, serve objective reality in confirming its objectivity. Scout Peter’s sceptical standpoint is therefore entirely accurate.

I have examined in detail the problem of events irretrievably lost in the past in a number of separate opinions within the ECtHR (for example in Saadi v. Italy, application no. 37201/06, judgment of 28 February 2008). The fact of the matter is that the majority of legally relevant events are non-repeatably historical. This is the reason why they cannot be reconstructed. While they can be simulated, their repetition is not possible.

The saying that history is written by the winner surely indicates Scout Peter’s dilemma. However, considering the requirements of law, past historical events constituting a foundation for a judgment of any kind need to be considered in a particularly objective and impartial way. I have explicitly pointed out this issue in my separate opinion on the Kyprianou case, dealing with the question of so-called contempt of court. The fact, though, is simply that the objective recurrent effect, according to epistemological laws in science, is ensured by the objectivity of a scientific experiment, which is lacking in law. It is misleading when, in science, the creator of the hypothesis appears to be the same as the one proving it. This is misleading because a scientific hypothesis is only a falsifiable hypothesis that can be proven false by others. Thus, in science the creator’s hypothesis is open not only to an objective experiment but also to critical subjective examination by other scientists. However, in law, the latter is not carried out even by appellate courts, which in principle do not deal with the facts at all. The problem with the Continental investigating judge, which as an institution is on the verge of extinction even in France, derives in its entirety from the inadmissible fusion of the functions of creating and confirming a hypothesis (see my recent separate opinion in Vera Cruz v. Spain). Needless to mention at this point, the investigating judge is from a historical perspective an inquisirens in inquisitorial criminal procedure, and hence someone intimately connected with the Inquisition and torture. Therefore, the assimilation of the formation and examination of a hypothesis is inadmissible. Contrary to the authoritarian contamination of Continental procedure following the inquisitorial tradition, the functions of the formation or proposition and examination of a hypothesis are completely separated in adversarial procedure in the Common Law tradition. The actions of the defence oppose the active role of those who legally articulate a hypothesis (the prosecutor), while the jury or even a passive judge stand indifferent as to which of the two theses will finally prevail. Thus, the passivity of the jury, as in the above-mentioned case from Wyoming, does not serve its own purpose, but rather prevents the final judge form asserting its right to form a hypothesis in an active and hence biased manner.

The second point which makes adversarial procedure impartial is the very dialectical interaction between the thesis and the antithesis, and thus between the prosecution and the defence. However, the gist of the matter is not the dialec-
tics, but rather its side-effect. A passive adjudicator of a case (the jury, judges) is, following this dynamic, convinced at one point by the thesis and at another by the antithesis. Since impartiality means that the channels of information from both sides are not cut off, it is the active ambivalence of the jury or the judge, which increases the probability that the one delivering the judgment will perceive each burden of proof in contrast to the opposite burden of proof. What is of the essence here is an understanding of the fact that the final judgment represents the decision of the adjudicator, but is, however, never impartial. On the contrary, the purpose of adjudication and the judgment is to agree with one or the other party. Res judicata is accordingly in its very nature partial.

A judicial process can be impartial only if alongside the passivity of the adjudicator on the one hand and its active ambivalence on the other there thrives the final partiality. The book offers a detailed analysis of all of these issues. Nevertheless, Mr d’Almeida apparently could not accept it. The question arises as to why not. A simple answer would be that Mr d’Almeida, passionately adhering to Spanish legal tradition, is in fact biased and that he cannot allow himself to accept a thesis describing the inquisitorial and mixed criminal procedures as an anathema.

Mr d’Almeida also clashes with my assertion that by the nature of things conflict resolution in adjudication takes precedence over truth finding. In truth, this assertion is not difficult to prove in civil procedure, given that a compromis-sum, settlement can at any moment override the truth and, nevertheless, become res judicata. This is naturally logical and even desirable; however, in Continental criminal procedure it is not possible by virtue of the obsessive-compulsive preoccupation with the aforementioned “truth,” which we have already established is merely a circular approval of State violence. It is a priori clear that, except in criminal procedure, truth finding is not a central and fundamental function of legal proceedings. The truth is a means and is instrumental for dispute resolution only in so far as the establishment of certain legally relevant facts subsumes them under a pre-existing normative major premise. Thus, within criminal procedure, if it is focused on the necessity of truth finding, as is the case in the Continental legal system, impartiality is in fact incompatible with truth finding and vice versa. At the end of page 150 Mr d’Almeida accuses me of failing to decide which of the two philosophies – Continental or Anglo-Saxon – is more desirable and suggests that for me the question is rather which of the two philosophies is true. Mr d’Almeida cites the sentence from page 46 of my book in which I state that the question is which of the two philosophies adequately describes what the law does in reality. Mr d’Almeida observes that for him, this is hard to comprehend.

This is of course hard for Mr d’Almeida to comprehend, since he does not distinguish between the prescriptive and descriptive functions of law. True, the Continental legal system really did bring about the burning of witches on the stake; however, that was not the same truth we are dealing with here. Less dramatically put, the present-day mixed Continental criminal procedure, especially if the investigating judge takes part in it, is in no way impartial – nonetheless, this is the reality of the Continental legal process.

When Miha Pohlin first described the foundations of Slovene grammar, he must have thought he was describing the grammar and syntax of a living Slovene langue. It is a descriptive function that we are talking about here. However, once he described the grammar and syntax of a living language, he also prescribed it. This is a prescriptive function. Evidently, prescriptive and descriptive functions are interwoven in law, through the process of so-called normative integration among other things. If Mr d’Almeida asserts that this is difficult to comprehend, then this difficult comprehension of something that is otherwise simple and logical is very probably a consequence of the fact that Mr d’Almeida feels bound to defend the Continental legal tradition. However, concerning the latter we maintain, as stated above, that it does not derive from a democratic tradition; the proof of this can be found in Articles 5 and 6 of the ECHR.

On page 152 Mr d’Almeida reaches beyond his competence. Talking about the privilege against self-incrimination, he refuses to recognise that the integration of violence into criminal procedure is what subverts due process in its entirety, which is my fundamental thesis. This thesis...
is ultimately simple and could be written on the back of a business card. Clearly – and this is understood even by Mr d'Almeida – each legal procedure is in essence an alternative to reciprocal physical retribution, and hence to the Hobbesian war of everybody against everybody. The latter is an anteroom of anarchy. It is evident and therefore fully comprehensible that a verbal and logical dispute resolution is in essence an alternative to a violent dispute resolution. Following from this, any integration of violence into a legal procedure (torture) is a subversion of the legitimacy of due process – all along, its primary purpose being exactly to avoid violent dispute resolution. This is clear.

What is, however, less clear is whether the use of lies and guile as a means of achieving victory in legal procedure is acceptable or not. An ECTHR case in which one of a defendant’s fellow prisoners, who was actually a stool pigeon for the police, transmitted information gathered from the defendant to the police and the prosecutor is paradigmatic. On the basis of this information the defendant was later convicted, which raises the question whether this is acceptable or not. The ECTHR was of the opinion that it is, while contradicting itself in as much as the privilege against self-incrimination in ECtHR case-law, is equated with the right to remain silent. In the Jalloh v. Germany case this misconception came to be particularly apparent, as can be discerned from the analysis in my separate opinion. Nevertheless, the main idea lies elsewhere.

As much as the foundation of due process constitutes an alternative to violent dispute resolution, it is also clear that all of the violent forms of dominion in legal procedure (deception, guile) are, according to this theory and this theory alone, admissible. The eminent philosopher Barry Stroud speaks of a logical necessity with which he intuitively presents the possibility that in a given discussion, not necessarily a legal one, we compel the adversary, if he shares with us at least the original axioms, to confess to not being right. We have demonstrated our assertion as logically inevitable, compelled him to see that two plus two equals four, and thus defeated him.

However, legal procedure is undoubtedly not that simple and cannot come down to formal logical inevitability, if for no other reason than the fact that certain information (evidence) is accessible to one party and not to the other. Since these are historical events (see above), Scout Peter's scepticism is entirely warranted, which on the other hand indicates the possibility that explanations of certain facts will vary radically. The above-mentioned ECTHR case did not concern this scenario, though. It concerned the non-violent acquisition of evidence which was under certain conditions dismissed as illegitimate by the United States Supreme Court in the Brewer v. Williams case (see Zupančič et al., Constitutional Criminal Procedure, 2nd Ed., 1996). Similarly, the case of Gäfgen v. Germany witnessed a policeman in Frankfurt threatening the defendant with torture, without actually having the intention to proceed with it. All of these acts constitute ruses and lies which, however, are not violent and therefore are not, in the given sense, fundamentally in contradiction with due process and, thus, do not subvert it. I shall not elaborate on this any further here. Nonetheless, it is evident that a lie and a ruse can be incompatible with the legitimacy of procedure for a whole array of other reasons.

Finally, let us touch upon some critical comments conveyed by Mr d'Almeida in part 4 of his review. Mr d'Almeida suggests that many of the book's true claims will strike most readers as so trivially true as to obviate the need for the extensive discussion that the author accords them. He asserts that the main traits and the comparative virtues and vices of the two pure or ideal-type models of criminal procedure, to which so much concern is devoted, have been well known for a long time. In the footnote to this sentence he cites a work by Luigi Ferrajoli, Diritto e regione, teoria del grantismo penale, Rome, Laterza 2008, para. 39. Since this work because in the Italian language is unfamiliar to me, I can only be amazed at Mr d'Almeida's citing of a work not published until 2008 as proof of something that has been well known for a very long time. A generalised assertion of something being common knowledge simply cannot rest, at least not nowadays, on a work written in a tangential language such as Italian, quite apart from the fact that in order to support such an assertion, a critic should cite a variety of works. In the next sentence Mr d'Almeida accuses me of doing little more than restating
these well-known facts. This claim of course fails because of the lameness of the major premise (see above) on the familiarity of my contentions. Mr d’Almeida proceeds by citing my remark on page 7 that the unresolved antagonism between the inquisitorial and the adversarial types of adjudication no longer receives much theoretical attention and observes that there is good reason for this state of affairs. Supposedly, the reason is that there is little today in engaging in such a discussion, now that decades-old examples of differently structured criminal systems are available as a source of material for the fruitful construction of different theoretical models of mixed systems whose comparison and analysis is said to be of more interest and pressing importance, and more serviceable. Hence, Mr d’Almeida asserts, *argumento a contrario*, that my analysis is uninteresting, unimportant and unserviceable. In addition, Mr d’Almeida remarks that *The Owl of Minerva* scarcely engages with current discussions or with actual provisions of contemporary Continental codes. This is undoubtedly true, since I openly confess that I do not find contemporary Continental codes with their mixed (-up) procedures at all interesting. It was never my intention to discuss the distinctions between Portuguese and Spanish criminal procedures. I can, nonetheless, maintain with certitude that the inanities in contemporary Italian criminal procedure are the result of a careless imitation of Anglo-Saxon system, as has been depicted in a series of ECtHR de-
cisions. Mr d’Almeida will encounter difficulties in asserting anything relative to the fruitfulness of drawing a comparison between both ideal-type models of criminal procedure if his discussion is limited to contemporary codes lacking a direct connection with Anglo-Saxon procedure.

In the same way Mr d’Almeida criticises my theory on the circularity of the myth in substantive criminal law, deeming all the discussions to be of little importance. If the finding that procedural violence reintegrates violence into substantive law is of little importance, I find it hard to imagine anything left that would still be significant in theoretical discussions. On page 155 Mr d’Almeida reiterates that the theoretical novelties in *The Owl of Minerva* are scarce, suggesting that it adds little to my previous contributions on these topics. It is very easy to reply to this statement, given that *The Owl of Minerva* is nothing but a collection of my previous contributions on these topics. Mr d’Almeida continues by remark-
ing that the book incorporates most of my work from the last three decades – which is true – and not much else. Needless modesty aside, I can be only surprised that Mr d’Almeida regards three decades of theoretical discussions as hardly substantial.

And so on. At the end of this response to Mr d’Almeida I have to sincerely thank him, without any ironical intent, for even reading my work and meticulously and critically analysing it. I have to add, though, with a bitter aftertaste, that this is the first reaction to *The Owl of Minerva* that I have seen. Be that as it may, the title itself expresses the author’s nostalgia towards the times when the moral dilemmas selected and addressed in the book were still considered important. Truly, Hegel’s owl of Minerva spreads its wings only with the falling of the dusk.

Translated from Slovenian by Nastasja Suhadolnik