GOETHE UNIVERSITÄT FRANKFURT AM MAIN

Internationale Vereinigung für Rechts- und Sozialphilosophie

25th IVR World Congress of Philosophy of Law and Social Philosophy

LAW SCIENCE TECHNOLOGY

15 – 20 August 2011
Frankfurt am Main / Germany

Abstract book

www.ivr2011.org

NORMATIVE ORDERS
Exzellenzcluster an der Goethe-Universität Frankfurt am Main

CONTENT

Welcome to Frankfurt!

Dear participants,

On behalf of myself and my colleagues Professor Dr. Klaus Günther and Professor Dr. Lorenz Schulz, it is my great pleasure to welcome you to the 25th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR) in Frankfurt am Main.

You will find a detailed time schedule of the congress in this booklet, which also includes the scripts of the plenary lectures (as far as they were available in time). For plenary lectures held in German, please find enclosed an English translation or an English abstract.

I would like to take this early opportunity to thank all those involved in the preparation of the congress for their active support. In particular, I would like to thank the research assistants of my chair, Ms. Ass. jur. Diana Goldau and Mr. Dr. Sascha Ziemann, who bore the main burden of the organizational arrangements.

We wish you an academically enriching, inspiring and pleasant stay in Frankfurt.

Professor Dr. Dr. h.c. Ulfrid Neumann

Willkommen in Frankfurt!

Liebe Tagungsteilnehmer,

auch im Namen meiner Frankfurter Kollegen Prof. Dr. Klaus Günther und Prof. Dr. Lorenz Schulz möchte ich Sie zu dem 25. Weltkongress der Internationalen Vereinigung für Rechts- und Sozialphilosophie (IVR) in Frankfurt am Main sehr herzlich begrüßen.

Den genauen Ablauf der Tagung entnehmen Sie bitte diesem Heft, das auch die Plenarreferate (soweit sie uns rechtzeitig zur Verfügung gestellt werden konnten) enthält. Den Referaten, die in deutscher Sprache vorgetragen werden, ist eine englische Übersetzung bzw. eine englische Zusammenfassung beigefügt.

Schon an dieser Stelle möchte ich mich bei all denen bedanken, die uns bei der Vorbereitung des Kongresses tatkräftig unterstützt haben. Ein besonderer Dank gilt den wissenschaftlichen Mitarbeitern an meinem Lehrstuhl, Frau Ass. jur. Diana Goldau und Herrn Dr. Sascha Ziemann, die die Hauptlast der organisatorischen Vorbereitungen getragen haben.

Wir wünschen Ihnen einen wissenschaftlich ertragreichen, anregenden und angenehmen Aufenthalt in Frankfurt.

Professor Dr. Dr. h.c. Ulfrid Neumann

Academic Program

Sunday, 14 August 2011	
14.00 – 18.00	Registration
19.00	Welcoming evening
Monday, 15 August 2011	
8.00 – 18.00	Registration
9.00	Opening
9.30 – 10.15	Prof. Dr. Samantha Besson University of Fribourg / Switzerland International Human Rights and Equality
10.15 – 11.00	Discussion Chair: Prof. Dr. Anne Ruth Mackor University of Groningen / Netherlands
11.00 – 11.30	Coffee break
11.30 – 12.15	Prof. Dr. Tercio Sampaio Ferraz University of São Paulo / Brazil Die Erosion subjektiver Rechte als Folge der technischen Entwicklung (Patentrecht, Urheberrecht) (The Erosion of Legal Rights through Technical Developments (Patent Law, Intellectual Property Law))
12.15 – 13.00	Discussion Chair: Prof. Dr. Ricardo Guibourg University of Buenos Aires / Argentinia
13.00 – 14.30	Lunch
14.30 – 16.30	Special Workshops / Working Groups
16.30 – 17.00	Coffee break
17.00 – 18.30	Special Workshops / Working Groups
19.30 / 20.00	Reception City of Frankfurt
Tuesday, 16 August 2011	
9.30 – 10.15	Prof. Dr. Klaus Günther Goethe University, Frankfurt/Main Unviolability as a Legal Concept
10.15 – 11.00	Discussion Chair: Prof. Dr. Günter Frankenberg Goethe University, Frankfurt/Main

11.00 – 11.30	Coffee break
11.30 – 12.15	Prof. Dr. Seana Shiffrin University of California, Los Angeles / USA A Thinker-Based Approach To Freedom Of Speech
12.15 – 13.00	Discussion Chair: Prof. Dr. Rainer Forst Goethe University, Frankfurt/Main
13.00 – 14.30	Lunch
14.30 – 16.30	Special Workshops / Working Groups
16.30 – 17.00	Coffee break
17.00 – 18.30	Special Workshops / Working Groups
20.00	Prof. Dr. Dr. h.c. mult. Robert Alexy Christian-Albrechts University of Kiel The Existence of Human Rights
Wednesday, 17 August 2011	
9.30 – 10.15	Prof. Dr. David Dyzenhaus University of Toronto / Canada The Morality of Legality: A Hobbesian Account
10.15 – 11.00	Discussion Chair: Prof. Dr. Chongko Choi Seoul National University / Korea
11.00 – 11.30	Coffee break
11.30 – 12.15	Prof. Dr. Dr. h.c. mult. Stanley Paulson Washington University in St. Louis / USA The Very Idea of Legal Positivism
12.15 – 13.00	Discussion Chair: Prof. Dr. Marek Zirk-Sadowski University of Lódz / Poland
13.00 – 14.30	Lunch
14.30 – 20.00	Excursion Heidelberg

Academic Program

Thursday, 18 August 2011	
9.30 – 10.15	Prof. Dr. Marijan Pavčnik University of Ljubljana / Slowenia Methodologische Klarheit und/oder gegenständliche Reinheit des Rechts? Bemerkungen zur Diskussion Kelsen – Pitamic (Methodological Clarity or Substantial Purity? Notes on the Discussion between Kelsen and Pitamic)
10.15 – 11.00	Discussion Chair: Prof. Dr. Alexander Bröstl, University of P. J. Šafárik, Košice / Slovakia
11.00 – 11.30	Coffee break
11.30 – 12.15	Prof. Dr. Hiroshi Kamemoto Kyoto-University / Japan How should Legal Philosophers make Use of Economic Thinking?
12.15 – 13.00	Discussion Chair: Prof. Dr. Sandra Marshall University of Stirling / UK
13.00 – 14.30	Lunch
14.30 – 16.30	Special Workshops / Working Groups
16.30 – 17.00	Coffee break
17.00 – 18.30	Special Workshops / Working Groups
19.30	Concert
Friday, 19 August 2011	
9.30 – 10.15	Prof. Dr. Olivier Jouanjan University of Strasbourg / France The philological Turn: History and Metaphysics in Savigny
10.15 – 11.00	Prof. Dr. Carl Wellman Washington University in St. Louis / USA The Internationalization of the IVR
11.00 – 11.30	Coffee break
11.30 – 12.15	Discussion Chair: Prof. Dr. Tomasz Gizbert-Studnicki, Jagiellonian University Krakow / Poland Chair: Prof. Dr. João Maurício Adeodato Federal University of Pernambuco / Brazil
12.15 – 13.00	Dr. Adrian Künzler, Yale Law School / USA Cost-Benefit-Analysis and the Quest for Wealth Maximization: How to Embrace Complexity and Uncertainty (IVR Prize Lecture)

13.00 – 14.30	Lunch
14.30 – 16.30	Special Workshops / Working Groups
16.30 – 17.00	Coffee break
17.00 – 18.00	Special Workshops / Working Groups
18.00 – 19.00	General Assembly
20.00	Farewell dinner
Saturday, 20 August 2011	
Excursion / Sightseeing Tours (optional)	

Program Sunday, 14 Aug 2011

HZ / Hörsaalzentrum / Lecture Hall

	HZ / Hörsaalzentrum / Lecture Hall
	HZ Foyer / Entrance Hall
14.00	14.00-18.00
18.00	**Registration**

HOF / House of Finance

	HOF / House of Finance
	HOF / E.01 / Deutsche Bank
14.00	14.00-18.30
18.30	**EC meeting (non-public event)**

CAS / Casino-Gebäude / Casino Building

	CAS / Casino-Gebäude / Casino Building
	Foyer / Entrance Hall
19.00	Starting at 19.00
	Welcoming Evening

Program Monday, 15 Aug 2011

HZ / Hörsaalzentrum / Lecture Hall

	HZ / Hörsaalzentrum / Lecture Hall									
	HZ 1/2	**HZ 7**	**HZ 8**	**HZ 9**	**HZ 10**	**HZ 11**	**HZ 12**	**HZ 13**	**HZ 14**	**HZ 15**
08.00	Starting at 08.00 **Registration**									
09.00	09.00 **Opening**									
	09.30-10.15 **PL Besson**									
10.00	10.15-11.00 **Discussion**									
11.00										
	11.30-12.15 **PL Sampaio Ferraz**									
12.00	12.15-13.00 **Discussion**									
13.00										
14.00										
		14.30-18.30 **SW 61**	14.30-18.30 **SW 8**	14.30-18.30 **SW 44**	14.30-18.30 **SW 19**	14.30-18.30 **SW 14**	14.30-18.30 **SW 40**	14.30-18.30 **SW 78**	14.30-18.30 **SW 65**	14.30-18.30 **SW 6**
15.00										
16.00										
17.00										
18.00										
19.00										
	Starting at 19.30 **Reception City of Frankfurt, Town Hall** (For detailed information please see invitation in the delegate pack)									

Program Monday, 15 Aug 2011

HOF / House of Finance

	HOF / House of Finance							
	E.01 / Deutsche Bank	**E.21 / Paris**	**E.22 / Commerz-bank**	**1.27 / Dubai**	**1.28 / Shanghai**	**2.45 / Boston**	**3.36 / Chicago**	**3.45 / Sydney**
08.00								
09.00								
10.00								
11.00								
12.00								
13.00								
14.00								
	14.30-18.30 **SW 48**	14.30-18.30 **SW 41**	14.30-18.30 **SW 56**	14.30-18.30 **SW 34**	14.30-18.30 **SW 59**	14.30-18.30 **SW 68**	14.30-18.30 **SW 10**	14.30-18.30 **SW 1**
15.00								
16.00								
17.00								
18.00								
19.00								
	Starting at 19.30 **Reception City of Frankfurt, Town Hall** (For detailed information please see invitation in the delegate pack)							

Program Monday, 15 Aug 2011

IG / IG-Farben-Hochhaus / IG-Farben Building

	IG / IG-Farben-Hochhaus / IG-Farben Building							
	251	**254**	**454**	**457**	**0.251**	**0.254**	**0.454**	**0.454**
08.00								
09.00								
10.00								
11.00								
12.00								
13.00								
14.00								
15.00	14.30-18.30 **WG 8.2**	14.30-18.30 **WG 8.1**	14.30-18.30 **WG 5.1**	14.30-18.30 **WG 5.2**	14.30-18.30 **WG 19**	14.30-18.30 **WG 26**	14.30-18.30 **WG 4**	14.30-18.30 **WG 18**
16.00								
17.00								
18.00								
19.00								
	Starting at 19.30 **Reception City of Frankfurt, Town Hall** (For detailed information please see invitation in the delegate pack)							

Program Monday, 15 Aug 2011

RUW / Gebäude Recht und Wirtschaft / Building Law and Economics

	RUW / Gebäude Recht und Wirtschaft / Building Law and Economics						
	1.101	**1.102**	**1.301**	**1.302**	**1.303**	**2.101**	**2.102**
08.00							
09.00							
10.00							
11.00							
12.00							
13.00							
14.00							
15.00	14.30-18.30 **SW 67**	14.30-18.30 **WG 12.1**	14.30-18.30 **WG 11.2**	14.30-18.30 **WG 11.1**	14.30-18.30 **SW 62**	14.30-18.30 **WG 7**	14.30-18.30 **SW 28**
16.00							
17.00							
18.00							
19.00							
	Starting at 19.30 **Reception City of Frankfurt, Town Hall** (For detailed information please see invitation in the delegate pack)						

Program Monday, 15 Aug 2011

RUW / Gebäude Recht und Wirtschaft / Building Law and Economics

	RUW / Gebäude Recht und Wirtschaft / Building Law and Economics					
	3.101	3.102	3.201	4.101	4.201	4.202
08.00						
09.00						
10.00						
11.00						
12.00						
13.00						
14.00						
	14.30-18.30 **SW 24**	14.30-18.30 **SW 75**	14.30-18.30 **SW 36**	14.30-18.30 **WG 24**	14.30-18.30 **WG 25**	14.30-18.30 **WG 16**
15.00						
16.00						
17.00						
18.00						
19.00						
	Starting at 19.30 **Reception City of Frankfurt, Town Hall** (For detailed information please see invitation in the delegate pack)					

Program Tuesday, 16 Aug 2011

HZ / Hörsaalzentrum / Lecture Hall

	HZ / Hörsaalzentrum / Lecture Hall									
	HZ 1/2	HZ 7	HZ 8	HZ 9	HZ 10	HZ 11	HZ 12	HZ 13	HZ 14	HZ 15
09.00	Starting at 09.00 **Registration**									
	09.30-10.15 **PL Günther**									
10.00	10.15-11.00 **Discussion**									
11.00										
	11.30-12.15 **PL Shiffrin**									
12.00	12.15-13.00 **Discussion**									
13.00										
14.00										
		14.30-18.30 **SW 61**	14.30-18.30 **SW 8**	14.30-18.30 **SW 44**	14.30-18.30 **SW 5**	14.30-18.30 **SW 51**	14.30-18.30 **SW 21**	14.30-18.30 **SW 64**	14.30-18.30 **SW 18**	14.30-18.30 **SW 23**
15.00										
16.00										
17.00										
18.00										
19.00										
20.00	Starting at 20.00 **PL Alexy (Special Lecture)**									

Program Tuesday, 16 Aug 2011

HOF / House of Finance

	HOF / House of Finance							
	E.01 / Deutsche Bank	E.21 / Paris	E.22 / Commerz-bank	1.27 / Dubai	1.28 / Shanghai	2.45 / Boston	3.36 / Chicago	3.45 / Sydney
08.00								
09.00								
10.00								
11.00								
12.00								
13.00								
14.00								
15.00	14.30-18.30 **SW 32**	14.30-18.30 **SW 49**	14.30-18.30 **SW 17**	14.30-18.30 **SW 35**	14.30-18.30 **SW46**	14.30-18.30 **SW 66**	14.30-18.30 **SW 33**	14.30-18.30 **SW 79**
16.00								
17.00								
18.00								
19.00								
20.00								

Program Tuesday, 16 Aug 2011

IG / IG-Farben-Hochhaus / IG-Farben Building

	IG / IG-Farben-Hochhaus / IG-Farben Building							
	251	254	454	457	0.251	0.254	0.454	0.454
08.00								
09.00								
10.00								
11.00								
12.00								
13.00								
14.00								
15.00	14.30-18.30 **WG 28.1**	14.30-18.30 **SW 73**	14.30-18.30 **SW 2**	14.30-18.30 **SW 16**	14.30-18.30 **SW 4**	14.30-18.30 **SW 32.2**	14.30-18.30 **WG 32.1**	14.30-18.30 **SW 37**
16.00								
17.00								
18.00								
19.00								
20.00								

Program Tuesday, 16 Aug 2011

RUW / Gebäude Recht und Wirtschaft / Building Law and Economics

	RUW / Gebäude Recht und Wirtschaft / Building Law and Economics						
	1.101	1.102	1.301	1.302	1.303	2.101	2.102
08.00							
09.00							
10.00							
11.00							
12.00							
13.00							
14.00							
15.00	14.30-18.30 **SW 50**	14.30-18.30 **SW 76**	14.30-18.30 **SW 52**	14.30-18.30 **WG 12.2**	14.30-18.30 **WG 47**	14.30-18.30 **SW 39**	14.30-18.30 **SW 28**
16.00							
17.00							
18.00							
19.00							
20.00							

Program Tuesday, 16 Aug 2011

RUW / Gebäude Recht und Wirtschaft / Building Law and Economics

	RUW / Gebäude Recht und Wirtschaft / Building Law and Economics					
	3.101	3.102	3.201	4.101	4.201	4.202
08.00						
09.00						
10.00						
11.00						
12.00						
13.00						
14.00						
15.00	14.30-18.30 **SW 53**	14.30-18.30 **SW 45**	14.30-18.30 **SW 42**	14.30-18.30 **SW 29**	14.30-18.30 **SW 60**	14.30-18.30 **SW 70**
16.00						
17.00						
18.00						
19.00						
20.00						

Program Wednesday, 17 Aug 2011

HZ / Hörsaalzentrum / Lecture Hall

	HZ / Hörsaalzentrum / Lecture Hall									
	HZ 1/2	**HZ 7**	**HZ 8**	**HZ 9**	**HZ 10**	**HZ 11**	**HZ 12**	**HZ 13**	**HZ 14**	**HZ 15**
08.00										
09.00	Starting at 09.00 **Registration**									
	09.30-10.15 **PL Dyzen-haus**									
10.00	10.15-11.00 **Discussion**									
11.00										
	11.30-12.15 **PL Paulson**									
12.00	12.15-13.00 **Discussion**									
13.00										
14.00										
...	Starting at 14.30 **Excursion to Heidelberg** (For detailed information please see invitation in the delegate pack)									
...										
20.00										

Program Wednesday, 17 Aug 2011

HOF / House of Finance

	HOF / House of Finance							
	E.01 / Deutsche Bank	**E.21 / Paris**	**E.22 / Commerz-bank**	**1.27 / Dubai**	**1.28 / Shanghai**	**2.45 / Boston**	**3.36 / Chicago**	**3.45 / Sydney**
08.00								
09.00								
10.00								
11.00								
12.00								
13.00								
14.00	14.00-17.00 **EC meeting (non-public event)**	Starting at 14.30 **Excursion to Heidelberg** (For detailed information please see invitation in the delegate pack)						
15.00								
16.00								
17.00								
	17.30-19.00 **Nominations Committee meeting (non-public event)**							
18.00								
19.00								
20.00								

Program Wednesday, 17 Aug 2011

IG / IG-Farben-Hochhaus / IG-Farben Building

	IG / IG-Farben-Hochhaus / IG-Farben Building							
	251	**254**	**454**	**457**	**0.251**	**0.254**	**0.454**	**0.454**
08.00								
...								
14.00								
...	Starting at 14.30 **Excursion to Heidelberg** (For detailed information please see invitation in the delegate pack)							
20.00								

RUW / Gebäude Recht und Wirtschaft / Building Law and Economics

	RUW / Gebäude Recht und Wirtschaft / Building Law and Economics						
	1.101	**1.102**	**1.301**	**1.302**	**1.303**	**2.101**	**2.102**
08.00							
...							
14.00							
...	Starting at 14.30 **Excursion to Heidelberg** (For detailed information please see invitation in the delegate pack)						
20.00							

RUW / Gebäude Recht und Wirtschaft / Building Law and Economics

	RUW / Gebäude Recht und Wirtschaft / Building Law and Economics					
	3.101	**3.102**	**3.201**	**4.101**	**4.201**	**4.202**
08.00						
...						
14.00						
...	Starting at 14.30 **Excursion to Heidelberg** (For detailed information please see invitation in the delegate pack)					
20.00						

Program Thursday, 18 Aug 2011

HZ / Hörsaalzentrum / Lecture Hall

	HZ / Hörsaalzentrum / Lecture Hall									
	HZ 1/2	**HZ 7**	**HZ 8**	**HZ 9**	**HZ 10**	**HZ 11**	**HZ 12**	**HZ 13**	**HZ 14**	**HZ 15**
08.00										
09.00	Starting at 09.00 **Registration**									
	09.30-10.15 **PL Pavcnik**									
10.00	10.15-11.00 **Discussion**									
11.00										
	11.30-12.15 **PL Kamemoto**									
12.00	12.15-13.00 **Discussion**									
13.00										
14.00										
		14.30-18.30 **SW 61**	14.30-18.30 **SW 55**	14.30-18.30 **SW 7**	14.30-18.30 **SW 5**	14.30-18.30 **SW 31**	14.30-18.30 **SW 21**	14.30-18.30 **SW 72**	14.30-18.30 **SW 65**	14.30-18.30 **SW 15**
15.00										
16.00										
17.00										
18.00										
19.00										
	Starting at 19.30 **Concert, Concert Hall of the Lessing Gymnasium** (For detailed information please see invitation in the delegate pack)									

Program Thursday, 18 Aug 2011

HOF / House of Finance

	HOF / House of Finance							
	E.01 / Deutsche Bank	**E.21 / Paris**	**E.22 / Commerz-bank**	**1.27 / Dubai**	**1.28 / Shanghai**	**2.45 / Boston**	**3.36 / Chicago**	**3.45 / Sydney**
08.00								
09.00								
10.00								
11.00								
12.00								
13.00								
14.00								
15.00	14.30-17.30 **SW 32**	14.30-18.30 **SW 26**	14.30-18.30 **SW 17**	14.30-18.30 **SW 69**	14.30-18.30 **SW 74**	14.30-18.30 **SW 12**	14.30-18.30 **SW 63**	14.30-18.30 **SW 54**
16.00								
17.00								
18.00	18.00-19.00 **IVR Section President's Meetings (non-public event)**							
19.00	Starting at 19.30 **Concert, Concert Hall of the Lessing Gymnasium** (For detailed information please see invitation in the delegate pack)							

Program Thursday, 18 Aug 2011

IG / IG-Farben-Hochhaus / IG-Farben Building

	IG / IG-Farben-Hochhaus / IG-Farben Building							
	251	**254**	**454**	**457**	**0.251**	**0.254**	**0.454**	**0.454**
08.00								
09.00								
10.00								
11.00								
12.00								
13.00								
14.00								
15.00	14.30-18.30 **SW 27**	14.30-18.30 **WG 9.1**	14.30-18.30 **WG 13.1**	14.30-18.30 **WG 14.1**	14.30-18.30 **WG 15.1**	14.30-18.30 **WG 2.1**	14.30-18.30 **WG 3.1**	14.30-18.30 **WG 22.1**
16.00								
17.00								
18.00								
19.00	Starting at 19.30 **Concert, Concert Hall of the Lessing Gymnasium** (For detailed information please see invitation in the delegate pack)							

Program Thursday, 18 Aug 2011

RUW / Gebäude Recht und Wirtschaft / Building Law and Economics

	RUW / Gebäude Recht und Wirtschaft / Building Law and Economics						
	1.101	**1.102**	**1.301**	**1.302**	**1.303**	**2.101**	**2.102**
08.00							
09.00							
10.00							
11.00							
12.00							
13.00							
14.00							
15.00	14.30-18.30 **SW 50**	14.30-18.30 **SW 9**	14.30-18.30 **SW 11**	14.30-18.30 **SW 22**	14.30-18.30 **SW 58**	14.30-18.30 **WG 21.1**	14.30-18.30 **WG 29.1**
16.00							
17.00							
18.00							
19.00							
	Starting at 19.30 **Concert, Concert Hall of the Lessing Gymnasium** (For detailed information please see invitation in the delegate pack)						

Program Thursday, 18 Aug 2011

RUW / Gebäude Recht und Wirtschaft / Building Law and Economics

	RUW / Gebäude Recht und Wirtschaft / Building Law and Economics					
	3.101	**3.102**	**3.201**	**4.101**	**4.201**	**4.202**
08.00						
09.00						
10.00						
11.00						
12.00						
13.00						
14.00						
15.00	14.30-18.30 **WG 31.1**	14.30-18.30 **SW 3**	14.30-18.30 **SW 25**	14.30-18.30 **SW 71**	14.30-18.30 **SW 30**	14.30-18.30 **WG 1.1**
16.00						
17.00						
18.00						
19.00						
	Starting at 19.30 **Concert, Concert Hall of the Lessing Gymnasium** (For detailed information please see invitation in the delegate pack)					

Program Friday, 19 Aug 2011

HZ / Hörsaalzentrum / Lecture Hall

	HZ / Hörsaalzentrum / Lecture Hall									
	HZ 1/2	**HZ 7**	**HZ 8**	**HZ 9**	**HZ 10**	**HZ 11**	**HZ 12**	**HZ 13**	**HZ 14**	**HZ 15**
08.00										
09.00	Starting at 09.00 **Registration**									
	09.30-10.15 **PL Jouanjan**									
10.00	10.15-11.00 **PL Wellman**									
11.00										
	11.30-12.15 **Discussion**									
12.00	12.15-13.00 **PL Künzler (IVR Prize Lecture)**									
13.00										
14.00										
15.00	14.30-15.30 **Centennial 100 years of IVR**									
16.00			15.30-18.00 **SW 55**	15.30-18.00 **SW 7**	15.30-18.00 **SW 5**	15.30-18.00 **SW 20**				15.30-18.00 **SW 15**
17.00										
18.00	18.00-19.00 **General Assembly**									
19.00										
20.00	Starting at 20.00 **Farewell Dinner, Casino Building** (For detailed information please see invitation in the delegate pack)									

Program Friday, 19 Aug 2011

HOF / House of Finance

	HOF / House of Finance							
	E.01 / Deutsche Bank	**E.21 / Paris**	**E.22 / Commerz-bank**	**1.27 / Dubai**	**1.28 / Shanghai**	**2.45 / Boston**	**3.36 / Chicago**	**3.45 / Sydney**
08.00								
09.00								
10.00								
11.00								
12.00								
13.00								
14.00								
15.00								
16.00		15.30-18.00 **WG 30**	15.30-18.00 **SW 43**	15.30-18.00 **WG 17.1**	15.30-18.00 **WG 17.2**	15.30-18.00 **SW 12**	15.30-18.00 **WG 27.1**	15.30-18.00 **WG 27.2**
17.00								
18.00								
19.00	19.00-20.00 **Meeting of the new EC (non-public event)**							
20.00	Starting at 20.00 **Farewell Dinner, Casino Building** (For detailed information please see invitation in the delegate pack)							

Program Friday, 19 Aug 2011

IG / IG-Farben-Hochhaus / IG-Farben Building

	IG / IG-Farben-Hochhaus / IG-Farben Building							
	251	**254**	**454**	**457**	**0.251**	**0.254**	**0.454**	**0.454**
08.00								
09.00								
10.00								
11.00								
12.00								
13.00								
14.00								
15.00								
16.00	15.30-18.00 **WG 2.2a**	15.30-18.00 **WG 9.2**	15.30-18.00 **WG 13.2**	15.30-18.00 **WG 14.2**	15.30-18.00 **WG 15.2**	15.30-18.00 **WG 2.2b**	15.30-18.00 **WG 3.2**	15.30-18.00 **WG 22.2**
17.00								
18.00								
19.00								
20.00	Starting at 20.00 **Farewell Dinner, Casino Building** (For detailed information please see invitation in the delegate pack)							

Program Friday, 19 Aug 2011

RUW / Gebäude Recht und Wirtschaft / Building Law and Economics

	RUW / Gebäude Recht und Wirtschaft / Building Law and Economics						
	1.101	**1.102**	**1.301**	**1.302**	**1.303**	**2.101**	**2.102**
08.00							
09.00							
10.00							
11.00							
12.00							
13.00							
14.00							
15.00							
16.00	15.30-18.00 **WG 6**		15.30-18.00 **WG 23.1**	15.30-18.00 **WG 23.2**	15.30-18.00 **WG 20**	15.30-18.00 **WG 21.2**	15.30-18.00 **WG 29.2**
17.00							
18.00							
19.00							
20.00	Starting at 20.00 **Farewell Dinner, Casino Building** (For detailed information please see invitation in the delegate pack)						

Program Friday, 19 Aug 2011

RUW / Gebäude Recht und Wirtschaft / Building Law and Economics

	RUW / Gebäude Recht und Wirtschaft / Building Law and Economics					
	3.101	**3.102**	**3.201**	**4.101**	**4.201**	**4.202**
08.00						
09.00						
10.00						
11.00						
12.00						
13.00						
14.00						
15.00						
16.00	15.30-18.00 **WG 31.2**	15.30-18.00 **SW 3**	15.30-18.00 **WG 10**	15.30-18.00 **WG 28.2**	15.30-18.00 **WG 1.2a**	15.30-18.00 **WG 1.2b**
17.00						
18.00						
19.00						
20.00	Starting at 20.00 **Farewell Dinner, Casino Building** (For detailed information please see invitation in the delegate pack)					

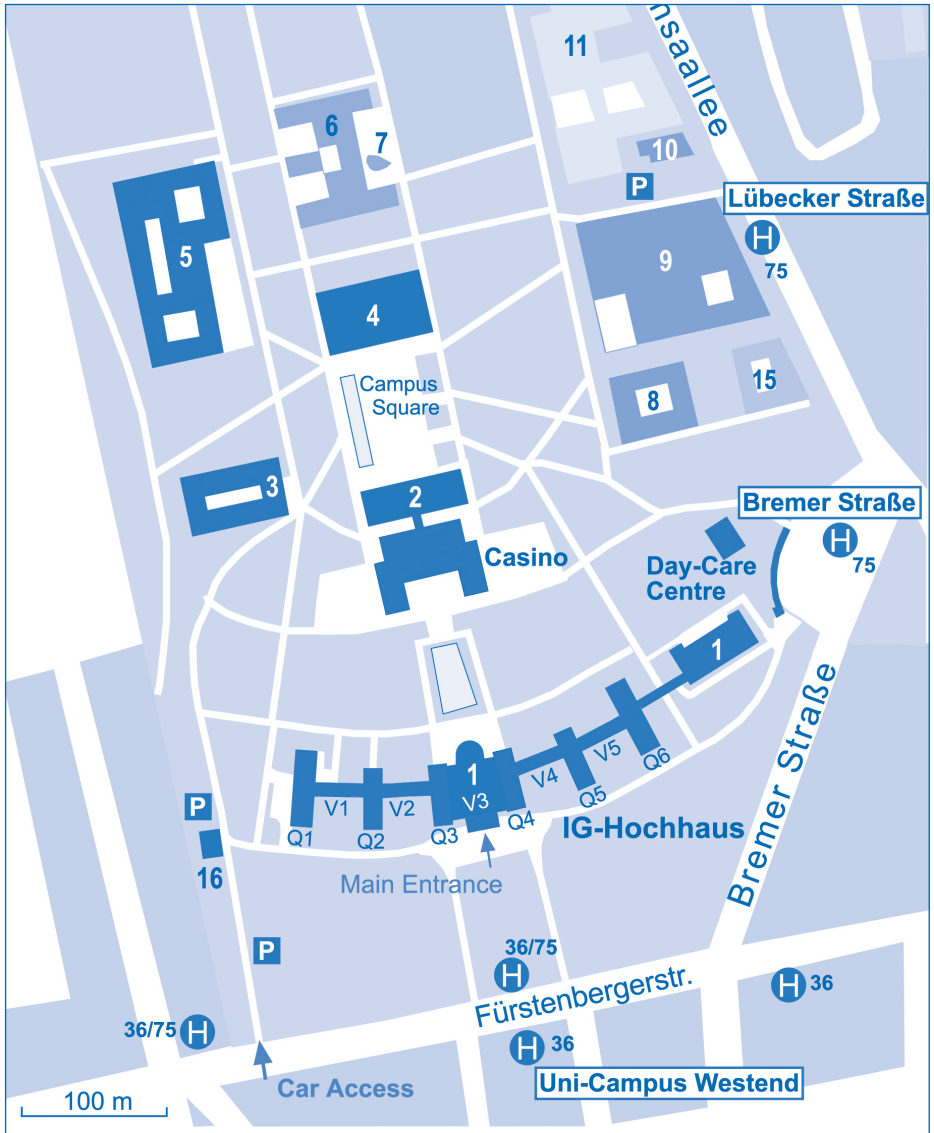
Program Saturday, 20 Aug 2011

HOF / House of Finance

	HOF / House of Finance							
	E.01 / Deutsche Bank	**E.21 / Paris**	**E.22 / Commerz-bank**	**1.27 / Dubai**	**1.28 / Shanghai**	**2.45 / Boston**	**3.36 / Chicago**	**3.45 / Sydney**
08.00								
09.00			09.00-14.00 **SW 43**					
10.00								
11.00								
12.00								
13.00								
14.00								

Social Program	
Monday, 15 Aug 2011	10.00-12.00 **Tour: Discover Frankfurt** (For detailed information please see delegate pack)
Tuesday, 16 Aug 2011	10.00-12.00 **Tour: Frankfurt – Goethe's Hometown** (For detailed information please see delegate pack)
Wednesday, 17 Aug 2011	14.30–20.00 **Excursion to Heidelberg** (For detailed information please see delegate pack)
Thursday, 18 Aug 2011	10.00-12.00 **Tour: Frankfurt – Architectural Highlights of more than 1000 years** (For detailed information please see delegate pack)
Friday, 19 Aug 2011	10.00-12.00 **Frankfurt Palmengarten Tour** (For detailed information please see delegate pack)
Saturday, 20 Aug 2011	Optional: **1. Tour: Romantic Rheingau, 2. Tour: Romantic Rothenburg** (For detailed information please see delegate pack)

Congress Venue



Congress buildings
1 IG | 2 CAS | 3 HOF | 4 HZ | 5 RUW

Overview

Monday, 15 Aug 2011	
9.30-10.15	Samantha Besson, University of Fribourg / Switzerland **International Human Rights and Equality**
11.30-12.15	Tercio Sampaio Ferraz Junior, University of São Paulo / Brazil **Die Erosion subjektiver Rechte als Folge der technischen Entwicklung (Patentrecht, Urheberrecht)** **Erosion of subjective rights by reason of technical development (Patent, Copyright)**
Tuesday, 16 Aug 2011	
9.30-10.15	Klaus Günther, Goethe University, Frankfurt/Main **Unviolability as a Legal Concept**
11.30-12.15	Seana Valentine Shiffrin, University of California, Los Angeles / USA **A Thinker-Based Approach To Freedom Of Speech**
20.00	Special Lecture Robert Alexy, Christian-Albrechts s-University of Kiel **The Existence of Human Rights**
Wednesday, 17 Aug 2011	
9.30-10.15	David Dyzenhaus, University of Toronto / Canada **The Morality of Legality: A Hobbesian Account**
11.30-12.15	Stanley L. Paulson, Washington University in St. Louis / USA **The Very Idea of Legal Positivism**
Thursday, 18 Aug 2011	
9.30-10.15	Marijan Pavcnik, University of Ljubljana / Slowenia **Methodologische Klarheit und/oder gegenständliche Reinheit des Rechts? Bemerkungen zur Diskussion Kelsen – Pitamic (Methodological Clarity or Substantial Purity? Notes on the Discussion between Kelsen and Pitamic)**
11.30-12.15	Hiroshi Kamemoto, Kyoto University / Japan **How should Legal Philosophers make Use of Economic Thinking?**

Friday, 19 Aug 2011	
9.30-10.15	Olivier Jouanjan, University of Strasbourg / France **The philological Turn: History and Metaphysics in Savigny**
10.15-11.00	Carl Wellman, Washington University in St. Louis / USA **How Should We Legal Philosophers Make Use of Economics?**
12.15-13.00	IVR Prize Lecture Adrian Künzler, Yale Law School / USA **Cost-Benefit-Analysis and the Quest for Wealth Maximization: How to Embrace Complexity and Uncertainty**

PLENARY LECTURE

International Human Rights and Equality Prof. Dr. Samantha Besson, University of Fribourg / Switzerland	
Date	MON 15 Aug 2011
Time	9.30 h – 10.15 h
Location	HZ 1/2

Abstract:

Recently, a few authors have tried to link international human rights to equality and equal status in particular, and hence to fill a gap that was left open not only by human rights theorists but also by equality specialists. Neglect for that connection is attributable both to the lack of interest for international law and politics beyond domestic boundaries that has long plagued theories of egalitarianism, but also to the resilience of foundationalist and especially monist approaches to the justification of huyman rights. Even though the egalitarian dimension of international human rights has now been uncovered, more work is needed on what that normative ideal means in this context. My argument unravels in four steps. A first section presents what conception and kind of equality I have in mind. In the second section, I explain how human rights are related to equality and how human rights theory can explain that connection together with their universal justification. The third section explains what the implications are for international human rights and especially international human rights law. In a fourth section, I draw some of the implications of the egalitarian dimension of human rights to explain the relationship between international anti-discrimination rights and equality, on the one hand, and between international human rights law and equality more generally, on the other. The tensions between ideal and non-ideal political theory, on the one hand, and between international and domestic equality, on the other, that often obscure the connections between those different themes will be unpacked and made the most of in the course of the argument.

About the author:

Samantha Besson is Professor of Public International Law and European Law at the University of Fribourg (Switzerland) and Co-Director of the European Law Institute of the Universities of Bern, Fribourg and Neuchâtel (Switzerland). She holds a degree in Swiss and European Law (University of Fribourg and Vienna), a Magister Juris in European and Comparative Law (University of Oxford), a PhD in Law (University of Fribourg) and a Habilitation in Legal Theory and Swiss, Comparative, European and International Constitutional Law (University of Bern). Her publications and research interests lie in European and international law and legal and political philosophy, and in particu-

lar in human rights law and theory. Besides publications in French, she is the author of the monograph The Morality of Conflict: Reasonable Disagreement and Law (Hart Publishing: Oxford, 2005). She co-edited the collections of essays Deliberative Democracy and its Discontents (Ashgate: Aldershot, 2006) with José Luis Martí, Legal Republicanism: National and International Perspectives (Oxford University Press: Oxford 2009) with José Luis Martí and The Philosophy of International Law (Oxford University Press: Oxford, 2010) with John Tasioulas. In 2009, she started workin on a monograph on the legal theory of human rights which she plans to complete while on research leave at the Wissenschaftskolleg zu Berlin during the academic year 2011-2012.

PLENARY LECTURE

Die Erosion subjektiver Rechte als Folge der technischen Entwicklung (Patentrecht, Urheberrecht) **Erosion of subjective rights by reason of technical development (Patent, Copyright)*** Prof. Dr. Tercio Sampaio Ferraz Junior, University of São Paulo / Brazil	
Date	MON 15 Aug 2011
Time	11.30 h – 12.15 h
Location	HZ 1/2

* Note:
The Lecture will be held in German.

Abstract:

Every thing has become so intricate that for its mastery an exceptional degree of understanding is required. For it is not enough any longer to be able to play the game well; but the question is again and again: what sort of game is to be played now anyway? Wittgenstein: Vermischte Bemerkungen[1]

The reflection that I propose in this presentation has the subjective right that refers to the so-called immaterial property as its core. Without sticking to dogmatic distinctions between copyright, industrial property rights, and between the normative protections afforded to distinctively different objects such as trademarks and patents, industrial designs, trade names and artworks, what particularly interests me is the authorship phenomenon and the set of legal institutes, which in western tradition, have come to qualify the auctor as someone who holds the rights of his/her intellectual, or also called immaterial production[2].

The characterization of copyright (Urheberrecht) constitutes, for the purpose of this reflection, a rich source of doctrinal debate. New cases and the diversity of uses or forms of exploring intellectual products require constant interpretation of the rules that apply to them from doctrines and jurisprudence. More than that, given the quality of innovations as to the exploration regimes and the new forms of distribution via new media technologies, they demand reflection even regarding its nature. It is noticed that in doctrinal disputes in favor of one or another regulatory solution for a hypothetical case, the panelists start from contradictory answers about key issues such as: what is copyright? which product is protected? what is the intellectual work? what is the purpose of its protection?

The classic structure of copyright defines it as property rights, especially with regard to its economic exploitation.[3] It is property in the broad sense that the phrase acquires in the constitutional text (any property right, or product susceptible to economic valuation). In the words of Portuguese civilist José de Oliveira Ascensão, "(...) there is a specific constitutional sense of ownership; and this sense does not coincide with the property sense, real maximum right, which is regulated by the Law of Things".[4] The property, for example, referred in the Brazilian Constitution (1988), is not confined to real rights; it also covers rights relating to intangible things. And, given that incorporeity, it is understood as personal property.

In this regard, it is worth noting that Brazilian Copyright Law (Law No. 9.610/1998) provides that "copyright is reckoned, for legal purposes, as personal property" (art. 3).

It is known that the increasing use of computing and the consolidation of the world wide web, profoundly changed the possibilities of communication between individuals and private and public corporations, with consequences for the subjective right of property of the author. In fact, these changes in social relationships bring about the perception that the liberty of creating intellectual products go on to depend on possibilities of access to and control of these new technologies and the information disclosed therein.

From this perception, two topics have become essential in the so-called information networks societies: on the

1 Ludwig Wittgenstein: Culture and Value/ Vermischte Bemerkungen, ed. By Von Wright, Blackwell, 2006, MS 118 20r: 27.8.1937.

2 See K. Larenz: Allgemeiner Teil des Deutschen bürgerlichen Rechts, Beck, München, 1967, p. 299.

3 See Bittar, Carlos Alberto. Direito de Autor. 3. ed. Rio de Janeiro: Forense, 2000, p. 10-11.

4 Ascensão, José de Oliveira. Princípios constitucionais do direito de autor. Revista Brasileira de Direito Constitucional, n. 5, jan./jun. 2005, p. 434.

one hand, with respect to the disclosed information, the individual freedom before the control information and the need for the universalization of access to new information and, on the other hand, with respect to the vehicle information, how to disseminate technological knowledge and promote: both topics, relating to information policy, are closely related to the law, either as a cause for changes in the legal system, and as a result of such changes. The theme of freedom in the virtual space of the communications network[5] deserves therefore a reflection, which causes immediate repercussions on the notion of subjective rights (copyright as subjective right of an author). Anyway, the definition of the opening or enclosure of computer literacy is still done through the definition of subjective rights concerning this knowledge or the product of this knowledge, resulting, however, in significant practical problems.

In fact, as a consequence of these rapid changes in the structure of society and society's very perceptions of these changes, the understanding of the legal order that regulates it is also altered. That is, even without changing the legal order, social changes of this magnitude cause, necessarily, a reinterpretation of the existing valid order. This reinterpretation may be local, regarding a specific rule, as, for instance, the problem of determining whether a contract signed through the Internet should be considered a contract between absent parties or between present parties; or it may be global regarding the topoi that organize the legal system, such as the conceptualization of the notion of freedom within an environment of computer information.

From this perception, the topics, relating to IT policy, are closely related to disputes within the scope of legal dogmatics.

Take, for example, the intense debate over what should be the model or form of the preponderant subjective right, adopted for the use of software. The criticisms are mainly based on those who wish to break the proprietary model, which accentuates the patrimonial aspect of subjective rights.

In summary, the controversy boils down to the following. As creation, softwares are embedded in the traditional regime of intellectual property and copyright, which grants the author broad powers over his/her creation, including the power to exclude others. However, in this creation, there is a form of knowledge, which becomes inaccessible or too costly to access, when the source code is closed. This dual nature, of creation or intellectual product with a well-defined practical use on one hand and knowledge on the other hand, underlies the controversy.

The controversy faces the dogmatic use of language, which is typically legal. We are faced here with the ancient legal concept of the "nature of things". The difficulty lies in attributing the nature of res to softwares, as the legal common sense does. Treating it as knowledge or as a product means to grant it features that it would have as a substrate. However, when compared to literary works by law (Law 9609/98, art.2o), the idea of substrate proves inappropriate.

Therefore, as the literary work does not exist without a deed (or a memorized speech), but is not limited to it, it is also difficult to treat software as res.

Reflection on immateriality

The difficulty in treating software as res or even as an intangible thing or yet as an immaterial object allows for a quick semantics incursion. The Latin word materia results from the attempt of the Romans to translate the Greek hylé, which originally meant wood (timber, lumber, Holz, Bauholz)[6]. The Spanish word madera (in Portuguese: madeira) is reminiscent of that use the Latin word (materia). In reality, it referred to the wood stored in the workshops of carpenters. In that sense, something amorphous (from morphé), waiting for the form that it would be given by the carpenter. The form-matter dualism, therefore, remits to the term stuff, from the verb to stuff, as a world ("stuffed" world) that only comes to be when it becomes the filling (stuffing) of something. Hence, the material world as something that fills forms (stuffing). The corresponding word in French is farce (in German Füllsel, Füllung, in English farcing), whence the possibility of understanding the material world (stoffliche Welt) as Farce (farce)[7].

It is not my intention to enter the well-known philosophical controversies on the subject. Although, in a dangerous synthesis, it can be said that this was the original sense of the form/matter dualism that was lost with the advent of modern experimental science (experiment as the controlled observation of sensory matter: res). It is this same dualism, however, that seems to return under the impact of information technology.

I will explain.

If the known tangible universe (houses, furniture, chairs, tables, cigarettes, books, pictures, etc.) was until now the environment of our existence (Dasein), orienting oneself in the world meant to move between things, separating them, i.e. classifying them into different forms (tangible/intangible, movable/immovable, sensitive/intellective, material/immaterial, etc), projecting them in regulated spaces: mine, yours, ours, theirs.

It is precisely this environment that has been changed by this non-thing (Unding) we now call information. For the electronic images on the television screen, data stored on your computer,

5 Ferraz Jr., Tercio Sampaio. A liberdade como autonomia recíproca de acesso à informação, in: Greco, Marco Aurélio & Martins, Ives Gandra da Silva (org.). Direito e Internet: relações jurídicas na sociedade informatizada. São Paulo, 2001, S. 241-248.

6 See Heidegger: Zollikoner Seminare: Protokolle – Zwiegespräche – Briefe, Klostermann, Frankfurt am Main, 1987 (II - 3. März. 1966).

7 Vilém Flusser, Dinge und Undinge: phänomenologische Skizzen, München/Wien, Carl Hanser Verlag, 1993.

holograms and programs are so impalpable that they seem to entirely escape the possibility of being grasped (capere) with our hands even upon understanding/conceiving/grasp (conceptum/concept/Begriff). Information in terms of computers has to do with technical equipment that allow the screens to present algorithms (mathematical formulas) in the form of images, color images, moving images, even texts, textfiles (e-books) that have no matter to be put in a form (in-formed, shaped). On the contrary, it has to do with forms (numeric codes) that allow other worlds of forms to appear. This turns the criteria for distinguishing the false from the true and, consequently, the correct (righteous, gerecht) from the incorrect (unrichtig, Unrecht), the object of an entirely new task. This happens because, unlike the traditional world in which the immaterial (form) allowed the matter to appear and its adequate condition (adaequatio) was taken, commonly, as a record of fact, now we deal only with virtual worlds.

To understand this transformation, the Anthropological strength of grabbing with your hands deserves to be underlined. Thus, if the first "industrial revolution" of humanity came about with the invention of the tool as an extension of the hand (the chipped stone, the wooden staff, the arrowhead), the tool world was a device dependent (function) on humans for thousands of years. The man-tool makes himself into what he is: the Carpenter does not make tables only, but due to his activity, he becomes a carpenter. Hence, the need for ars and techné. And, for the sake of stability of the human activity in these conditions, came the need for fences around properties, for territorial boundaries around the city, for laws to govern behavior. In politics, the citizen has a "privilege" (in the social sense, not in the legal sense): he is the subject of jus civile and as such participates in the government. There is no need, per se, for an opposition between "rights." The connection of humans to their instrument (tool) is direct: disputes between private citizens do not have an original "right" as a foundation, but an insult (in a sacred sense: impurity).

The Roman vindicatio, for example, therefore is not a claiming of a thing (rei-vindicatio) in the sense of modern ownership, but a procedural status act (actio), in other words, an issue on relevance to the community of citizens (civitas) by reason of possession of land, (fundus approximately meaning, member of the community or communal, to which the Greek correspondent is kleros)[8].

With the second industrial revolution (a little over two hundred years ago), which came about with the invention of the machine, the world is changed by changing the man/extension relationship, giving rise to the factories. The world of factories is the world of the man-machine. Its existence depends on the machine as a kind of tool designed and built from a scientific theory and that gives meaning to the existence (Dasein): the man is no longer, what he does, but he does what the machine determines. To that extent, he is replaceable, works in shifts and to be what he is, he leaves home and goes towards a device (the factory) that dominates him. The relationship is reversed: Man becomes a function of the machine. Legally, what is mine and yours, theirs and ours are organized according to captured spaces, abstractly conceived under the title of property: property right. Namely, in the eyes of homo faber, the work force is only a means to produce an object for use or an object for exchange. In this society, a society dominated by the idea of exchange, the right is regarded as a good that is produced (it is manufactured). It is the identification of jus with lex. The good that is produced through the issue of standards is therefore an object of use, something that is owned, a space that is protected, acquired, which can be assigned. In short, something that has exchange value. Hence its own space: the subjective right as a realm, within the man rules independent of any others will.[9]

But the third, the current industrial revolution, is the one that involves the substitution of machinery for electronics, increasingly miniaturized into units of technological convergence. With this, the topology of the world environment is changed since the spaces of manufacture cease to be important. In its place appears a new relationship between man and world, i.e. the relationship between human being-electronic device, in which, on the one hand, the dependence relationship is reversible: man carries his device (computer, phone) wherever he goes; on the other hand, he acts only as per the capacity of its appliance. In this reversibility, its activity depends on the activity of the other in a different way: neither mechanical nor organic, but in a network. In this new way of being, the device-man (Apparatmensch) seems to live together in classical terms, not in the factory as the place of negotium (nec otium, ascholé), but to exist in a kind of school (scholé, otium) to acquire information. Homo faber is replaced by a homo ludens. He does not deal with things (res) any longer or acts with his hands (to handle). The existence (Dasein) is no longer a drama (actio) and becomes a spectacle (show).

In this new world, the computer memory is a non-thing (Unding). Not quite immaterial, because it is not really consumable. Although it exists in enclosed things (silicon chips, lasers), is not an object of use[10].

It is not at hand's reach (at hand, vorhanden), although it is available (on hand, zuhanden). What still needs to be "done", that is, what has to be apprehended and produced, is performed automatically by non-things (Unding), by programs.

In these terms, a technically sui gene-

8 Weber, Wirtschaft und Gesellschaft, Tübigen, 1976, II. Halbband, VII, § 2º.

9 Savigny, Friedrich Carl von. System des heutigen römischen Rechts, I. 1840, S. 7.

10 Flusser, Vilém. Dinge und Undinge: phänomenologische Skizzen. München; Wien, 1993.

ris relationship is inaugurated. Although the software written in natural language (source code) and software translated into machine language (object code) are equivalent in terms of computer processing to which they are addressed, they are not equivalent with regard to the information content expressed by them.[11] While the program in object code does not express any justification of the functions that the commands perform in the program, the program in natural language (source code) grants access to justification (metaprogram) insofar as it enables the understanding of each instruction and its function in the program. This, in turn, allows the programmer to understand the function of the program as a whole (metametaprogram).

As the access to source code allows an individual to control the reasons that make the program effective[12], an opportunity arises for the program to be developed as to adapt to new situations or seek a solution to new problems. This feature is relevant in view of the "defeasible" nature of the justification, in other words, new data or new practical requirements can make information content not justified.[13]

A certain effective knowledge may prove inept to explain phenomena or to produce successful results in different application contexts, so that knowledge is not a static set of information but a dynamic process of revision and improvement of such content. In other words, industrial production is converted into a complex network that makes use of information from (improperly speaking) several auctores.

Thus, there is a qualitative distinction between accessing the program only in object code and the access that includes its source code. In the first case, access to software is a simple computing solution, where the information content is accessed simply as the program's rules. In the second case, access to the software is a "metaprogram" (computer knowledge).

In this new condition, the human being is under discussion not as a persona of concrete actions, but as a performer (Spieler), which does not act, but types. What is left of his hands are just the fingers. Instead of capturing (fassen) and conceiving (auffassen), seeing (schauen) and playing (schauspielern).

Therefore, in short, let's point out the elements of the computing condition:

a) a new vehicle: computing environment (electronic device);
b) a new way of playing: digitalization;
c) a system for instantaneous and global communication;
d) a "device" human being (Apparatmensch).

Hence the following "un-thingnification" (Verundinglichung) of intellectual/immaterial creations in computer terms: bit as intangible support (according to Brazilian art. 7 of Law 9610/98).

Indeed, the notion of intangibility is inadequate, since it is built from the nuclear physical perception of reality. Properly, the bit is not the denial of the tangible (tangere as touching with your fingers). Therefore, a non-thing (Unding) is mentioned. The popularized term to express this new state or form of being is virtual. The virtual, in this new sense, is not tangible or intangible; nor does it bear reference to the mere physical possibility by some skill; virtual not as a product of virtus/virtue, but as ludic, according to a code.

Hence the problem of protecting the contents: not only intellectual creations, but also the database.

Take, for instance, the concept of reproduction. Before it was the setting in a tangible medium (print), now it is the electronic access: storage in digital form as an equivalent to reproduction.

This puts in check the storage as a temporary fix, transitory or incidental in nature. This applies, for example, to reproduction for teaching purposes. Another example is remote access as a copy (electronic processing and computer use).

Note, then, the convergence of three technical elements: digitalization, compression, virtual transmission means. Faced with the virtual world, even when using artificial storage mechanisms, comes the question of criteria for selection of information to be processed: operations are carried out in groups of human and artificial elements, whose outcome cannot be attributed to a single auctor.

Hence the problem faced today by the theory of the law (Rechtslehre): how to deal with the subjective right of the author (copyright) in the computer world?

Profile of copyright on software

I start with the software, which use can be subject to rules, that, allowing or preventing access to the source code, may define its cognitive or merely functional character. This way, the legal regime adopted defines the nature of the use of software and user interface with this intellectual/intangible product.

Initially, I use legal profile assigned by the Brazilian legislation on the rights to software and the profile defined in the Trade Related Aspects of Intellectual Property Rights-TRIP/GATT 47 to the right to software. In Brazil, as in the Berne Convention, this right is treated as copyright, being the software equivalent to literary works (Access to Information Act, Law 9609/98, art. 2). Such qualification, as copyright (the Brazilian Law of Copyright, Law 9610/98) and not of Industrial Intellectual Property (Brazilian Law 9279/96), brings an important legal consequence: what it protects is not the res, which specifies the creation, but creation itself, expressed in a certain way (artistic). It is this aesthetic sense of the work and its originality, which justify the protection of copyright through

11 Sartor, Giovanni. "Proprietà e comunione del sapere informatico". In M. Bertani (ed.) Open Source, Milano, Giuffré, 126-153. References are from the manuscript available at http://www.cirsfid.unibo.it/~sartor/GSCirsfidOnlineMaterials/GSPublications.pdf.

12 There is also reverse engineering that constitutes a inductive method of reconstruction of the program in natural language from the machine language.

13 Concerning "defeasibility" of knowledge and justification before new circumstances see Lewis, David. "Elusive Knowledge", Australasian Journal of Philosophy 74, 4 (1996), pp.549-67. See also "Widerlegung" in science as pointed by Karl Popper (Conjecturas e Refutações, Coimbra, 2003).

the assignment of rights concerning the work.[14] These rights over works (and not the works themselves) are considered personal property (Law 9610/98, art. 3).

As an expression of the intellect, the work reflects and has an intimate connection with the author's personality, hence the moral dimension of such right, protected by warranties such as: claiming authorship of the work, having the author's name announced, keeping it unpublished, opposing to changes or acts that may harm the author's reputation, withdraw the work from circulation or suspending any form of use previously permitted (Law No. 9610/98, art. 24/also Berne Convention). According to the Brazilian Law of Copyright, such rights are inalienable because they are related to the very personality of the creator (the law refers to inalienability and impossibility to renounce, art. 27). With regard to software, Law 9610/98 partially waives the author's moral rights, remaining only the right to demand the paternity of the work and that of opposing to the reproductions that offend its honor or reputation (art. 2, § 1).

On the other hand, there is the protection of property interests that the author may have with respect to his creation. That is the order of the rules that grant the author the exclusive right of use, fruition and disposal (Law 9610/98 art. 28).[15] Under the legal system, authors are granted full powers to exploit their works and dispose of their exclusive rights of use, which is incorporated by the legislation on software.

As regards such patrimonial rights, the holder of a copyright is the subject of distinct levels of rules: (i) primarily (rules of conduct) the holder of copyright holds, with exclusivity, the right to use the program, i.e., run it in a machine, copy, distribute and modify it (permission of use); (ii) secondarily (competence rules) the holder of copyright holds the power to alter the rules that define its system of use, granting these rights to third parties in the whole or in part.[16]

By legal definition adopted in Brazil (Law 9609/98, art. 1)[17], such rights concern both the source code and object code and are independent of the registration of the work (art.2, § 3).

If the copyright is exclusive to the source code and the program in natural language is the key to the justification of the program, would there be, here, an exclusive right to knowledge or the idea behind the software?

At this point, it should be noted that rights (exclusive use, copy, modification, etc.) fall back on the intellectual creation, i.e. the form of expression, not on the underlying knowledge. So that, in the field of scientific works, "... the protection will fall on literary or artistic form, not covering their scientific or technical content ..." (Law 9610/98, art. 7 § 3). There is no property rights for the knowledge involved in creating the software, once the idea is not subject to protection as copyright law (Law No. 9610/98, art. 8º, inc. I)[18]. Thus, although it is perfectly possible to implement the rule of protection to the form of expression for literary works and at the same time, allow the propagation of knowledge or culture, as a non-appropriable product, in the case of softwares, in which the language is coded for execution through a machine, copyright for the source code closes an apparent contradiction.

For example, a software can successfully solve the problem of making a robot find the exit of a room by using more than one sensor for receiving information about presence/absence of obstacles. Without access to the source code, however, knowledge can remain private to the programmer as could a particular idea of paraconsistent logic (which efficiently processes contradictory information) used as the underlying system of the programming. This knowledge, under Copyright Law, may not be appropriated (there is no ownership), but the Software Law allows it to become inaccessible to others.

The apparent conflict would be resolved when one observes that knowledge can be contained in the software itself, in the sense that only the owner has access to the justification of the program, but does not own it, i.e. you cannot market it or legally prevent it from being used by others. But the difference, therefore, is de facto not legal. If the knowledge contained in literary works is immediately disclosed and becomes common with its economic exploitation, in the case of software, that knowledge can continue to be the copyright owner's even if its use is licensed to third parties (where the license only allows for the execution of the program in object code).

Thus, any extension of rights conferred by the author on his program to a third party is relevant in determining their function (right) as a propagator of knowledge or as a simple computing solution. This power of the author to modify the legal use of software is exercised through the license agreement (Law 9609/98, art.9), by which software rights are granted to third parties (action standards, as permission of use, distribution, modification, etc).

Note that in the license agreement, the owner retains the power to change the legal status of the work, that is, unlike what happens with the intellectual property, in which the res (as if it were res: thing, Ding), once transferred, will integrate the assets of the purchaser and the licensed work continues under the

14 Bittar, Carlos Alberto. Direito de Autor, Forense, São Paulo, 3a ed. 2001, pp. 30-31.

15 For the German Law: Larenz, p. 299.

16 For a discussion of the distinction between standards of conduct and competence in subjective rights, see Alf Ross. Sobre el Derecho y la Justicia, Eudeba, Buenos Aires, 1994, p. 164 et seq. For a conceptualization of primary and secondary rules to explain the regulatory system, see Hart, The Concept of Law, Oxford, 1997, p. 79 et seq.

17 Law 9609/98, art. 1: Computer program is the expression of an organized set of instructions in natural or codified language, contained in physical support of any kind, of necessary use in automatic information processing machines, devices, instruments or peripheral equipment, based on digital analog technique, to make it function in the manner and for specific ends of 11 (not in the original underlined).

18 According to the Berne Convention, the „idea" is not subject to protection as "copyright".

purview of the author.[19] However, there is the possibility of total or partial assignment of property rights, in which case the purchaser becomes the owner of copyright (one may use, change the rules of use and oppose to use by others), incorporating its prerogatives, except for moral rights (Law9610/98, art. 49).

Legal regimes for use of the software

The existing rules on copyright laws and Software rights do not pre-determine the usage regime of the computer program, whether proprietary or free, granting, rather, the copyright holder broad disposing powers over the work. Such powers are compatible with both regimes. I thus examine some license arrangements relevant to this presentation.

Permission to use the software can only cover the execution of the program in object code, in which case the licensee does not develop any cognitive activity and only "consumes" a certain computing solution.

It may also cover the use of source code and the right to study the architecture of the program and adapt it to the needs of the licensee. In this case, the licensee acquires and is interested not only in the use of a specific solution but also in certain computing knowledge. This is the so-called open source software: free software. Remember that the subjective right rests with the object of creation, expressed in natural language, and access to knowledge is a factual result of exercising that right.

The legal regime for the assumption that free software is not limited to open source, including, besides the right to run the program and study its source code, the right to reproduce, modify and redistribute the software. These permissions to third parties, which consist of primary standards, are added to the so-called copyleft, in other words, the requirement that any derivations developed by third parties be licensed with the same rights, or what is the same thing, the prohibition of altering, in the derivations, the open use regime of the original work. Therefore, copyleft is the revocation of third party competence regarding the disposition of the derivative work.[20] This prohibition (or revocation) acts at the secondary normative level.

This possibility of revoking the powers and rights of exclusive use of the author of the derivative work on the derivation does not imply violation of the prerogatives of the authorized author? Although, admittedly, the author of the derivative work is the holder of the rights to derivation, the derivation itself depends, according to Law 9610/98, art. 29, inc. III, on prior written permission of the original work. By the argument a majore ad minus, if the originating author may prohibit the derivation, he may condition the use of the authorized derivation. Copyright, therefore, still maintains the original author's rights on the derivation. Specifically for software, bearing in mind that the moral right to revoke uses of previously authorized uses did not survive, the conditions for the use of derivative work must be present at the time of the authorization. Software Law is even clearer about the possibility of conditioning, stating that "the rights of the authorized derivations by the holder of the rights of the computer program, including its economic exploitation, will be owned by the authorized person who does so, except in contractual stipulation stating otherwise" (Law 9609/98, art. 5). Thus, the contract may "revoke" the property rights and jurisdiction of the derivative author to determine the usage regime of the derivation by agreement between original author and author of the derivation. Obviously, the author of the derivative work still maintains moral rights to claim authorship and to oppose the offensive uses of his derivation.

With copyleft, established as a condition for permission of use, the derivations eventually produced, become effectively communitarian, in the sense that everyone is allowed to use in all its forms and no one is given the power to amend such classification rules. The hypothesis of free software is significant because it thus creates an effective chain of creation and production of computer knowledge. In fact, in this chain, only the originating producer holds the power to modify the free regime of the derivations. The derivations produced by the original author himself may be appropriated, since, obviously, he does not celebrate the license and is not subject to copyleft. Therefore, it is possible to create junctions in the communitarian production chain so that the same software can be developed in the free regime and have one of its derivations appropriated by the original author, which is then distributed in the closed regime.[21]

This form of exercising the competence of modifying the software, which makes its use free turns to the dissemination of the program and the knowledge that underlies it, in terms of developing a communitarian and mutual cognitive activity. The original computing solution is thus subjected to a dynamic of adaptations and derivations, so that the underlying knowledge is constantly improved and these improvements are not owned by any user, but remain shared by the community of programmers (rather than negotium: nec otium, knowledge/school: scholé, otium).

19 Bittar, op. cit. p. 5.

20 It is, for example, the regime adopted by the GNU GPL (GNU General Public License), considered by the Free Software Foundation (FSF) as a prototype for the definition of free software. For this paper, we will consider as free the licensing that meets the FSF's definition (according to: http://www.gnu.org/philosophy/free-sw.html).

21 See Boyle, James. "The Second Enclosure Movement and the Construction of the Public Domain", available at http://www.law.duke.edu/journals/66LCPBoyle; Rifkin, J. The age of Access: How the shift from ownership to access is transforming modern life, London, Penguin, 2000; Lessig, L. Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity. New York, Penguin, 2004; Benkler, Y. "Coase's Penguin, or Linux and the nature of the firm", The Yale Law Journal, 2002. Available at: http://www.benkler.org/CoasesPenguin.PDF.

Non exclusive Exercise of the subjective right of the author

Thus, an important issue to address consists in the character of resignation or not the exclusive rights of copyright, through licensing of the software under a free regime. For the integrated cognitive activity triggered by the opening of the original software can be seen as an alternative mode of production to the model of property and market. As Yochai Benkler shows, in this alternative model, which he calls "commons-based peer-production", rather than production meaning cost to be paid by the exclusive appropriation of the benefits, the costs of hiring programmers and program testing are reduced to zero, and there is still sufficient motivation (given the large number of participants) for agents to develop the productive activity.[22]

This affects the perception of the work as a manifestation of the personality of the creator versus new technologies. Especially when the creative act is not performed by a subject/persona, but by a program (software) capable of producing another.

If the 19th Century understood the creative process as marked by the personality of the author, today, the creations require updates and upgrades, or by virtue of the interactive process (internet), or creation of derivative works (multimedia technology: text + image + drawings + sounds + photos + programs/software).

Moreover, not only man but also the machine itself "creates" works of aesthetic nature, where there is copyright without the author: who is the author? the creator of the program?

Thus, arose in place of personalization, the functional character of the work and, consequently, the depersonalization: what determines the work is not the personal authorship, but the function it exerts.

Hence, for example, the need for an effort to identify global identification systems for protected content, such as the so-called tattoo (type of mark or sign) for the opportunity to download a file.

Thus, the cultural object is not independent of the creator or those who have access to it. It is in terms of communication. Hence, its understanding as a necessarily social object. Not social in terms of individual interaction (nuclear individuals), but access communication system that only has a social purpose in order to promote virtual access to culture: as a social product, it is only in the dimension of access (to access).

This questions the concept of originality, an apparent questioning in the case of multimedia. It is not about the quality of a substance – the work – either, but a functional reference of the work, itself perceived as a function of the triad author/work/public. Hence the uniqueness of the setting, with reference to central decision of disclosing intellectual creation or not, in other words, to make it a work or not. By law, only the creator is given to start the triad, i.e., the right "to conserve the unpublished work" (mentioned in Brazilian Law, art. 24, III). Strictly speaking, however, in the functional sense, it is the creation that is unpublished. The work exists only in the relationship with the public.

This affects the notion of exclusivity: right to exclusive use versus virtual availability.

Here, the introduced communicative relationship is also regulated so as to safeguard the author against public acts, such as the right to oppose any act that may affect the integrity of the work so as to affect him in his honor or reputation (art. 24, IV). In fact, the functionalization of exclusivity makes us realize that an important rule for this communicative relationship is ensuring the later manifestations of the author, through the work, as the right to "modify the work, before or after use" (art. 24, V). However, in this relationship, the public is safeguarded as well. Thus the author's right to interrupt the communicative relationship, denying public access by "withdrawing the work from circulation or suspending any form of previously authorized use" is subject to a justification grounded in the right to honor. Or the interruption of the relationship, by the author, who has a privileged position to set forth his will univocally, in regard to the group of undefined individuals comprising the "public", will be admitted only "when circulation or use imply offense to his reputation and image" (art. 24,VI).

This last rule is clearly directed towards the protection of the right to public access to the work. This, in turn, is affected, problematically, by the concept of private use in case of downloading.

This has to do with access as a faculty to be controlled. Take, for instance, the relationship of the provider in the balance between property rights and right to public use.

With this, we notice the presence of a new key concept: access, where there is a new sense of freedom. And, consequently, a significant change in the legal perception of subjective rights.

Subjective right: conclusion.

The classic notion of subjective rights was typically built on three factors: (i) a privilege or exclusive advantage to the holder that is opposed by a duty of another or of all others; (ii) the jurisdiction or power to change this legal situation; (iii) the power to start procedures upon infringement of these rights by others.[23]

These typical traits of subjective rights are based on the notion of freedom as conceived by economic liberalism founded on free enterprise and free market and where the State played only a protective role for those freedoms. It is a common knowledge that freedom in this concept has a double meaning: of no impediment and autonomy. In a negative sense, of no impediment, freedom has a connotation of resistance, being free is to ensure a space for action that resists the free action of others. But freedom also appears

22 Benkler, Yochai, Coase's Penguin, or Linux and the nature of the firm. Yale Law Journal. Available at: http://www.benkler.org/CoasesPenguin.PDF.

23 This is a simplification according to the dominant legal theory. See Larenz, op. cit. p. 216.

in a positive sense of autonomy, of being able to determined for something and through the will use that determination valid for others.

The result of this freedom, built in the modern era, is the opening to opportunities for the individual to employ his products in the market without external constraints. In fact, this freedom is exercised through the property and rights to such property, hence the notion of privilege or advantage (i). Hence, also, the State's protection against violations of these privileges, through the initiation of certain procedures (ii). Autonomy is institutionalized in the figure of the contract, which is reflected in the construction of the subjective right as the power of disposition of the rights (iii).

This still usual dogmatic construction of subjective rights is guided by rules that assign duties and competences to individuals. But we must bear in mind that this constitutes a construction, and it instrumentalizes these rules. It is not easy in the current context, to argue that the subjective right constitutes an entity or substrate distinct from the rules, or that it contains the essence that would comprise those three hallmarks.

Thus, the typical notion of subjective right meets a certain conception of freedom, which obviously endured and continues to endure mutations. With these mutations, the legal order or the interpretation of the legal order changes, which allows for a reinterpretation of the very notion of subjective right with the underlying conception of freedom as a common place (topos) that guides this interpretation.[24] Thus, there is hardly a substantial unity of subjective rights, but legal situations in which the set of applicable rules allows for talk about subjective rights with their typical or atypical features, with respect to its construction in the modern era.[25]

In the scope of the information society, the classic notion of freedom as a space for action not restricted by the freedom of others, which manifests itself on products whose use excludes the use of others, tends to suffer revision. As a matter of fact, it throws us onto a limit of abstraction, whose concept seems to go beyond an atypical alternative use. In the computing field, in the absence of physical limitation, we deal with property (information and knowledge), whose use by one does not exclude use by others. In fact, it comes to be conceptually impossible to define that "one". Not even as a "collective subject". That is, the space of action may continue to be free regardless of the action of others. More than that, in this sphere, the action space for the subject is relevant in that it allows for communication with others. Cyberspace[26], for example, is only built as each space of action for each subject is designed to communicate with the others, without which the environment itself becomes meaningless.

24 For an analysis of the historical evolution of the concept of freedom and subjective right, see Ferraz Junior, Tercio Sampaio. Direito e Liberdade, in Estudos de Filosofia do Direito, Atlas, 2nd ed. 2003, pp. 75 to 132.

25 According to Alf Ross, op. cit. p. 172 et seq.

26 Essa expressão apareceu pela primeira vez num livro de ficção científica de William Gibson. It is not quite "space" as res materialis or even immaterialis. Although it does not remove us from the space in which we live, culturally it overcomes it (aufhebt).

We experience, of course, several uses for the word space: geographical or territorial, space in the sense of physics, space as social, religious environment, regulating space (e.g.: domicile as opposed to residence, jurisdiction), political space (nationality). In common usage, these uses interact, which allows us to deal with the spaces through categories. The so-called cyberspace, in this context, seems to release us from the territorial bonds, of regulatory jurisdictions or policies (rechtsfreier Raum), the finiteness of a place, when casting us in the virtual ubiquity, which affects time in terms of simultaneity/speed. This causes legal negotiations (Rechtsgeschäfte) to be made without simultaneous physical presence and yet with simultaneous confirmatory wills: speedier and speedier webs the spider its spider web around the world [27].

From this perception of change in the conception of freedom in the computing field, whose exercise takes place in a relationship of reciprocity, Wolfgang Hoffmann-Riem argues that "the right to informational self-determination is, therefore, not a privatistic defense right of the individual who opposes part of society, but aims to allow each one to participate in communication processes. Others [human beings] are the social context in which the limits of each one's personality expands: autonomy, rather than anomie, of the individual is the directing image of the Constitution. Autonomy should be possible in vital spaces that are socially connected, where freedom of communication – or better: common freedom cannot be oriented to a limiting concept of protection to egocentric expansion, but should be understood as the exercise of freedom in reciprocity. This freedom is not to be free of others, but freedom through others."[28]

In fact, one can go further, because this way, it changes the ancient principle that human dignity is focused on individual freedom and one's freedom ends where another's freedom begins. Indeed, the environment where communication and reciprocity are means for individual achievement, dignity focuses on living in open communication with each other. And here we speak of "means" not as a "tool" but as "environment". Thus, freedom in the information society could be well captured by the phrase "one's freedom begins where the freedom of others begins."[29] Based on this freedom, the lawful subject is thought not as an agent that dominates the computing products, but as an agent that communicates in the midst of such property. While the explo-

27 Immer schneller webt die Spinne ihr Netz um die Welt. Süddeutsche Zeitung (18.07.1995), cited by Flechsig, Norbert in Rechtsprobleme internationaler Datennetze, Becker, Jürgen (org.), Nomos, Baden-Baden, 1996, p. 57.

28 Wolfgang Hoffmann-Riem. Rechtliche Rahmenbedingungen in Der neue Datenschutz Helmut Bäumler (org.) Neuwied/Kriftel, Luchterhand, 1998, p. 13.

29 Ferraz Junior, Tercio Sampaio, A liberdade como autonomia recíproca de acesso à informação, in Direito e Internet, RT, São Paulo, 2001, pp. 241-247.

ration of the manufactured property (the machine world) is exercised with the exclusion of others, the retribution due to the recognition of the value of digital authorship is not exercised with the exclusion of the public, but begins with it and assumes it.

For example: take a form, any linkable numerical algorithm; introduce this form, through a computer, in a plotter, fill this form as much as possible with particles, and observe: "worlds" will emerge.

But with one important difference.

In the digital world, the intellectual or cultural or immaterial product, whatever it may be called, ceases to be the result of a process in which what is given (Gegebenes) is converted into something that is made (Gemachtes). In this process, human activity diverts (entwendet) something (Gegebenes) from its natural course, to convert it (umwenden) into something manufactured (Gemachtes), to give it applicability (anwenden) in a market of exchanges (object of exchange) and use it (verwenden) as its own (object of use). In the digital process, it is just a spin (wenden) of one (pro)gram into another (pro)gram.

Observe again, for example, the so- called "free" exploration of the software. In the relationship established by the free software license, all licensees, patients of the exercise of their right to exploit the work, are also agents in the sense that they consume the computing solution and at the same time, at least potentially, produce it and make it circulate. Moreover, to any member of the chain of licenses it is possible to seek judicial protection against violations of those rights, in other words, for the protection of this reciprocal freedom. The violation occurs precisely in the attempt to appropriate, i.e. the exclusion of agents members of this free activity. These rules give the subjective right a distinct configuration from the classic: the author does not lose the advantage of using the product, but this advantage is no longer a privilege that excludes the other, to include it.[30]

The third revolution, the digital revolution, thus seems to be destroying the old public space. Ortega y Gasset[31] has been overcome: In the current revolution of the masses – which occurs now – the circumstance becomes ego and the ego becomes circumstance.

With the substitution of writing by digits, the world of images replaces the world of concepts; the public space of the right becomes the space of appearance in a new sense: show, spectacle. Indeed, instead of reading, roaming.[32]

30 Although there is the possibility of privatistic (exclusive) exploration, this is not the only way to benefit from intellectual creation. The benefit may be granted by the very interaction of an undetermined number of programmers who can enhance the creation, testing the work and developing it to solve new problems and adapt the original program to new requirements. In turn, this communication and the spread of use of software to create conditions for that computing knowledge to be standardized, which could mean a gain for the creator as it dominates the standardized technology.

31 La rebelión de las masas, in Obras Completas, II vol., Madrid, 1947, p. 19 (yo soy yo y mis circunstancias)

32 Take, for example, the preservation of the activity of informing, representing and negotiating, which in good faith, justifies in a democracy, the existence of certain limits (rights)

In conclusion: for Helmut Coing, in the early 60's (1962), the concept of subjective right, even if not for everything, seemed essential for a scientific understanding (Erfassung) of private law. Accordingly, it still seemed to be essential to determine to whom the utility (Nutzung) and the power to dispose (Verfügungsgewalt) of a specific legal position (Rechtsposition) would be transferred (übertragen) to define who is a legitimate part (wer zum Rechtsschutz berechtigt ist), in other words, to whom the right (wem das Recht zusteht) belongs to, above all to serve to maintain each one's freedom (Freiheit des einzelnen) in society[33].

Subjective rights are emerged and developed in a structural conception of law as a concatenated system of concepts, In the computer world where the sense of communitarian relations is inherent, its concept seems to slightly slip into the sense of subjective legal situation (Duguit)[34] and from there to precarious positions that homo ludens occupies in the network, more in the direction of a functional conception (Bobbio)[35]. This happens, however, in a truly disturbing manner. For, in a world where the amount of information is highly complex, the capacity of an individual memory overcomes the subjective situation, hence the problem of selecting information and the necessary actions in groups composed of human and artificial elements.

That is, the cultural revolution brought by the digital world makes us realize that, slowly, old and firm notions, such as subjective rights, in addition to no longer being "the central concept of private law" (der zentrale Begriff des Privatsrechts – von Tuhr: 1910 – apud Coing), is no longer able to handle this disintegration into pieces (bits) of the complete structure of things. For the cultural and, to that extent, the legal revolution, which enables us to build alternative and parallel universes to the supposedly given world (Gegebenes), converts the sub-jecti – single individuals – in pro-jecti of several worlds.

for full immediacy of the transparency of diplomatic activity, as shown by Celso Lafer in his paper Vazamentos, sigilo, diplomacia: a propósito do significado do WikiLeaks, in Política Externa, vol. 19, nº 4, mar/abr/maio, São Paulo, 2011, p. 12: "The great sea of information leaked by WikiLeaks has been revealing more or less questionable conduct. (...) The scandal, in addition to being a part of the political battle may also provide entertainment and trivialization of what is discussed in public spaces, generating, in the words of Mario Vargas Llosa, an "informative exhibitionism" that, besides questioning the dominance of the private, hinders the good functioning of democratic institutions. I would therefore say, in conclusion, that the WikiLeaks phenomenon is primarily a precedent that, facilitated by the Digital Revolution, manufactured a type of risk that undermines the fullness of the activity of informing, negotiating and representing the diplomatic function. I believe that not even human beings, in their unique individuality, or the institutionalized diplomatic activity can support, with ease, the daily immediacy of the lights of full transparency".

33 Zur Geschichte des Privatrechtssytems Frankfurt a/Main, 1962, p. 54.

34 Traité de Droit Constitutionel, 3º Ed., tome I, p. 307 et seq.

35 Dalla struttura alla funzioni, Milano, Edizone di Comunità, 1977.

About the author:

Prof. Dr. Tercio Sampaio Ferraz Junior

Born in São Paulo, Brazil, on July 2nd, 1941.

- PhD in Philosophy at Johannes Gutenberg-Universität of Mainz (1968)
- PhD in Law at University of São Paulo (1970)
- Privatdocent at University of São Paulo (1974)
- Full Professor at University of São Paulo (1979)

Major publications:

- Die Zweidimensionalität des Rechts als Voraussetzung für den Methodendualismus von Emil Lask", Anton Hain Verlag, Meisenheim/Glan, 1970;
- „Direito, Retórica e Comunicação", São Paulo, Editora Saraiva, 1973;
- „Conceito de Sistema no Direito", São Paulo, Editora Revista dos Tribunais/ EDUSP, 1976;
- „Teoria da Norma Jurídica", Rio de Janeiro, Editora Forense, 1978;
- „Democracia e Participação", Brasília, Editora Universidade de Brasília, 1979;
- „A Ciência do Direito", São Paulo, Editora Atlas, 2ª edição, 1980;
- „Constituinte - Assembléia, processo, Poder", São Paulo, Editora Revista dos Tribunais, 2ª edição, 1986;
- „Interpretação e Estudos da Constituição de 1988", São Paulo, Editora Atlas, 1990;
- „Função Social da Dogmática Jurídica", São Paulo, Editora Revista dos Tribunais, 1998;
- "Estudos de Filosofia do Direito", São Paulo, Editora Atlas, 2002;
- "A Invenção do Futuro – Um debate sobre a pós-modernidade e a hipermodernidade", São Paulo, Editora Manole, 2005;
- "Direito Constitucional", São Paulo, Editora Manole, 2007;
- "Poder Econômico", São Paulo, Editora Manole, 2008;
- "Introducción al estudio del Derecho", Madrid, Marcial Pons Ediciones Jurídicas y Sociales, 2009;
- "Introdução ao Estudo do Direito: Técnica, Decisão, Dominação", São Paulo, Editora Atlas, 6ª edição, 2010.

PLENARY LECTURE

Unviolability as a Legal Concept Prof. Dr. Klaus Günther, Goethe University, Frankfurt/Main	
Date	TUE 16 Aug 2011
Time	9.30 h – 10.15 h
Location	HZ 1/2

Abstract:

Science and technology have increased the power of humankind to intervene in nature and to subdue nature to the intentions and purposes of human beings. Francis Bacon`s famous equation of scientific knowledge with power has become a central part of the self-understanding of modern societies. Hand in hand with the process of increasing power over nature goes the experience of new risks and dangers for human life resulting from the use and abuse of this power. The examples range from railway accidents in the 19th century to the risks and damages caused by nuclear energy nowadays. As far as human life and body are concerned, civil law and public law developed new instruments to deal with these cases of accidents. What these examples have in common is that nobody challenged the practice of human intervention in nature itself, only dangerous consequences of the scientific and technological use of nature are subjected to legal regulation. Only recently this picture has changed. Science and technology today provide us with a new kind of power – with the power to intervene in human nature. Of course, human beings always had the ability to gain and to use knowledge about human nature in order to save them from illness and the danger of death. But today we are confronted with the possibility to change human nature by enhancing human biology, e.g. by genetic engineering or neurological enhancement. With regard to this new kind of power, we do not only ask whether and how we should protect human beings from harmful consequences for life and body, but also whether we should permit or prohibit the use of this power at all. The question is raised whether persons have a right to do what they want with their own nature (and the nature of their descendants). That human nature is "inviolable" or not at one´s discretion, has already been debated with regard to abortion or to mercy killing. The legal concept of "inviolability" has its origin in a somewhat different context – the idea that fundamental human rights and human dignity are inalienable with regard to the state and its monopoly of power by which it can intervene in and dispose of the rights. Today the discussion focuses on the question whether persons should be prohibited to dispose of their rights and their dignity at their own discretion.
As a legal concept, "inviolability" (or inalienabilty) is paradoxical at first glance. It is a common experience that human nature as well as human rights and human dignity are and can be violated. It happens every day. If one reads it not as a statement of fact but as a prohibition, the question is whether this concept adds anything to the standard instruments of legal protection against violations of rights and dignity. With regard to interventions in human nature this questions becomes even more severe, because we do not only deal with cases of third party violations but of voluntary interventions of the legal subject in its own nature. "Inviolability" then could mean that there might be a limitation of human inter-

* Professor of Philosophy and Pete Kameron Professor of Law and Social Justice, UCLA. For enlightening criticism and commentary, I am grateful to Mark Greenberg, Jeffrey Helmreich, Barbara Herman, Heidi Kitrosser, Terry Stedman, participants in the Columbia Legal Theory Workshop, the Princeton Program in Ethics and Public Affairs and my free speech seminars at UCLA, and, of course, the members of the free speech discussion group from which this paper originates, especially Ed Baker and Steve Shiffrin. Terry Stedman also provided invaluable research assistance.

vention inherent in human nature itself. But what could that mean if one does not refer to theological or metaphysical assumptions (e.g. the argument that human life is donated to us by God)? And what could that mean in a legal context?

About the author:

Klaus Günther, born in 1957, Professor of Legal Theory, Criminal Law and Criminal Procedure at Goethe University of Frankfurt Faculty of Law (1998-); Co-Speaker Cluster of Excellence EXC 243 Formation of Normative Orders at Goethe University (2007-); Member of Board of Directors Institute of Social Research (IfS) Frankfurt; Member of Board of Directors Institute of Advanced Study in the Humanities (Forschungskolleg Humanwissenschaften) Bad Homburg v.d.H. (2006-); studied Philosophy and Law in Frankfurt, First Law Degree Frankfurt 1983; Dr. jur Frankfurt 1987; Habilitation Criminal Law and Philosophy of Law Frankfurt 1997; Fellow Institute of Advanced Study (Wissenschaftskolleg) Berlin 1995/96; Visiting Professor SUNY at Buffalo (2000), Corpus Christi College Oxford (2001), Maison des Sciences de l`Homme Paris (2003).

PLENARY LECTURE

A Thinker-Based Approach To Freedom Of Speech Prof. Dr. Seana Valentine Shiffrin, University of California, Los Angeles / USA*	
Date	TUE 16 Aug 2011
Time	11.30 h – 12.15 h
Location	HZ 1/2

Abstract:

Introduction

Many contemporary autonomy theories of freedom of speech champion the perspective and freedom of just one side of the communicative relation – usually, the speaker or the listener(s). Such approaches seem to neglect or subordinate the autonomy interests of the other relevant parties. Other autonomy theories do not privilege one perspective on the communicative relation over another, but strangely treat the speakers' interests and the listeners' autonomy interests as rather discrete entities – disparate constituents both demanding our attention. Both strands gloss over a source of justification for free speech that both connects the two perspectives and recognizes the wider foundations that underpin their value (by contrast with the more narrow connections drawn between them by democracy theories). Specifically, both approaches celebrate one or more external manifestations of thought but do not focus on the source of speech and cognition – namely the thinker herself – and the conditions necessary for freedom of thought. I submit that a more plausible autonomy theory of freedom of speech arises from taking the free thinker as the central figure in a free speech theory and that we should understand freedom of speech as, centrally, protecting freedom of thought.

Hence, I propose to sketch a particular sort of autonomy theory of freedom of speech, namely a thinker-based foundation for freedom of speech. Although this account does not capture all of the values of freedom of speech or yield a comprehensive theory of freedom of speech, a thinker-based foundation can provide a stronger and more coherent foundation for the most important free speech protections than rival free speech theories, including the more common speaker-based or listener-based autonomy theories.[1]

In saying a thinker-based foundation undergirds the most important free speech protections, I mean 'most important' in a normative sense, and not in the sense that they are necessarily acknowledged as such, or at all, in contemporary free speech doctrine.[2] My paper aims to identify strong theoretical foundations for the protection of free speech but not to provide the best theoretical account of our system or our current practices of protecting (or failing to protect, as the case may be)[3] free speech. Articulating a theory of free speech along the former, more ideal lines, provides us with a framework to assess whether our current practices are justified or not, as well as which ones are outliers. An ideal theoretical ap-

1. I have explored some aspects of a thinker-based approach in prior work. Vincent Blasi & Seana V. Shiffrin, The Story of West Virginia Board of Education v. Barnette, in Constitutional Law Stories 433 (Michael Dorf ed., 2d ed. 2009); Seana Valentine Shiffrin, What is Really Wrong with Compelled Association?, 99 Nw. U. L. Rev. 839 (2005). I do not mean to represent Vince as endorsing the general thinker-oriented approach I outline above, however. Some other authors have explored aspects of thinker-based approaches as well, although from different angles and with different emphases. See, e.g., Charles Fried, Modern Liberty 95–123 (2007); Timothy Macklem, Independence of Mind 1–32 (2006); Susan Williams, Truth, Autonomy, and Speech: Feminist Theory and the First Amendment 130–229 (2004); Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225 (1992); Dana Remus Irwin, Freedom of Thought: The First Amendment and the Scientific Method, 2005 Wis. L. Rev. 1479; Neil M. Richards, Intellectual Privacy, 87 Tex. L. Rev. 387 (2008); Christina E. Wells, Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence, 32 Harv. C.R.-C.L. L. Rev. 159 (1997). Although Ed Baker's writing often suggests a speaker-based approach, in email correspondence about a draft of this paper he indicated that his true sympathies lay with a thinker-based approach. E-mail from Ed Baker to Seana Shiffrin (Feb. 13, 2009) (on file with author).

2. Seana Valentine Shiffrin, Methodology in Free Speech Theory, 97 Va. L. Rev. (forthcoming 2011) (defending a normative approach to free speech theory that does not take explanation of extant doctrine as foundational).

3. One free speech howler from the most recent term around which I would not care to tailor a free speech theory is Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730–31 (2010) (upholding Congressional prohibition of assistance to designated terrorist organizations, including its application to mere speech that provides advice on how to petition the U.N. or how to use legal means to resolve conflicts peacefully).

proach also supplies both a measure for reform and some structural components to form the framework to assess new sorts of cases.

Which freedom of speech protections figure among the most important is, of course, contested. My position in that contest is that a decent regime of freedom of speech must provide a principled and strong form of protection for political speech and, in particular, for incendiary speech and other forms of dissent, for religious speech, for fiction, art – whether abstract or representational – and music, for diaries and other forms of discourse meant primarily for self-consumption, and for that private speech and discourse, e.g. personal conversations and letters, crucial to developing, pursuing, and maintaining personal relationships.[4] Further, all of these forms of expression should enjoy foundational protection, by which I mean there should not be a lexical hierarchy of value between them, nor should the protections for some depend dominantly on their playing an instrumental role in securing the conditions for the flourishing practice of another. To put it more pointedly, an adequate free speech theory will avoid the convolutions associated with the more narrow democracy theories of freedom of speech and their efforts to explain why abstract art and music should gain free speech protection. Although a case could be made that the freedom to compose and to listen to Stravinsky is important to developing the sort of open personal and cultural character necessary for democracy to flourish or that it feeds the "sociological structure that is prerequisite for the formation of public opinion,"[5] that justification is strained and bizarrely indirect.[6] In any case, the right of Stravinsky to compose and of audiences to listen (or to cringe in non-comprehension) should not depend upon whether The Rite of Spring breeds democrats or fascists, or whether it supports, detracts from, or is superfluous to a democratic culture.[7]

A good free speech theory should identify a non-contingent and direct foundation for its protection. On the other hand, protection for commercial and non-press, business corporate speech is a less central matter, one that reasonably may involve weaker protections and may reasonably rely heavily on more instrumental concerns. A good free speech theory should explain why commercial and business corporate speech may be different and why arguing for their protection may be a less straightforward matter.

Briefly put, I believe these desiderata are best satisfied by a thinker-based free speech theory that takes to be central the individual agent's interest in the protection of the free development and operation of her mind. Legal materials (by which I mean to encompass laws, regulations, court rulings, and resolutions) and government activity inconsistent with valuing this protection are inconsistent with a commitment to freedom of speech. In my view, legal materials or activity may be inconsistent with valuing this protection in three main ways: (1) the legal materials or the government ac-

4. These are, of course, theoretically informed, provisional starting points that strike me as highly intuitive, secure, illuminating, and important lodestars. Nonetheless, if a plausible theory cannot be found that supports and explains these judgments or if a more plausible theory would reject them for good reason, these judgments should be revised or discarded. That is, I regard their identification as just an early step in a process aimed at achieving reflective equilibrium and not as fixed or immutable 'results' that must be accommodated, no matter what the other theoretical costs. See John Rawls, A Theory of Justice 17–21, 46–53 (Original ed. 1971) (discussing reflective equilibrium). Further, the argument that follows does not, largely, use these starting points as premises. So, subscription to these starting points is not a precondition for the argument's success; it is merely that their accommodation and explanation seems to be desiderata of a satisfactory theory.

5. See Robert Post, Participatory Democracy and Free Speech, 97 Va. L. Rev. X, 10 (forthcoming 2011).

6. Jim Weinstein offers a refreshingly candid admission of this difficulty. James Weinsten, Participatory Democracy as the Central Value of American Free Speech Doctrine, 97 Va. L. Rev. (forthcoming 2011). No more successful is the argument that democracy theories will protect the arts because to understand one another and to form a conception about what should be a public matter, we must have access to the forms of expression others engage in and deem important. See, e.g., Robert Post, Participatory Democracy and Free Speech, 97 Va. L. Rev. (forthcoming 2011) ("So long as Brokeback Mountain, and indeed all forms of communication that sociologically we recognize as art, form part of the process by which society ponders what it believes and thinks, it is protected under a theory of the First Amendment that stresses democratic participation.") This justification is circuitous. It is parasitic upon others' developing the art form (which now we must have access to in order to understand them and their preferences) but either: does not provide foundational support for their freedom to develop it, or if it does, the argument lacks a fundamentally and specifically democratic form that is independent of and logically prior to an appeal to the interests of the autonomous thinker.

7. Joshua Cohen offers a far less narrow democratic account of free expression, one grounded in his deliberative democratic approach. His approach shows sensitivity to the interests of the citizen qua thinker and his approach provides a more plausible grounding for art, religious speech, erotic speech, and other forms of speech that are not explicitly or even indirectly political. Joshua Cohen, Freedom of Expression, 22 Phil. & Pub. Aff. 207 (1993), reprinted in Joshua Cohen, Philosophy, Politics, Democracy 98, 114–20 (2009); Joshua Cohen, Democracy and Liberty, in Deliberative Democracy 185 (Jon Elster ed., 1998), reprinted in Philosophy, Politics, Democracy, supra at 223, 248–54; Joshua Cohen, Deliberation and Democratic Legitimacy, in Deliberative Democracy 67 (James Bohman & William Rehg eds., 1997), reprinted in Philosophy, Politics, Democracy, supra at 16, 32–34 (2009).
Although our approaches are fairly congenial, Cohen's case for rights of personal, non-political expression is usually voiced in terms of what the citizen "reasonably takes to be compelling considerations" or "substantial reasons" for expression (emphasis added). See, e.g., Cohen, Freedom of Expression, supra at 115–17; Cohen, Democracy and Liberty, supra at 248–50. By contrast, I find unnecessary and over-demanding his stress upon agents' having substantial, compelling or obligatory reasons for their particular expression. Putting aside the peculiarly intense drive of the single-minded artist, many citizens' reasons for most of their speech, including a variety of images, melodies, artistic or quotidian thoughts, lack that charge. Nonetheless, in my view, they present no weaker of a case for protection. My aim is to develop an approach that does not rely on the idea that particular, personal expression is protected because its expression reasonably presents itself as akin to, or on a spectrum with, felt obligations of the speaker, interference of which would be unreasonable by the polity, but rather, an approach that is fully consistent with the admission that much personal and artistic speech is banal and unimportant in the grand scheme of things. A broader focus on the condition of the thinker, rather than on the (perceived) significance of the expression, seems better able to satisfy that desideratum.

tivity may, on their face, ban or attempt to ban the free development and operation of a person's mind or those activities or materials necessary for its free development and operation; (2) the effect of the legal materials, or of the activity, may objectionably interfere with the free development and operation of a person's mind; (3) the rationale for the materials, or the activity, may be inconsistent with valuing this protection.[8]

In developing this position I will proceed from the assumption that, for the most part, we are individual human agents with significant (though importantly imperfect) rational capacities, emotional capacities, perceptual capacities and capacities of sentience – all of which exert influence upon each other.[9] I will also assume that our possession and exercise of these capacities correctly constitute the core of what we value about ourselves.

I will not say much to defend these assumptions. I do not regard them as especially controversial. Indeed, many popular theories of freedom of speech only make sense if the individual mind and the autonomy of its operation (a notion I will say more about below) are valued and treated with respect. If we did not regard the autonomy of the individual mind as important, it is hard to see why we would value its expression or outputs in the way and to the degree that truth theories or democratic theories value speech. The same holds true of speaker-based and listener-based theories.[10] Still, each theory shares the presupposition that the autonomous thinker fundamentally matters, speaker, listener, and democracies theories start from an intermediate point and hone in on one activity of the thinker, rather than on the thinker herself. Reasoning from the standpoint of the thinker and her interests can yield a more comprehensive, unified foundation for much of the freedom of speech protection than is yielded by starting from a more partial intermediate point.

My aim in what follows is to show the supportive connection between valuing ourselves as so described and: (1) valuing speech; (2) valuing freedom of speech; (3) regarding speech as, in some politically and legally normative respects, special. With respect to this last item, contra Fred Schauer, I deny that an autonomy theory of free speech must show that speech is special or unique with respect to its relation to autonomy, in order to justify strong protections for freedom of speech. It may succeed at that justificatory project while articulating values that cast a broader net encompassing other forms of autonomous activity.[11] Indeed, I regard it as a general strength of autonomy theories that they explain the continuity between speech protections and rights of intimate association. But, although the plausibility of a theory of strong protections for freedom of speech does not depend upon its showing that speech is special, nonetheless, I do think speech occupies a special place in the life and politically germane needs of the autonomous thinker. It is worth showing how it is both special and, at the same time, how it connects to other autonomy interests.

Autonomous Agents And Freedom Of Speech

Having stated my aspirations, let me move on to the argument. I begin with an explicit, albeit perhaps partial, elaboration of the interests of autonomous thinkers.

If we do value ourselves as rational agents with the capacities previously described, then I submit we should recognize a more articulated (though sometimes overlapping) list of interests that emerge from our possession of these valuable capacities.

Namely, every individual, rational, human agent qua thinker has interests in:

a. A capacity for practical and theoretical thought.

Each agent has an interest in developing her mental capacities to be receptive of, appreciative of, and responsive to reasons and facts in practical and theoretical thought, i.e. to be aware of and appropriately responsive to the true, the false, and the unknown.

b. Apprehending the true.

Each agent has an interest in believing and understanding true things about herself, including the contents of her mind, and the features and forces of the environment from which she emerges and in which she interacts.

c. Exercising the imagination.

Rational agents also have interests in understanding and intellectually exploring non-existent possible and impossible environments. Such mental activities allow agents the ability to conceive of the future and what could be. Further, the ability to explore the non-existent and impossible provides an opportunity for the

8. See also Seana Valentine Shiffrin, Speech, Death and Double Effect, 78 N.Y.U. L. Rev. 1135, 1164–71 (2003).

9. In some of us, these capacities are fledgling, partial, or compromised. Nonetheless, agents with them have an interest in their development and operation. Although the degree of development and future potential may make some difference in some cases and contexts, I do not think that, at base, a free speech theory delivers fundamentally different results depending upon whether we are discussing children, the mentally disabled, those suffering dementia, or fully formed adults. The most salient context in which degree of development might be thought normatively to make a difference, the schoolroom, seems better explained by reference to time, place, and manner restrictions than to the developmental level of children. This, of course, is a normative claim and one that does not entirely square with doctrinal developments over the last twenty years. For discussions of children and the First Amendment see Blasi & Shiffrin, supra note 1; Colin M. Macleod, A Liberal Theory of Freedom of Expression for Children, 79 Chi.-Kent L. Rev. 55 (2004.) See generally Symposium, Do Children Have the Same First Amendment Rights as Adults?, 79 Chi.-Kent L. Rev. 3 (2004).

10. Some purely instrumental theories of freedom of speech that focus on the importance of controlling the excesses of state authority may differ on this point.

11. Frederick Schauer, Must Speech Be Special?, 78 Nw. U. L. Rev. 1284 (1984). Some of Post's criticisms of autonomy theories of freedom of speech appear to be versions of the complaint that such theories cannot explain why speech is special. See Post, supra note 5, at 3–4, 12.

exercise of the philosophical capacities and the other parts of the imagination.[12]

d. Becoming a distinctive individual.
Each agent has an interest in developing a personality and engaging more broadly in a mental life that, while responsive to reasons and facts, is distinguished from others' personalities by individuating features, emotions, reactions, traits, thoughts, and experiences that contribute to a distinctive perspective that embodies and represents each individual's separateness as a person.

e. Moral agency.
Each agent has an interest in acquiring the relevant knowledge base and character traits as well as forming the relevant thoughts and intentions to comply with the requirements of morality. (This interest, of course, may already be contained in the previously articulated interests in developing the capacity for practical and theoretical thought, apprehending the true, and exercising the imagination (a-c)).

f. Responding authentically.
Each agent has an interest in pursuing (a-e) through processes that represent free and authentic forms of internal creation and recognition. By this, I mean roughly that rational agents have an interest in forming thoughts, beliefs, practical judgments, intentions and other mental contents on the basis of reasons, perceptions, and reactions through processes that, in the main and over the long term, are independent of distortive influences. So too they have an interest in revealing and sharing these mental contents at their discretion, i.e. at the time at which those contents seem to them correct, apt, or representative of themselves as well to those to whom (and at that time) such revelations and the relationship they forge seem appropriate or desirable. This is the intellectual aspect of being an autonomous agent. In saying these processes are independent of distortive influences, I mean they do not follow a trajectory fully or largely scripted by forces external to the person that are distinct from the reasons and other features of the world to which she is responding.

g. Living among others.
Each rational, human agent has an interest in living among other social, autonomous agents who have the opportunities to develop their capacities in like ways. Satisfaction of this interest does not merely serve natural desires for companionship but crucially enables other interests qua thinker to be achieved, including the development and recognition of a distinctive self and character, the acquisition and confirmation of knowledge, and the development and exercise of moral agency.

h. Appropriate recognition and treatment.
Each agent has an interst in being recognized by other agents for the person she is and having others treat her morally well.

This list may not be exhaustive, but I believe it identifies some of the more foundational and central interests that agents have, independent of their specific projects, interests, and desires, but just in virtue of their capacities for thought, broadly understood to include autonomous deliberation and reactions, practical judgment, and moral relations. Briefly summarized, these are interests in self-development, self-knowledge, knowledge of others, others' knowledge of and respect for oneself, knowledge of the environments in which they interact, opportunities for the exercise of one's intellectual capacities including the imagination, and the intellectual prerequisites of moral relations.[13]

Speech, and free speech in particular, are necessary conditions of the realization of these interests. First, given the opacity of our minds to one another, speech and expression are the only precise avenues by which one can be known as the individual one is by others. If what makes one a distinctive individual qua person is largely a matter of the contents of one's mind,[14] to be known by others requires the ability to transmit the contents of one's mind to others. Although some information about one's thoughts and beliefs may be gleaned from observation, such inferences are typically coarse-grained at best and cannot track the detail and nuance of the inner life of the observed. Communication of the contents of one's mind primarily through linguistic means, but also through pictorial, or even musical representation, uniquely furthers the interest in being known by others. It thereby also makes possible complex forms of social life. [15] Further, it helps to develop some of the capaci-

12. See Jed Rubenfeld, The Freedom of Imagination: Copyright's Constitutionality, 112 Yale L.J. 1, 38–39 (2002).

13. In other work, I have argued that it is a mandatory, central (and fully liberal) aim of law to accommodate and facilitate individuals' ability to engage in moral agency. See Seana Valentine Shiffrin, Inducing Moral Deliberation: On the Occasional Virtues of Fog, 123 Harv. L. Rev. 1214, 1222–29 (2010); Seana Valentine Shiffrin, The Divergence of Contract and Promise, 120 Harv. L. Rev. 708, 713–19 (2007). Although I have mainly focused on other legal contexts of moral accommodation and facilitation, free speech protections may represent the most important legal context for the legal support of agents' moral capacities. See also Seana Valentine Shiffrin, Compelled Association, Morality, and Market Dynamics, 41 Loy. L.A. L. Rev. 317, 324–26 (2007).

14. I do not mean what individuates one as a creature. In that respect, physical features including one's genetic composition and perhaps other physical, non-mental facts may be important.

15. This consideration figured large among the motivations behind Kant's views about truthfulness and lying. See Immanuel Kant, Of Ethical Duties Towards Others, and Especially Truthfulness, in Lectures on Ethics 200–209 (Peter Heath & J.B. Schneewind eds., trans. Peter Heath, 1997). Of course, individuals may not fully know themselves and, further, may be self-deceived. Hence, they may not be fully equipped to share all of the contents of their minds with others and to enable others fully to know themselves directly through testimony. This does not diminish my point. Even when people are self-deceived, what they take to be their beliefs, emotions and other mental contents is an important aspect of who they are; further, sharing these contents with others and confronting the reactions of others and their observations of one's contrary behavior is often crucial to resolving and eliminating self-ignorance and self-deception.

ties prerequisite to moral agency because successful communication demands having a sense of what others are in a position to know and understand. Practicing communication initiates the process of taking others' perspective to understand what others know and are in a position to grasp.

Being known by others as the distinct individual one is is important in itself. It is also essential for one to be fully respected by others. Further, having access to the contents of others' minds (at their discretion) is essential for being able to respect them, at least insofar as some forms of respect and other moral duties involve understanding and respecting individuals as separate persons and in light of features of their individuality, including their reasons, aims, and needs. Moreover, other forms of moral activity, as well as appreciation of the moral activity of others, require some recognition of agents' motives.

Furthermore, I suspect that one cannot fully develop a complex mental world, identify its contents, evaluate them, and distinguish between those that are merely given and those one endorses, unless one has the ability to externalize bits of one's mind, formally distance those bits from one's mind, identify them as particulars, and then evaluate them to either endorse, reject, or modify them. For many people, some thoughts may only be fully identified and known to themselves if made linguistically or representationally explicit. Many find that difficult to do using merely mental language, especially with sufficiently complex ideas; one has to externalize what the thoughts are through verbal or written speech or through other forms of symbolic representation to identify them completely (and sometimes to form them at all), a prerequisite to evaluating their contents. Other thoughts and methods of tracking one's environment over time require some form of external representation because of the frailties of the human memory; to form the complex thought, one needs the device of external representation to keep track of portions of it over time.[16] The ability and opportunity to generate external representations may both make public what has already fully formed in the mind and may render possible the formation of new sorts of thoughts that cannot take full form in our limited mental space.[17]

Of course, it is not merely the development and identification of one's thoughts that requires the use of representation and external articulation. To pursue our interest in forming true beliefs about ourselves and our environment, we need the help of others' insights and beliefs, as well as their reactions and evaluative responses to our beliefs. Others can only have the basis for responding, and the means to respond with the sort of precision necessary to be helpful, if they are able to use speech.

My argument that rational human thinkers need access to other thinkers under conditions in which their mental contents may be known with some degree of precision, explicitly recognized as such, and reacted to, is partially but poignantly confirmed by the evidence of the disastrous effects of involuntary solitary confinement. Prisoners in solitary confinement deteriorate mentally and emotionally. They progressively lose their grip on reality, suffering hallucinations and paranoia, and many become psychotic.[18] "Human beings rely on social contact with others to test and validate their perceptions of the environment. Ultimately, a complete lack of social contact makes it difficult to distinguish what is real from what is not or what is external from what is internal."[19] Prisoners subject to solitary confinement suffer terrible depression, despair and anxiety; moreover, their emotional control and stability wanes and their abilities to interact with others atrophies.[20]

Of course, prisoners in solitary confinement endure more than just the lack of conversation and the absence of interlocutors; they lack fundamental forms of control over their lives, other sorts of interactions with persons, and other forms of perceptual access to reality. But, most other prisoners lack this sort of control and lack broader forms of access to the world and yet do not suffer the degree of devastation to mental function that prisoners in solitary confinement do.[21] "Whether in Walpole or Beirut or Hanoi, all human beings experience isolation as torture."[22] What seems to push them over the edge is the absence of regular, bilateral, communication. My worry is that to forbid or substantially to restrict free expression is not tantamount to solitary incarceration but lies on a spectrum with it: it is to institute a sort of solitary confinement outside of prison but within one's mind.

So, in short, the view I am attracted to is that it is essential to the appropriate development and regulation of the self, and of one's relation to others, that one have wide-ranging access to the opportunity to externalize one's mental contents, to have the opportunity to make one's mental contents known to others in an unscripted and authentic way, and that one has protection from unchosen interference with one's mental contents from processes that would disrupt or disable the operation of these processes. That

16. Tyler Burge, Computer Proof, Apriori Knowledge, and Other Minds: The Sixth Philosophical Perspectives Lecture, 32 Noûs Suppl.12 1, 10–13, 19–22, 27–28 (1998); Tyler Burge, Memory and Persons, 112 Phil. Rev. 289, 300–03, 314–21 (2003).
17. See also Macklem, supra note 1, at 1–32.
18. See, e.g., Bruce A. Arrigo & Jennifer Leslie Bullock, The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change, 52 Int'l J. of Offender Therapy & Comp. Criminology 622, 627 (2008); Craig Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 Crime & Delinq. 124, 130–32 (2003).
19. Arrigo & Bullock, supra note 18, at 7 (citing the work of Haney, supra note 18). Similar evidence presents itself about the effects of uncorrected hearing loss. Stig Arlinger, Negative Consequences of Uncorrected Hearing Loss: A Review, 42 Int'l J. of Audiology 2S17, 2S17–20 (2003) (reporting the hearing loss may reduce intellectual and cultural stimulation, give rise to changes in the central nervous system, and may affect the development of dementia).
20. See Haney, supra note 18.
21. See id. at 125.
22. Atul Gawande, Hellhole, The New Yorker, Mar. 30, 2009, at 36 (emphasis added).

is to say, free speech is essential to the development and proper functioning of thinkers.

Further, because moral agency involves the ability to take the perspective of other people and to respond to their distinctive features as individuals, including some of their mental contents, then free speech also plays a foundational and necessary (though not sufficient) role in ensuring citizens develop the capacity for moral agency and have the opportunities and information necessary to discharge their moral duties. Politically, these arguments should resonate with us, yielding an argument for constitutional protection for freedom of speech, both from respect for the fundamental moral rights of the person and also because, as I have argued elsewhere, a well-functioning system of social cooperation and justice presupposes that the citizenry, by and large, have active, well-developed moral personalities.[23] The successful operation of a democratic polity, as well as its meaningfulness, would also seem to depend upon citizens' generally having strong and independent capacities for thought and judThis view makes no important distinction, at the foundations, between communication about aesthetics, one's medical condition and treatment,[24] one's regard for another, one's sensory perceptions, the sense or lack thereof of the existence of a God, or one's political beliefs. All of these communications serve the fundamental function of allowing an agent to transmit (or attempt to transmit so far as possible) the contents of her mind to others and to externalize her mental contents in order to attempt to identify, evaluate, and endorse or react given contents as authentically one's own; further, they allow others to be granted access to the information necessary to appreciate the thinker, on voluntary terms, and to forge a full human relation with her. One's thoughts about political affairs are intrinsically and ex ante no more and no less central to the human self than thoughts about one's mortality or one's friends; in so far as a central function of free speech is to allow for the development, exercise, and recognition of the self, there is no reason to relegate the representation of thoughts about personal relations or self-reflection to a lesser or secondary category. Pictorial representations and music (and not merely discourse about them) should also gain foundational protection because they also represent the externalization of mental contents, contents that may not be accurately or well-captured through linguistic means; after all, not all thoughts are discursive or may be fully captured through discursive description.[25]

On the other hand, this approach can render sensible the notion that non-press, business corporate and commercial speech may be different and that their protection may assume a weaker form and may rest upon separate, more context-dependent and instrumental, foundations.[26] First, business corporate speech does not involve in any direct or straightforward fashion the revelation of individuals' mental contents.[27] Corporate-to-corporate as well as corporate-to-individual speech often bear only an indirect relation to the revelation and development of the thinker or the intellectual, emotional, or moral relations between thinkers. Of course, thinkers may have an interest in access to corporate speech because corporate and commercial speech may report information about one's given environment, but, in other circumstances, the point of corporate speech, as well as other commercial speech, is to alter the environment, e.g. to manufacture desire, not to report it.

To be sure, however, altering the environment is also the aim of advocacy speech by individuals as well. That aim in no way diminishes the protection that should be afforded to it. Advocacy speech represents a form of exercise of thinkers' interests in developing their moral agency and in treating one another well by attempting to discern and to persuade others of what each of us or what we together should think and do. By contrast, non-press, business corporate and commercial speech, by design, issue from an environment whose structure does not facilitate and, indeed, tends to discourage

23. Shiffrin, Inducing Moral Deliberation: On the Occasional Virtues of Fog, supra note 13, at 1231–32. See also John Stuart Mill, Considerations on Representative Government 24–25 (Currin Shields ed., 1958); Rawls supra note 4, at 395–587.

24. Respect for this right is far from a given. Prita Mulyasari was recently incarcerated in Indonesia for three weeks of pre-trial detention on charges of internet defamation after she sent an email to friends complaining about a wrongful diagnosis at a local hospital. After an international campaign in her defense, she was acquitted but the government is appealing her acquittal and seeking a 6 month prison sentence. See Norimitsu Onishi, Trapped Inside a Broken Judicial System after Hitting Send, N.Y. Times, Dec. 5, 2009, at A6; Turning Critics Into Criminals: The Human Rights Consequences of Criminal Defamation Law in Indonesia, Human Rights Watch, 5, 26–28 (May 2010) available at http://www.hrw.org/node/90023 (discussing other criminal defamation cases for other consumer complaints).
Indonesia imposes criminal penalties for defamation, enhancing them if the communication is sent over the internet. Truth, on its own, is not a standard defense. Whether it is permitted at all seems to be a matter of the judge's discretion. Further, defendants seeking to use the truth defense in cases not involving public officials must bear the burden of proof and must show that the defamatory statement was offered from necessity or 'in the general interest.' Pursuing an unsuccessful truth defense may subject the defendant to an even harsher sentence of up to four years in prison. Human Rights Watch, supra at 16–17.

25. See Frank Jackson, Epiphenomenal Qualia, 32 Phil. Q. 127, 128–30, 133–36 (1982); Frank Jackson, What Mary Didn't Know, 83 The J. of Phil. 291 (1986).

26. For one example of its context-dependence on other features of the economic climate and our system of economic regulation, see Shiffrin, Compelled Association, Morality, and Market Dynamics, supra note 13, at 324, 327.

27. See, e.g., Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 971 (2010) (Stevens, J., dissenting) (discussing the differences between corporations and human beings and the distance between corporate speech and any individual points of view); C. Edwin Baker, The First Amendment and Commercial Speech, 84 Ind. L.J. 981, 987–89 (2009) (stressing that commercial corporations are limited forms of entities created for instrumental reasons and that the people who operate within them do not act fully autonomously); Steven H. Shiffrin, The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment, 78 Nw. U. L. Rev. 1212, 1246 (1983) (discussing the structure of the corporation and the distance between its speech and the views of its shareholders).

the authentic expression of individuals' judgment. As Ed Baker has argued, the competitive structure of the economic market and the narrowly defined aims of the corporate or commercial entity place substantial pressures on the content of corporate and commercial speech. So too may the internal structural design of the corporation.[28] In Baker's view, their content has a 'forced profit orientation,' and does not represent a 'manifestation of individual freedom or choice';[29] in my somewhat weaker terms, external environmental pressures render more tenuous any charitable presupposition that such speech is sincere, authentic, or the product of autonomous processes. As I have argued elsewhere, Baker's starkly-put position may involve a degree of over-generalization given market imperfections, market actors who are true believers, and market actors using the market and speech within it to further external and sincere moral goals.[30] Nonetheless, I concur with him that the market's structure tends "very strongly [to] determine [corporate and commercial] speech content."[31] These distortive influences render more precarious the claims that strong presumptions against speech regulation in this domain reliably serve the interests of the thinker-qua-speaker or the thinker-qua-listener as the recipient of such communications. Together, these considerations provide reason to treat non-press, business corporate and commercial speech as non-standard cases within a free speech domain and justifiably, depending on context and content, often to treat such speech as permissible targets of a more comprehensive scheme of economic regulation.[32]

Comparing A Thinker-Based Approach To Other Autonomy Approaches

This approach, one that showcases freedom of thought and the needs of thinkers as such as the central theme of a free speech perspective, is compatible with many of the traditional insights associated with speaker-based and listener-based theories (and with democracy and truth theories for that matter). All of these approaches, however, work from an overly narrow foundation or they start by valorizing one manifestation of free thought, while neglecting other manifestations that are no less important. Although the ability to externalize one's mental contents through speech is of prime importance on this account, it would make no sense to give it pride of place over ensuring that others could listen or take in these transmissions or over the protection of one's rational processes from interference or disruption.

Because this account derives the basic free speech protection from the foundational interests of the autonomous agent qua thinker, it therefore, rests on sparer assumptions than other autonomy accounts, such as Ed Baker's, that revolve around the autonomous agent qua self-governor.[33] Whether in its substantive form (the agent as a person with the capacity "to pursue successfully the life she endorses") or its formal conception (the agent with "the authority to make decisions about her own meaningful actions [and resources]"), Baker's ideal invokes an attractive model towards which to aspire, but utilizes unnecessarily controversial assumptions.[34]

For instance, I do not believe that the autonomy case for protecting free speech hinges upon whether we have (or should have or should value) the full panoply of executive skills and control over our actions that the broader ideal of self-authorship and self-governance involves. We may have all the interests I identify (along with their capacities to pursue them) even if we lack the ability or authority to implement our decisions. Rightfully detained prisoners will lack both these features but, in my view (if not the Court's), enjoy the relevant moral right of freedom of speech.[35] Skepticism about the broader ideal therefore should not impugn the more narrowly tailored, thinker-centered case for free speech protections.[36] Further, a thinker-based approach is better positioned to undergird a more expansive free speech protection, or at least to do so in a more

28. See Shiffrin, The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment, supra note 27.
29. See C. Edwin Baker, Human Liberty and Freedom of Speech 196, 204 (1989); C. Edwin Baker, Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike, 54 Case W. Res. L. Rev. 1161, 1163 (2004); Baker, The First Amendment and Commercial Speech, supra note 27, at 985–987.
30. See Shiffrin, Compelled Association, Morality, and Market Dynamics, supra note 13, at 320.
31. Id.
32. See also Baker, The First Amendment and Commercial Speech, supra note 27, at 994. I have assumed throughout this part of the discussion that the government's motives in regulating commercial or business corporate speech would be permissible ones, that is to say that they were not driven by a rationale that is inconsistent with valuing the autonomous operation of the mind. The requirement that the government's rationale must be a permissible one, as I specify above, is not suspended in this domain (or any other).
33. See Edwin Baker, Autonomy, 27 Const. Comment. (forthcoming 2011). See also Baker, Human Liberty and Freedom of Speech, supra note 29, at 47–69; Baker, The First Amendment and Commercial Speech, supra note 27, at 990 (identifying autonomy in terms of embodying values in action).
34. See C. Edwin Baker, Autonomy, supra note 33.
35. Beard v. Banks, 548 U.S. 521, 530–33 (2006) (plurality opinion) (upholding ban on access to newspapers, magazines, and personal photographs by prisoners in the most restrictive level of incarceration); Turner v. Safley, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."); Bell v. Wolfish, 441 U.S. 520, 548–52 (1979) (upholding ban on pretrial detainees receiving hardback books by mail unless sent directly by the publisher or a bookstore); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129–33 (1977) (upholding ban on bulk mailing and inmate-to-inmate solicitation to join prisoner's union); Pell v. Procunier, 417 U.S. 817, 822–28 (1974) (upholding ban on prisoners initiating interviews with the press). For critical commentary on the low protection afforded to prisoners' first amendment rights see James E. Robertson, The Rehnquist Court and the "Turnerization" of Prisoners' Rights, 10 N.Y. City L. Rev. 97 (2006); The Supreme Court, 2005 Term--Leading Cases, 120 Harv. L. Rev. 125, 263 (2006).
36. Further, arguing just from the foundational interests of the thinker as such does not elicit the same worries regarding why speech in particular merits special, strong protection.

direct and obvious fashion, because our imagination and thoughts range more widely than our capacity for self-governance and self-authorship (at least if the latter is construed to involve self-regarding action and conduct). We are able to think and consider topics and subjects that have no specific and direct relation to ourselves and our pursuit of a life we endorse.

Explicitly making the thinker the central figure of free speech (as compared to focusing on the listener, the speaker, the self-governor or the functioning of the polity) may make a difference as far as what dangers and threats to free speech present themselves as salient. So, for example, although I find Tim Scanlon's emphasis on sovereignty of deliberation in the Millian principle at the center of his early listener-based theory highly congenial, its focus on the listener may distract us from equally significant forms of regulation that tamper with the sovereignty of deliberation but that are not directly targeted at interfering with a speaker-listener relation.[37] Scanlon's Millian principle states:

> [C]ertain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions . . . (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between [them] consists merely in the . . . expression le[a]d[ing] the agents to believe . . . these acts to be worth performing.[38]

Although the insulation of the agent's opportunity to form beliefs and opinions of her own is central to the thinker-based perspective, Scanlon's Millian principle – as stated – has its limitations as a form of protection of the thinker. From a freedom of thought perspective, such a principle is under-inclusive in an important respect.[39] It is unclear why we should protect only autonomous or authentic processes from efforts to interfere with belief and conclusion formation. Should we not also ensure that regulations are not propounded on the grounds that speech will yield emotional reactions of one sort or another or that speech will induce sensory reactions of one sort or another? Aren't these processes also central to human thought at least?

Moreover, Scanlon's principle only reaches and condemns regulation aimed at preventing the formation of false beliefs and practical judgments as consequences of expression. It does not directly speak to the wrongfulness of regulations or government activity aimed at instilling beliefs, attitudes, or reasons through compulsion, subliminal manipulation, or other efforts to circumvent rational deliberation.

Finally, it doesn't directly recognize the significance that assuming the role of speaker may have to an agent's own rational development and cognition. Expanding the theory to correct these forms of under-inclusion would not be, I take it, antithetical to the spirit of Scanlon's original approach.[40] Nonetheless, an explicitly thinker-oriented approach more naturally yields a comprehensive explanation of what is troubling about thought control, efforts at thought control, as well as other sorts of efforts to disrupt the free operation of the mind, whether or not such efforts also happen to operate through a mode of interfering interpersonal communication.

For example, as Vince Blasi and I argued at greater length elsewhere,[41] focusing on freedom of thought as such may yield a more straightforward account of the protection in West Virginia State Board of Education v. Barnette.[42] It is not clear that the compelled pledge, so long as its origins are transparent, restricts listener opportunities, nor does its motivation violate strictures on respecting listeners and their deliberative capacities. Further, although it seems clear that the compelled pledge violates the free speech rights of the party who must speak the pledge, it is less clear that the standard themes that have occupied speaker-oriented theories are squarely engaged here. So long as it is clear the pledge is compelled and so long as the speaker may disavow the pledge, the speaker's ability to express herself faithfully is arguably not seriously abridged.[43] The speaker will

37. See Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204 (1972) reprinted in T. M. Scanlon, The Difficulty of Tolerance 6, 14–15 (2003). Scanlon subsequently criticized the Millian principle on other grounds than I explore here and embraced a modified, but broader, theory of freedom of speech that, inter alia, offers primary recognition to speaker and audience interests. T. M. Scanlon, Jr., Freedom of Expression and Categories of Expression, 40 U. Pitt. L. Rev. 519 (1979), reprinted in The Difficulty of Tolerance, supra at 84.

38. Scanlon, A Theory of Freedom of Expression, supra note 37, at 213.

39. The Millian principle may be overinclusive in the following respect: the principle as stated does not provide a clear line to distinguish between false beliefs that result from fraud or intentional misrepresentation and false beliefs that result from sincere communication (but poor judgment, understanding or perception on the part of the speaker or the listener). The former may reasonably count as harms, I submit, on the grounds that a thinker-based view of freedom of speech provides no foundational protection for speech that aims to distort and control the thinker's rational processes of tracking and understanding her environment. Again, I doubt Scanlon would be hostile to this distinction, as suggested by his apparent friendliness to at least some sorts of defamation actions, id. at 12, and his later criticism in Freedom of Expression and Categories of Expression of the Millian principle for failing to allow laws on deceptive advertising. Scanlon, A Theory of Freedom of Expression, supra note 37, at 215. As originally stated, though, the Millian principle does not clearly make room for defamation liability.

40. See, e.g., Thomas Scanlon, Freedom of Expression and Categories of Expression, supra note 37, at 91–2 (observing the audience's interest "in having a good environment for the formation of one's beliefs and desires" and offering criticisms of subliminal speech).

41. See Blasi & Shiffrin, supra note 1.

42. 319 U.S. 624 (1943).

43. Of course, the necessity of correcting a false impression conveyed to an audience that does not understand the significance of the speech being compelled may impinge upon the speaker's interest in remaining silent with respect to the pledge and the sentiments and commitments expressed therein; necessarily, the interests in self-expression must include the ability to gather one's thoughts and engage in self-creation at one's own pace. There is something to this point but I am not sure that it car-

not be misunderstood by reasonable observers. Although reciting others' speech may not be a part of one's project of self-creation, so long as others' uptake isn't disrupted and so long as the compelled speech is not especially time consuming, focusing on the speaker—as such—seems strained. A more straightforward explanation would not focus predominantly on either side of the speaker-audience relationship.

What seems most troubling about the compelled pledge is that the motive behind the regulation, and the possible effect, is to interfere with the autonomous thought processes of the compelled speaker. Significantly, the compelled speaker is also a compelled listener and is compelled to adopt postures that typically connote identification with her message. The aim, and I believe the potential effect, is to try to influence the speaker to associate herself with the message and implicitly to accept it, but through means that bypass the deliberative faculties of the agent. Compelled speech of this kind threatens (or at least aims) to interfere with free thinking processes of the speaker/listener and to influence mental content in ways and through methods that are illicit: nontransparent, via repetition, and through coercive manipulation of a character virtue, namely that of sincerity, that itself is closely connected to commitments of freedom of speech.

Another advantage of a thinker-centered approach is that it yields a distinctive approach to freedom of association that both explains its centrality and depicts the relation between 'intimate' and 'expressive' as continuous. Again, the approach is not antithetical to other theories of freedom of speech, e.g. speaker-based or listener-based theories. But, occupying a thinker-based perspective may orient one more immediately to the centrality of association than other theories which may lead one to value association through a more circuitous route. Even once one adopts a capacious view of the content covered by a free speech norm, speaker-oriented theories have tended to think of the point of associations as bundles of speakers who come together to amplify their speech—to render it louder or to garner more attention for their positions. The model has been to think of speakers as having a prior message that brings them together and that the associations facilitate more effective, clearer communication of these ideas, formed prior to association. The association is a conduit or a pass through: it enhances the effectiveness of the message but plays little formative role with respect to the actual speech.

A thinker-based view of the sort I have been sketching identifies, at least more immediately, the role of associations in a free speech theory. If, as a general matter, our intellectual development and, indeed, our basic sanity depends upon our communicative interaction with others, and, if we conceive of the function of speech as critical to this development, we are more likely to be attuned to the ways that associations serve as sites of idea formation and development, and to recognize the ways in which the development (and not merely the broadcasting) of content occurs through mutual collaboration and mutual influence in explicit and implicit ways. Such an approach would not focus predominantly on whether regulations affect the message of an association but on whether regulations interfere with the ability of associations to function as sites for mutual cognitive influence.[44]

What makes speech special?

I observed earlier that it seems to me to be a positive feature, rather than an embarrassment, of a speech theory that it can show the compatibility of and even the continuity between different core protections of individual autonomy. At the same time, it does seem as though speech is special in some way. An attractive free speech theory should draw some normative distinction between speech as an exercise of autonomy and at least some other behaviors that are exercises of autonomy; although some forms of autonomous action should perhaps gain the same high level of legal protection as free speech, not all autonomous action should. An attractive free speech theory will help to make some sense of the divide.

With respect to the first desideratum of making sense of the continuity, it strikes me as a strength of the thinker-based approach that it renders the penumbra theory of Griswold[45] and Roe[46] sensible. First, certain substantive due process protections provide the preconditions for a meaningful free speech protection. If we accept the First Amendment and its justifications and we accept that our form of rational agency requires social connections to develop and flourish, then we must provide for safe havens for thought, communication, and mutual influence: the relevant forms of safety come both

ries enough significance to bear the full weight of the Barnette protection. Correcting a misimpression only requires explaining the significance or fact of compulsion; it does not require the speaker to make up her mind or reveal anything substantive about the pledge. This point, however, may be less persuasive in contexts in which any sort of correction or explanation may implicitly reveal some reservations about the pledge and such revelations would be socially or politically dangerous. Still, I assume the Barnette protection holds even for compelled speech that is less fraught or that is compelled in less charged contexts. See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977).

In any case, it is unclear how much of the substance, whether the positive protection or the negative limits, of the First Amendment protection should revolve around how unreasonable people might interpret the significance of a speech performance. For example, the fact that unreasonable people might take my friend's speech to represent my own views and that their misunderstanding might prompt me to speak on a topic about which I'd prefer to remain silent does not begin to ground an argument that I have a right that my friend not speak in a way that may mislead the unreasonable interpreters. The republishing libel doctrine also wanders a little too close for my comfort to the view that the limits of the First Amendment may be dictated by the unreasonable reactions of readers. See, e.g., Restatement (Second) of Torts § 578 (1977).

44. I develop an argument of this kind in greater detail in Shiffrin, What is Really Wrong with Compelled Association?, supra note 1.

45. Griswold v. Connecticut, 381 U.S. 479 (1965).

46. Roe v. Wade, 410 U.S. 113 (1973).

in numbers (i.e. having associates with whom one may share thoughts and who may witness what happens to one) and in the ability to select with whom and in what ways one will share fundamental forms of intimacy. If the state could prevent intimate associations or if it could require them to occur (rendering the connection forced and inauthentic), it would obstruct individuals' ability to forge the sort of authentic social connections essential for the development and maintenance of the personality and the free intellect.

Second, the central substantive due process protections are extensions of the values protected by freedom of speech. Sexual intimacy, e.g., expresses and may reveal any of a variety of mental states towards another: in the good cases, feelings of love, affection or at least lusty attraction.

But although (free) sexual intimacy and speech are both exercises of autonomy, both are not standard forms of communication or transmission of mental content; hence my remark that many substantive due process protections are extensions of the values protected by a free speech principle, rather than instantiations of it. A kiss typically expresses a happy reaction, attraction, or a warm attitude, where here I mean to invoke the sense of 'express' that is not synonymous with 'communicate' but rather that means to display and to manifest, rather than just to transmit the fact of or to communicate.[47] Although the mental attitude may be inferred from it, the kiss is not typically deployed merely to convey the fact of its existence. It can be used that way but its communicative use is parasitic upon the connotations of its expressive function.

This, of course, is a fraught distinction[48] but it is one that I think has a point that connects to two of the reasons why speech is special. I have argued that speech facilitates some of the core interests of autonomous agents by rendering their mental contents available to others and vice versa, thereby enabling them to know one another, to cooperate with one another, to investigate the world, and to enhance one's understanding of our environment and our circumstances, and thereby enabling (though not ensuring) moral agency.

The external representation of mental content and its communication plays an especially foundational role in furthering these ends in large part because, in general, it is so much more precise and informative than many of its non-essentially communicative, expressive counterparts. I mean something here as mundane as that an explanation of the reasons why one disapproves of another's conduct and a description of the emotional reactions that conduct gives rise to conveys more content than a wordless punch in the nose. Some content conveyed by communication cannot reliably and accurately be conveyed through other means. With respect to the interest in being recognized and known as the person one is and in providing an outlet from the isolation of each mind, curtailments on speech represent a severe incursion on this interest because speech provides unique modes of access to the contents of other minds. I do not mean to include only discursive communication here: a melody or painting of the image in my mind – a external representation of my internal visual imagery – may convey more of my mental contents – including but not limited to my mood – than approving or disapproving behavior; it necessarily conveys more about my private mental contents than silence and its visual analog.

As a general matter, regulations on the non-essentially communicative expression, manifestation or implementation of mental contents as such do not preclude the communication or transmission of the mental contents they express. Restrictions on my ability to express my anger through violence do not preclude my transmitting my anger through communicative means: saying I'm angry, detailing my complaints, and depicting my emotional maelstrom through words, images, or sounds. A restriction on the emotion's non-essentially communicative expression does not threaten to isolate me in my mind; a restriction on communication doeI hasten to add that this general point is perfectly compatible with the recognition that some forms of expression convey more than words, images, or sounds could on certain occasions. It may well be that, on some occasions, the depth of my anger can only be conveyed through violent aggression. I am neither arguing that agents have absolute rights to ensure that (any and all) others fully understand their mental contents on all occasions nor that externalized representations of thoughts always convey

47. Philosophers of language often use 'expressives' (and its cognate verb) to refer to speech acts that do more than convey content but also manifest it in a more active, direct way. See, e.g., John R. Searle, A Taxonomy of Illocutionary Acts, in Language, Mind, and Knowledge 344 (Keith Gunderson ed., 1975), reprinted in John R. Searle, Expression and Meaning: Studies in the Theories of Speech Acts 1, 15 (1979); John R. Searle, What is Language? Some Preliminary Remarks, 11 Ethics & Pol. 173, 181 (2009). Other speech acts may do even more, as with commissives, performatives, and declarations. See J.L. Austin, How to Do Things With Words 32–33, 151–57 (1962); Kent Greenawalt, Speech, Crime, and the Uses of Language 57–63 (1989). By 'communicate' and its cognates, I mean to capture both the transmission of content as well as the transmission of one's (presumed and often implicit) agreement or belief in that content. Still, despite the familiarity of this use of 'express' in the philosophical literature, I couldn't be more aware that my use of 'express' is not a salutary term in a context in which 'freedom of expression' is right at hand and sometimes is used interchangeably with "freedom of speech." As the better term occurs, so will the substitution.

48. I will not go into detail here about the various fault-lines and strengths of different accounts of this distinction. Rubenfeld's general discussion of the distinction is basically sensible. See Rubenfeld, supra note 12 at 42–44. Articulating the distinction from the perspective of sorting regulations sensitive and insensitive to it, he asks whether the relevant harm that a regulation targets is caused by the communicative aspect of the expressive act or by some other element of it. I defended something like this approach in Seana Valentine Shiffrin, Speech, Death, and Double Effect, supra note 8. I disagree with him in thinking, however, that governmental intent to punish or restrict communication as such is a necessary condition of running afoul of First Amendment protections; we agree that it may be a sufficient condition. See Jed Rubenfeld, The First Amendment's Purpose, 53 Stan. L. Rev. 767, 775–78, 793–94 (2001).

more than behavior that acts upon those thoughts in ways different than merely externalizing a representation. But, by and large, speech is special because it is a uniquely specific mechanism for the transmission of mental contents and their discussion, evaluation, development and refinement, independent from and prior to their implementation.

Of course, I do not deny that the transmission of mental contents sometimes immediately effects or implements them: directed at the relevant person, the desire to insult or, in certain contexts, to humiliate or to subordinate can be implemented merely by being communicated. But as a general matter, communicative methods of transmitting mental contents generate the possibility of an intermediate workshop-like space in which one may experiment with, advance tentatively, or try on, revise or reject a potential aspect or element of the self or of one's potential history before directly affirming it through endorsement or implementation.[49] One cannot preface one's thrown punch with 'maybe' or 'consider the possibility' and thereby, make the assault less of a punch in the way that prefatory remarks will qualify a proposition subsequently articulated so that it becomes less than a full-blown assertion. We find both intelligible and significant our abilities effectively to revise, clarify, or even retract what one has begun to say just using further words.[50] Whereas, I cannot revise or retract my intentional punch by following it immediately with more violence, cringing, or even with regretful words. A further stream of punches may clarify my assault was intentional but beyond that rudimentary clarification, further light – why I threw the punch – will typically require words.

The capacity of speech to be tentative and exploratory – to allow us in a non-committal way to try on an idea, whether to formulate it at all or to assess its plausibility or fit with oneself – is closely related to and helps to underpin a more familiar idea about the specialness of speech, namely that we must protect the ability to discuss and conceive of even those actions we may reasonably outlaw, because protecting our speech and conception of them permits us to revisit and justify our regulation; thereby, we may retain the ability to assess the aptness and legitimacy of our regulation and to preserve the ability to change course if we are mistaken.

Not all speech stops short of action and I am not arguing there is an especially clear speech/action divide, but there are some special features that hold generally of speech that render it distinct from other forms of autonomous action that go beyond revelation of mental content. These distinctive features, I submit, play some role in explaining why speech is special and why autonomy accounts, especially those focused on the freedom of thought, may reasonably place a particular premium on preserving and protecting speech.

49. Nevertheless, on occasion, even purely exploratory communication of thoughts and ideas may have moral significance and may be inappropriate to convey to some people, however explicitly inchoate they are in form.

50. Although sometimes the further speech will have to follow on immediately to be effective as a retraction as opposed to a later rethinking, our linguistic practice allows us to use speech to formulate and even generate our thoughts without the first stab at articulation rigidly gelling immediately into a final draft: we can try on an idea by articulating it without it immediately sticking to us or representing us. Such tentativeness is less possible with most actions (putting aside the special case of speech acts).

About the author:

Professor Seana Valentine Shiffrin,
Professor of Philosophy, Pete Kameron Professor of Law and Social Justice,
UCLA Department of Philosophy; School of Law.

Education:
- University of California, Berkeley, B.A. in Philosophy, 1988.
- University College, Oxford University, B.Phil., with distinction, 1990 (Philosophy); D.Phil., 1993 (Philosophy).
- Harvard Law School, J.D., Magna cum Laude, 1996.

Teaching Positions:
- Professor, Department of Philosophy and School of Law, UCLA, 2006-present.
- Associate Professor, Department of Philosophy, 2000-06 and Professor, UCLA School of Law, 2000-06.
- Bruce W. Nichols Visiting Professor of Law, Harvard Law School, January 2006.
- Visiting Scholar, NYU School of Law, Fall 2004.
- Visiting Associate Professor and Kadish Fellow at Center of Law and Philosophy, UC Berkeley, Spring 2002.
- Henry and Lucy Moses Visiting Professor of Law, Columbia Law School, Fall 2001.
- Assistant Professor, Department of Philosophy and School of Law, UCLA, 1998-2000.
- Assistant Professor, Department of Philosophy, UCLA, 1993-1998.
- Visiting Lecturer, Department of Philosophy, UCLA, 1992-1993.
- Teaching Fellow, Harvard University, Fall 1991.
- Lecturer, Department of Philosophy, New York University, Spring 1991.

Publications:
- "Incentives, Motives, and Talents," 38 Philosophy & Public Affairs 111-142 (2010).
- "Inducing Moral Deliberation: On the Occasional Virtues of Fog," 123 Harvard Law Review 1214-46 (2010).
- "Could Breach of Contract Ever Be Immoral?" 107 Michigan Law Review 1551-1568 (June 2009).
- "Promising, Conventionalism and Intimate Relationships," 117 Philosophical Review 481-524 (2008).
- "The Divergence of Contract and Promise," 120 Harvard Law Review 708-753 (January 2007).
- "Intellectual Property," Blackwell's Companion to Contemporary Political Philosophy, in Robert Goodin, Philip Pettit and Thomas Pogge eds.,

2d ed. 653-668 (2007).
- "Are Credit Card Late Fees Unconstitutional?" 15 William and Mary Bill of Rights Journal 457-500 (December 2006).
- "What's Really Wrong with Compelled Association?," 99 Northwestern Law Review 835-884 (February 2005).
- „Race, Labor, and the Fair Equality of Opportunity Principle," 72 Fordham Law Review 1643-1675 (April 2004).
- "Autonomy, Beneficence, and the Permanently Demented," in Ronald Dworkin and His Critics, (Oxford: Blackwell Publishers), in Justine Burley ed., 195-370 (2004) [submitted final draft in (1994); editorial delays pushed publication back].
- "The Story of West Virginia State Board of Education v. Barnette" (with Vincent Blasi), in Constitutional Law Stories: An In-Depth Look at Ten Leading Constitutional Cases, (Westbury, NY: Foundation Press), Michael Dorf ed., 433-475 (2004); updated version published in Constitutional Law Stories: An In-Depth Look at Ten Leading Constitutional Cases, 2d edition (Westbury, NY: Foundation Press), Michael Dorf ed., 409-453 (2009); reprinted in First Amendment Stories, (Westbury, NY: Foundation Press), Rick Garnett ed. (forthcoming 2011).
- "Egalitarianism, Choice-Sensitivity, and Accommodation," Reasons and Values: Themes from Joseph Raz, (Oxford: Oxford University Press), in Philip Pettit, Samuel Scheffler, Michael Smith, and Jay Wallace eds., 270-302 (2004).
- "Speech, Death, and Double Effect," 78 NYU Law Review 1135-1185 (June 2003) [excerpted in Law and Morality: Readings in Legal Philosophy, in David Dyzenhaus, Sophia Moreau, and Arthur Ripstein eds, 3d ed., 920-925 (2007)].
- "Caution about Character Ideals and Capital Punishment: Reply to Sorrell," 51 Criminal Justice Ethics, 35-39 (Summer/Fall 2002).
- „Lockean Justifications of Intellectual Property Rights," in New Essays in the Legal and Political Theory of Property, (Cambridge: Cambridge University Press), in Steven Munzer ed., 138-167 (2001).
- "Paternalism, Unconscionability Doctrine, and Accommodation," 29 Philosophy and Public Affairs, 205-250 (Summer 2000) [reprinted in Jules Coleman and Joel Feinberg eds., Philosophy of Law, (2003), (2007)].
- „Moral Subjectivism and Moral Overridingness," 109 Ethics, 772-794 (July 1999).
- "Wrongful Life, Procreative Responsibility, and the Significance of Harm," 5 Legal Theory, 117-148 (June 1999) [excerpted in Jules Coleman and Joel Feinberg eds., Philosophy of Law, (2007)].
- „Developments in the Law – DNA Evidence and the Criminal Defense," 108 Harvard Law Review, 1557-1582 (May 1995) (unsigned).
- „Moral Autonomy and Agent-Centered Options," 51 Analysis 244-254 (1991).

SPECIAL LECTURE

The Existence of Human Rights Prof. Dr. Dr. h.c. mult. Robert Alexy, Christian-Albrechts-University of Kiel	
Date	TUE 16 Aug 2011
Time	20.00 h – 22.00 h
Location	HZ 1/2

Abstract:

Human rights are considered, worldwide, as the basis of the normative order of society. This broad agreement is found not only in philosophy but also in politics and law. Numerous human rights covenants can be read as an expression of a triumphant march of human rights in the period after the Second World War. Their existence seems to be beyond question.

Nevertheless, there are doubts about whether the belief in the existence of human rights is anything more than a collective error or illusion. Fundamental criticism, directed to the assumption that human rights exist, is to be found not only in the dark regions of political, ideological, and religious extremism but also in highly respectable philosophical writings. Alasdair MacIntyre's claim that 'there are no such rights, and belief in them is one with belief in witches and unicorns' is an example. This along with the fact, often corroborated in the history of ideas, that widespread consensus is by no means a guarantee of truth, is reason enough to raise the question of the existence of human rights, in short, the existence question.

It makes no sense to talk about the existence of something without explaining what it is that is claimed to exist. For this reason, a definition of human rights has to be elaborated. According to this definition human rights are, first, moral, second, universal, third, fundamental, and, fourth, abstract rights that, fifth, take priority over all other norms. For the question of the existence of human rights, the first defining element is of special importance. According to it, human rights are moral rights. Rights exst if they are valid. Positive rights are valid if they are duly issued and socially efficacious. In contrast to this, moral rights are valid if and only if they are justifiable. For this reason, the existence of human rights qua moral rights depends on their justifiability, and on that alone.

The question of whether human rights are justifiable has far-reaching consequences for legal philosophy, for the theory of constitutional rights, and for politics. In legal philosophy, the answer to the question of what law is, that is, the question of the concept and the nature of law, essentially depends on whether human rights exist. If it should prove to be the case that human rights do not exist, then non-positivism would not be an acceptable alternative to positivism. The consequences for the theory of constitutional rights concern the basic char-

acter of constitutional rights. If human rights do not exist, constitutional rights would be nothing more than what has been written down in the constitution. They would have an exclusively positive character. If, however, it should be proven that they exist, the picture would change fundamentally. Constitutional rights would be understood as attempts to positivize human rights. This would imply that catalogues of constitutional rights can be assessed as more or less successful efforts to positivize human rights, and that the ideal character of human rights has to remain present in the interpretation of human rights. With respect to politics, finally, the main consequence concerns the problem of cultural relativism. The non-existence of human rights would count as a strong argument for cultural relativism, whereas the existence of human rights would be a good reason against cultural relativism. All of this shows that the question of the existence of human rights is of very real theoretical and practical significance.

The theories about the justifiability of human rights, as well as the theories about the justifiability of moral norms in general, can be classified in many different ways. The most fundamental distinction is that between approaches that generally deny the possibility of any justification of human rights and approaches claiming that some sort of justification is possible. The first approach may be termed 'scepticism', the second 'non-scepticism'. Scepticism will have its roots in forms of emotivism, decisionism, subjectivism, relativism, naturalism, or deconstructivism. Non-scepticism may well include one or more of these sceptical elements, but it insists that there be a possibility of giving reasons for human rights, reasons that lay claim to objectivity, correctness, or truth.

In order to defend non-scepticism, eight non-sceptical approaches may be considered. This list comprises, first, the religious, second, the intuitionistic, third, the consensual, forth, the biological, fifth, the instrumental, sixth, the cultural, seventh, the explicative, and, eighth, the existential approach. The first six approaches have more defects than strengths. For this reason, the justification of human rights is based on the seventh and the eighth approaches, that is, on explicative and existential arguments.

A justification of human rights is explicative if it consists in making explicit what is necessarily implicit in human practice. If the practice is the practice of asserting, asking, and arguing, the justification obtains a discourse-theoretic character. The practice of asserting, asking, and arguing presupposes rules of discourse that express the ideas of freedom and equality. The ideas of freedom and equality, however, are the basis of human rights. To recognize another individual as free and equal is to recognize him as autonomous. To recognize him as autonomous is to recognize him as a person. To recognize him as a person is to attribute dignity to him. Attributing dignity to someone is, however, to recognize his human rights.

The explicative argument provides, indeed, a necessary part of the justification of human rights, but it is, by itself, not sufficient. Two problems are easily identified. The first concerns the necessity of the discourse rules. It is possible to circumvent this necessity by avoiding any participation in the practice of asserting, asking, and arguing. The price one pays for this, would, however, be high. Never to assert anything, never to ask any question, never to give any reason would be to forbear from participating in what essentially belongs to the form of life of human beings qua discursive creatures. The second problem stems from the difference between discourse and action on the one hand and capabilities and interests on the other. Having discursive capabilities does not imply an interest in making use of them. This might be called the 'interest problem'. The interest in making use of discursive capabilities solely in the sphere of argument might be called a 'weak interest in correctness'. By contrast, the interest in making use of discursive capacities not only in the sphere of argument but also in the realm of action can be characterized as a 'strong interest in correctness'. The strong interest in correctness comprises taking seriously the implications of the discursive capabilities in real life, that is to say, in taking seriously human rights. In this way, the interest in correctness makes it possible for us to arrive at the object of our justification.

It might be objected that this is no justification at all. It has lost its character as a justification, so the objection runs, once the premise concerning the interest is introduced. Indeed, this objection is not without merit. The objection must, however, be qualified. As with any interest, the interest in correctness is connected with decisions. This decision concerns the fundamental question of whether we accept our discursive capabilities or possibilities. It is the question of whether we want to see ourselves as discursive or reasonable creatures. This is a decision about who we are. It might be called 'existential'. Still, to talk about justification or substantiation seems to be warranted, for this decision is not based on groundless or arbitrary preferences, drawn, so to speak, from nowhere. Rather, the decision has the character of an endorsement of something that has been proven, by means of explication, to be a capability necessarily connected with human beings or, in other words, a necessary possibility. As an endorsement of a necessary possibility the existential argument is intrinsically connected with the explicative argument. One might call this connection the 'explicative-existential justification'.

The explicative-existential justification connects objective with subjective elements. Objectivity connected with subjectivity is, to be sure, less than pure objectivity, but it is also more than pure subjectivity. If one adds to this the assumption that a purely objective justification of human rights is not possible, one has good reasons to qualify the explicative-existential argument qua objective-subjective argument as a justification of human rights. This justification suffices to establish the validity of human rights as moral rights, which is to say that human rights exist.

About the author:

Robert Alexy, born in 1945, studied law and philosophy at the Georg-August-University in Göttingen. He wrote a dissertation entitled "A Theory of Legal Argumentation", published in 1978, for which he received the award of the philologico-historical class of the Academy of Sciences in Göttingen. In 1984, he qualified as university lecturer in the faculty of law at the University of Göttingen. His thesis, submitted as his Habilitationsschrift, was entitled "A Theory of Constitutional Rights". Since 1986, he has been Professor of Public Law and Legal Philosophy at the Christian-Albrechts-University in Kiel. From 1994 to 1998, he was president of the German section of the IVR. Since 2002, he has been a member of the Academy of Sciences in Göttingen. In 2008, he was awarded a honorary doctorate, honoris causa, by the University of Alicante, the University of Buenos Aires, and by the University of Tucumán, in 2009, by the University of Antwerp, in 2010 in Lima (Universidad Nacional Mayor de San Marcos and Universidad Ricardo Palma). In 2010 he was awarded the First-Class Distinguished Service Cross of the Order of Merit of the Federal Republic of Germany.

PLENARY LECTURE

The Morality of Legality: A Hobbesian Account (Draft) Prof. Dr. David Dyzenhaus, University of Toronto / Canada	
Date	WED 17 Aug 2011
Time	9.30 h – 10.15 h
Location	HZ 1/2

Abstract[1]**:**

Introduction

A central debate in contemporary philosophy of law concerns the authority of law. Whilst there is general agreement that in order to understand law one must understand how it might be said to be authoritative over those subject to it, philosophers divide over the nature of law's authority. On the one hand, legal positivists who follow HLA Hart say that the law's claim to authority has to be understood in terms of the non-moral conditions that make a legal system into a de facto authority, one which while capable of exercising authority might not be de jure or legitimate. On the other hand, critics of legal positivism argue that law has certain intrinsic qualities that make it always at least to some extent moral, and thus endow it with a claim to legitimacy. This claim might be outweighed by other considerations, but that goes to show that de facto legal authority is always presumptively de jure.

This division is linked to another. Legal positivists like to think of themselves as engaged in a kind of social scientific or value neutral exploration of the nature of law.[2] On this view, legal philosophy shows that law has to be understood as normative, as an obligation-creating system in which at least some of the participants understand themselves as acting out of a sense of duty that is not reducible to motivation by fear of punishment. But the question whether the obligations created by the law of a particular system are moral is answered by standards external to law, the standards set by moral philosophy. In contrast, at least some of the critics of legal positivism argue that philosophical inquiry into law's authority cannot be compartmentalized in this way. Philosophy of law is a branch of political philosophy, because it seeks to answer a question that is fundamentally one of political morality: How is the authority of law legitimate? Indeed, for reasons that will become clearer below, this question can and should be formulated more succinctly as 'How is law authoritative?' That is, the law of any particular legal order purports to change the normative situation of those subject to it by obliging them to act in accordance with the law. That the law claims this normative power or authority over its subjects can be unpacked by saying that the law necessarily claims legitimate authority. But 'legitimate' serves only to emphasize that what is being claimed is authority – the ability to create obligations.

Thomas Hobbes's account of the authority of law might seem to straddle at least the first division, as he is commonly taken to argue that de facto legal authority begets de jure legal authority. Hobbes is taken, that is, to have argued that the possession in fact of the kind of centralized power that makes it possible for a regime to rule effectively the population within its territory suffices for that regime to be considered legitimate. He is also commonly taken to have argued that this central commander is not subject to any legal limits and that his laws are no more than his commands to which sanctions are attached that make obedience less painful than disobedience. He thus seems responsible for the command theory of law, taken over in large part by Jeremy Bentham and then John Austin.

Those who understand Hobbes this way notice that when he provided his definition of law he said more than that law is the commands of an uncommanded commander to which sanctions attach. He also said that the sovereign, the 'person Commanding', addresses his commands to 'one formerly obliged to obey

1 Professor of Law and Philosophy, University of Toronto. This paper started as one about the Engagement Controversy and Hobbes on authority for a symposium organized by Thomas Poole (LSE). Comments on that paper, especially from Jeffrey Collins, Dennis Klimchuk, Lars Vinx, and an anonymous reviewer for Cambridge University Press led me to contemplate radical revisions. Further comments on a different paper given to the Berkeley Jurisprudence workshop helped me to see the appropriate way to proceed, and here I thank in particular Andrew Brighten, Richard Flathman, and Kinch Hoekstra.

2 By 'legal positivists', I refer only to HLA Hart and his followers. Kelsen is, in my view, quite close to Hobbes on the issue of authority.

him'.[3] However, the idea that besides the sanctions that motivate obedience, there is a prior moral commitment of the legal subject to obey seems to make Hobbes's account of legal authority highly authoritarian. It amounts to the argument that any political order is superior to the chaos of the state of nature, hence legal subjects must obey the sovereign's commands, whatever their content. This argument puts Hobbes on the methodological side of the critics of legal positivism, since it subordinates his account of law to its utility in securing political order.[4]

In sum, Hobbes is from one perspective an early legal positivist, from another, a critic of the kind of methodology adopted by contemporary legal positivism. One solution to this conundrum is in Norberto Bobbio's suggestion that we should think of Hobbes as an 'ideological positivist', a philosopher whose positivist theory of law is constructed to serve certain political values.[5]

Indeed, Hobbes seems to hold the view that de facto political power is by definition legitimate political authority. The task of law in such a theory is simply to transmit as effectively as possible the judgments of the powerful to those subject to their power. It is no surprise, then, that Hobbes in chapter 26 defines 'Law in generall as 'not Counsell, but Command',[6] referring to his elaboration of the distinction in the previous chapter.[7] Hart, it is worth noting, thought that Hobbes had with this distinction made a signal contribution to the understanding of law in that it illuminated the idea of command as well as the 'similarities and differences between commands and covenants as sources of obligation and as obligation-creating acts'. And Hart took his most distinguished student, Joseph Raz's work on authority and the kinds of reasons that law gives us as an elaboration of Hobbes's contribution.[8] If Hart were right, it would follow that the commands had at least the following two qualities to them.

First, the commands come with an implicit claim to authority, that is, to rightfully or legitimately demand compliance from those subject to the commands. Here Hart is correct since Hobbes continues his definition of law as command in chapter 26 by saying that law is a command not to any individual since it must be 'addressed to one formerly obliged to obey him'.[9] Indeed, Hobbes might be said to subscribe to what Raz calls the Normal Justification Thesis, that 'a person should be acknowledged to have authority over another person … [when] the alleged subject is likely better to comply with reasons which apply to him … if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly'.[10] Though, of course, the difference would be that Hart and Raz think that it is very rarely the case that the law of any particular legal order will satisfy this requirement, while Hobbes supposes that the requirement is satisfied by the existence of de facto legal authority, that is, the existence of an organized, stable political power that is capable of governing through law.

Second, Hobbes might be thought to subscribe also to the idea that the commands must have a determinate content to them. This idea was put rather misleadingly by Hart as the idea of 'content-independence':[11] that the subject obeys not because of his or her agreement with the content of the command, but because of the reason that makes him or her regard the commander as an authority. It is misleading because legal positivists suppose that in order to have this quality, the command has to have a certain kind of content, one that is determinable without going into the questions that the judgment of the commander was supposed to settle through issuing the command. As Raz has summarized this idea, the law 'consists only of authoritative positivist considerations', and the latter are considerations 'the existence of which can be ascertained without resort to moral argument'.[12]

In sum, a command's success as a content-independent reason for action depends on its having a determinate content. Again, Hobbes might seem to agree with Raz on this point, as he says, early in Leviathan, that the parties to a dispute who agree to have the dispute settled by arbitration also agree to take the content of the arbitrator's decision as representing 'right reason' and that it would be irrational for them to contest his decision by invoking the considerations that brought them to arbitration.[13]

I will argue that Bobbio's views, and indeed the view just sketched of Hobbes's account of the authority of law, are mistaken. We can start by noticing that these views are inconsistent with the aim that Hobbes himself stated for Leviathan: to show how one could pass 'unwounded' between those 'who contend, on one side for too great Liberty, and on the other side for too much Authority'.[14] We need,

3 Thomas Hobbes, Leviathan (Cambridge: Cambridge University Press, 1997, Richard Tuck, ed.), 183. Hereafter Leviathan.

4 This claim is consistent with, though not committed to, the view that Hobbes's wishes to ground his political theory in science.

5 Norberto Bobbio, 'Sur Le Positivisme Juridique' in Bobbio, Essais de Théorie Du Droit, trans. by Michel Guéret with the assistance of Christophe Agostini (Buylant: Paris, 1998) 23, 27-29.

6 Leviathan, 183.

7 Ibid, 176.

8 HLA Hart, Essays on Bentham: Jurisprudence and Political Philosophy (Oxford: Clarendon Press, 1982), 244.

9 Leviathan, 183.

10 Joseph Raz, 'Authority, Law, and Morality' in Raz, Ethics in the Public Domain: Essays in the Morality of Law and Politics (Oxford: Oxford University Press, 1994) 194, at 198.

11 Hart, Essays on Bentham, 254-55.

12 Joseph Raz, 'The Problem about the Nature of Law' in Raz, Ethics in the Public Domain, 179, at 189-90. Notice that there is an ambiguity here between 'the existence of which can be determined' and the content of which can be determined'. In my view, Raz means both.

13 For an illuminating account of Hobbes in these terms, one which attempts to save his argument from several important difficulties, see Susanne Sreedhar, Hobbes on Resistance: Defying the Leviathan (Cambridge: Cambridge University Press, 2010), chapter 3, 'Limited obedience to an unlimited sovereign'.

14 See Hobbes's dedication to Francis Godolphin-Leviathan 3.

in other words, to avoid both the position of those who think that when authority clashes with their view of right there is no authority and the position of those who think that the commands of the powerful are always right.

Hobbes, on my account, goes a long way to meeting just that aim through an argument that we cannot distinguish between de facto and de jure legal authority, since it is in the nature of legal authority that it exercises its power rightfully, that is, in accordance with the fundamental laws of political morality he calls the laws of nature, laws that amount to principles of legality that discipline government according to law.[15] Hobbes reveals to us, in other words, the commitments of political morality that are involved in a society in which political power inheres in an artificial person – a state that exercises its power through law because it is legally constituted. Hobbes's methodology is not then strictly one in which a theory of law is subordinated to a political philosophy. Rather, political philosophy does the work of explaining why it is that law has authority, more elaborately, why it is that legal authority is always de jure or legitimate political authority.[16]

The Limits of Legal Authority

Despite Hobbes's general argument that there is no such thing as unjust law or command, he was clearly troubled by what to say about a sovereign who issues a command that is shameful for the subject to obey or inhuman or both, and by one particular example of such a command: a son who is commanded to kill his father; for he discussed it in De Cive (1642) and returned to it in Behemoth or the Long Parliament (1679),[17] a reflection on the civil war some 17 years after Leviathan.

In De Cive, Hobbes says that a son so commanded would not be obliged by the command because he would 'rather die, than live infamous, and hated of all the world'.[18] He also says others could do the job in place of the son and generalises the point by saying: 'There are many other cases, in which, since the Commands are shamefull to be done by some, and not by others, Obedience may, by Right, be perform'd by these, and refus'd by those; and this, without breach of that absolute Right which was given to the Chief Ruler'.[19]

One might well suppose that Hobbes is saying here that there is no way in which the sovereign's power is threatened because of the fact that someone else can easily be found to kill the father.[20] Thus Susanne Sreedhar concludes that these are cases in which it is the case both that obedience cannot be 'systematically expected' because the 'threat of punishment is likely to be ineffective' and that the 'sovereign can systematically permit'.[21]

Sreedhar thus plausibly supposes that this example helps to support her argument that 'Hobbes's sovereign is absolute (and absolutely authorized) in that he can command with impunity … But unlike many absolutists Hobbes does not think that absolute sovereignty requires absolute obedience'.[22] In order to solve the puzzle Hobbes creates of the subject being entitled to consider himself not bound in this and other situations, she relies on Raz's theory of authority. In particular, she finds helpful Raz's idea that an authoritative reason excludes reliance by the subject of an authoritative directive on the reasons excluded within a certain scope. She thus argues that for Hobbes there is a determinate set of reasons that are non-excludable—reasons that preclude killing oneself, bringing dishonour on oneself, etc. Hobbes has to concede that there is such a set because the premise of the whole argument for subjection to the sovereign is ensuring self-preservation. And he can make that concession without undermining the argument because the concession does not threaten the absolute nature of sovereignty.[23]

But Sreedhar's Razian solution to this puzzle does not work as well when Hobbes returns to this example in Behemoth, a book in the form of a dialogue where B is the young Hobbes and A the mature Hobbes.

> B: Must tyrants also be obeyed in everything actively? Or is there nothing wherein a lawful King's command may be disobeyed? What if he should command me with my own hands to execute my father, in case he should be condemned to die by the law?
>
> A: This is a case that need not be put. We have never read nor heard of any King so inhuman as to command it. If any did, we are to consider whether that command were one of his laws. For by disobeying Kings, we mean the disobeying of his laws, those his laws that were made before they were applied to any particular person; for

15 Hobbes's account of the operation of these laws is hardly every analysed, rather a reason is found for bypassing them which fits with the orthodox interpretation. For example, Bobbio argues that the 'true function' of Hobbes's extensive account of the laws of nature 'and the only one that cannot be eliminated, is to provide the most absolute ground to the norm according to which there is no other valid law than positive law'; Bobbio, Thomas Hobbes and the Natural Law Tradition, trans. Daniela Gobetti (Chicago: Chicago University Press, 1993), 'Natural Law and Civil Law in the Political Philosophy of Thomas Hobbes', 114, 148. More recently, SA Lloyd, Morality in the Philosophy of Thomas Hobbes: Cases in the Law of Nature (Cambridge: Cambridge University Press, 2009) argues that the laws of nature are 'self-effacing'. They play a role in grounding obedience but once civil society has been established, they go missing in action. See chapter 6.

16 My argument is thus, as I indicate in the text, primarily methodological or about the philosophical structure of Hobbes's position. Moreover, it is primarily about that position as it is elaborated in Leviathan, though I will refer to other works. I leave to another occasion the task of showing how Hobbes's views on such matters changed and developed across his entire corpus.

17 (London: Frank Cass, 1969, Ferdinand Tönnies, ed.)

18 Thomas Hobbes, De Cive (On the Citizen) (Cambridge: Cambridge University Press, 1998, Richard Tuck ed.), 6.13.

19 Ibid.

20 As Sreedhar, Hobbes on Resistance, says at 125.

21 Ibid, 130.

22 129.

23 Ibid, 108-22.

> the King, though as a father of children, and a master of domestic servants command many things which bind those children and servants yet he commands the people in general never but by a precedent law, and as a politic, not a natural person. And if such a command as you speak of were contrived into a general law (which never was, nor never will be), you were bound to obey it, unless you depart the kingdom after the publication of the law, and before the condemnation of your father.[24]

The passage is intriguing, first, because while B does not mention explicitly the distinction between a tyrant and a lawful king on which A relies, neither does B explicitly reject it, whereas Hobbes in Leviathan and other earlier works was adamant that such a distinction is both politically pernicious and conceptually confused.[25] It is intriguing, second, because B's remarks about why the case 'need not be put', especially when these are read in the light of the legal theory elaborated in Leviathan, reveal an account of law's authority that is very different from those usually attributed to Hobbes, including Sreedhar's Razian version.

In this passage, Hobbes expresses doubt that any sovereign would enact the law proposed in the question to him. This doubt is evidence of his optimism that sovereigns will not produce pathologies—situations that undermine legal subjects' basis for obedience or continuing consent to sovereign rule. But Hobbes nevertheless thinks it is important openly to confront the pathology.

His first point is that we have to be careful about what counts as a law. There is a difference between, on the one hand, the commands of a father to his children or to his servants and, on the other, the commands of the same individual who happens to be king when he wishes to fulfill his political role as sovereign, as the artificial person who has ultimate legal authority in the legal order. In the latter case, his commands have to be issued as laws, with the result that no command has any effect until it is in proper form.

Hobbes's second point is that proper form requires not only that the law precede any official act, but also that it be couched in general terms, and only then applied to particular circumstances. A law that commanded me to execute my father if my father were found guilty of a particular offence would not count as a law. Hobbes does, however, suggest that the sovereign could 'contrive' to put such a command into general form. Such a law would have to set out a crime punishable by the death penalty and stipulate that if the convicted criminal happened to have a son of a certain age in the country, the son must take on the office of executioner. If the sovereign succeeded in doing this, I would be bound to obey, Hobbes says, unless I managed to get out of the country before the condemnation of my father. So while it would be difficult to wrestle legal form into a shape that would allow a law that Hobbes clearly regards as inhumane to be brought into existence, he admits that it could be done.

Notice that while Hobbes is bothered by the sheer inhumanity or immorality of the law, his analysis in Behemoth does not focus on that fact. Rather, his point is that there are certain kinds of inhumanity that legal form resists. His earlier texts, in particular Leviathan, make it clear that the basis for the resistance is the laws of nature, which are not only laws that are derivable from the right of nature but also principles internal to legal order.[26]

Once we set the passage from Behemoth in the context of that and other discussions in Leviathan, matters become even more complex.

First, in order to take advantage of the gap between publication of the law and the condemnation of my father, I would have to be pretty sure that he would be convicted despite the fact that he would have to be tried and found guilty by a judge. For only after such a finding had been made, could the judge issue the particular command that I execute my father. This factor complicates matters because Hobbes has a rich understanding of the judicial role.

Hobbes argues that in arbitration in the state of nature, and in a dispute before a judge in civil society, the parties must on pain of irrationality accept the decision as representing right reason, and hence that they are not permitted to return to the original conflict of reasons between them to contest the judgment. They must take, in other words, the decision as settling the dispute. Hence, a standard interpretation of Hobbes is that it matters more in a conflict that the conflict is resolved or settled by a definitive decision than how it is resolved. The principle of settlement is then what makes it altogether rational to submit to arbitration, and thus by parity of reasoning to the decisions of an all-powerful political sovereign, whatever the content of the decision of the arbitrator or the decisions of the sovereign.[27]

If this interpretation captured the whole of Hobbes's argument, his solution to the problem of the state of nature would be wholly procedural. Further, his conception of an arbitrator in the state of nature and of the arbitrator's equivalent in civil society, the sovereign and his subordinate judges, would amount to no more than the person with authority to decide

24 Hobbes, Behemoth, 51.

25 For discussion of Hobbes's changing views on this distinction, see Kinch Hoekstra, 'Tyrannus Rex VS. Leviathan' (2001) 82 Pacific Philosophical Quarterly 420.

26 As Michael Oakeshott put it, for Hobbes the laws of nature make up the content of ius:

> But they should not be seen as independent principles which, if followed by legislators, would endow their laws with a quality of 'justice'; they are no more than an analytic break down of the intrinsic character of law, … the jus inherent in genuine law which distinguishes it from a command addressed to an assignable agent or a managerial instruction concerned with the promotion of interests.

Oakeshott, 'The Rule of Law' in Oakeshott, On History and Other Essays (Indianopolis: Liberty Fund, 1999) 129, 173. For my own attempts to elaborate this idea, see David Dyzenhaus, 'Hobbes's Constitutional Theory' in Ian Shapiro, ed., Leviathan (New Haven: Yale University Press, 2010), 453 and 'How Hobbes met the 'Hobbes Challenge"' (2009) 72 Modern Law Review 488.

27 See Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Georgia Law Review 1.

a dispute, however that person wanted to decide it. Indeed, there would be no need for Law 16 of the laws of nature, which makes it a duty on conflicting parties to submit to arbitration by a third party if they find themselves in conflict,[28] since it would be far more efficient for the conflicting parties simply to agree to the result of a coin toss.

As Hobbes makes clear, there is much more to arbitration than the principle of settlement. Once the conflicting parties' consent constitutes an arbitrator, that person is not simply a natural individual. Rather, he is an artificial person in that he takes on a role in which at least four of the other laws of nature are implicated. Law 11 is the law of equity, that 'if a man be trusted to judge between man and man, it is a precept of the Law of Nature, that he deal Equally between them'.[29] And because, says Hobbes, 'every man is presumed to do all things in order to his own benefit, no man is a fit arbitrator in his own cause', which gives us law 17.[30] For the same reason, law 18 holds that no man is to be judge who 'has in him a natural cause of partiality'.[31] Law 19 is that in controversies of fact, the judge must give credit to the witnesses.[32]

These last four laws are both procedural and substantive in that they affect, without determining, the content of any decision by an arbitrator who is faithful to the moral discipline of his role. Moreover, when the parties submit a dispute to an arbitrator, they do so not only in the expectation that he will give a decision which provides a definitive resolution to the dispute, and so permits them to avoid fighting it out by whatever means they choose, but also in the expectation that the decision will accord with the laws of nature which set out the moral discipline of the arbitrator's role. The authority of the arbitrator comes, then, not only from the consent of the parties to abide by his decision, but also from the kind of decision that they are entitled to expect. A complaint by one of the parties that the decision is flawed because the arbitrator failed to act in accordance with these constraints of role is different in kind from the complaint that Hobbes rules out – that the party simply does not like the way the arbitrator settled the dispute over right reason.[33]

Notice that the principles that condition the substance of the decision are principles that will figure on most, perhaps all lists of principles of legality or the rule of law. So if we move from the situation of an arbitrator in a state of nature to the situation of a judge in a civil society, we can put the point just made as follows. In Hobbes, the specific authority of law comes from not only from the fact that law provides an institutionally conclusive way of settling a dispute since it provides determinate conclusions about the obligations of legal subjects. Such authority also comes from the fact that conclusions about what the law requires will be based on sound reasons, reasons that include the principles of legality.[34] In play here is not the principle of settlement, but the principle of justification.

Of course, Hobbes does see differences between the situation of the arbitrator in the state of nature and the judge in a civil society since the legal order of civil society has to be staffed by subordinate judges because all laws require interpretation.[35] Hobbes tells us that a good judge is one who, in interpreting the written law, relies on his understanding of the unwritten law, the laws of nature.[36] Moreover, one should not think that there is anything illegitimate in judges interpreting the positive law through the lens of the laws of nature, because it would be a great insult if subordinate judges were to attribute to the ultimate judge, the sovereign, an intention to flout the laws of nature.[37]

As a result, the sovereign as ultimate judge is constrained by the laws of nature, not because he owes duties to his subjects, but because of the duties owed by judges to them. Their duty to the sovereign is exhausted by their obligation of 'fidelity' to law,[38] including the laws of nature. This duty, it must be emphasized, flows not to a natural individual, even if the sovereign happens to be one natural individual. As the quote from Behemoth makes clear, from the judicial perspective the sovereign is the body that makes the written laws that judges must interpret. That is, the sovereign is a legally constituted sovereign: the person or body that has the authority to make laws provided that it complies with the public criteria recognized for certifying that a law is valid.

I will call this the 'validity proviso'. But there is, following my account so far, another 'legality proviso'—the laws the sovereign makes have to be interpreted, and so must be interpretable, in light of the laws of nature.

The validity proviso tells us that Hobbes was well aware of the existence of something like Hart's 'rule of recognition', the ultimate rule of legal order that provides criteria for certifying the validity of particular laws. Hart and Hartians after him have taken for granted Hart's claim that the rule of recognition corrected the mistake of his positivist predecessors Bentham and Austin in supposing that the sovereign is legally unlimited, a supposition that Hobbes is even more famous for making. But Hart did not perhaps have the best understanding of his tradition on this score.[39] The better interpretation is that Hobbes, Bentham, and Austin did not mean by 'legally unlimited' that the sovereign could make law without

28 Leviathan, 108-9.
29 Ibid, 108.
30 Ibid, 109.
31 Ibid.
32 Ibid.

33 Raz almost gets to the point of seeing this in 'Authority, Law, and Morality', 196.

34 I adapt here the illuminating argument in Kenneth Winston, 'Introduction', to Winston, ed., The Principles of Social Order: Selected Essays of Lon L. Fuller (Hart Publishing: Oxford, 2001), 25, at 36-7.
35 Leviathan, 190-1.
36 Ibid, 95-6.
37 Ibid, 194.
38 To use Lon L. Fuller's term, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 632.

39 The legality proviso was, however, expressly rejected by Bentham and Austin after him. Legal positivists today are still struggling with the question of how to cope with it.

complying with public criteria for law-making. Rather, they had in mind a legal order in which the sovereign may at will change any law as long as he complies with the criteria by enacting a law.[40]

The legality proviso tells us that it is not sufficient for an enacted law to comply with the public criteria. The content of the law must also be one that judges can interpret in such a way that it complies with the laws of nature, that is, at least does not violate them, at best, displays an attempt to meet the highest aspirations set by these laws. Hence, Hobbes is not a legal positivist at least in so far as does not subscribe to the thesis that the law 'consists only of authoritative positivist considerations', with the latter being considerations 'the existence of which can be ascertained without resort to moral argument'.[41]

This last fact gives rise to the question of what happens when the two provisos clash, for example, when the sovereign, in full compliance with the public criteria, enacts a law that is difficult to square with one or more laws of nature. I pointed out that, in the example from Behemoth, Hobbes's analysis of the inhumane law focuses on the legally problematic aspects of the law rather than on its sheer inhumanity. That is, Hobbes focuses on the difficulties attendant on getting to the point where it is true that 'legally speaking, it is the case that you must execute your father'.

But we need to recall that he does not rule out the possibility that the point can be reached. My excursus into Hobbes's understanding of the role of a judge shows that the statement would have to follow not only the successful enactment of the general law, but also a full trial. That entails, on Hobbes's legal theory that from law's own perspective the judge would have to take into account any argument that sought to show that a law of nature required him to interpret the law in a particular way, perhaps one that goes against what seemed at first the self-evident meaning of the law. For Hobbes is clear that judges must take the meaning of any particular law to be the one that complies best with the laws of nature, even when another interpretation would seem the more obvious one outside of the interpretive context provided by natural law.

Note that in the Behemoth situation, there is one law of nature that should give the judge pause. Law 7 forbids the infliction of punishment 'with any other designe, than for correction of the offender, or direction of others'.[42] Hobbes must suppose that the death penalty may be inflicted when this would help to direct others by deterring them from certain crimes, even though it cannot 'correct' the offender.[43] Thus, a judge might conclude, though the conclusion will be somewhat strained, that my knowing that my own son will have to execute me should I be found guilty of committing a particular crime could be regarded as a plausible interpretation of this law of nature because the very inhumanity of the law might have a great deterrent effect.

But while the judge might think he can makes sense of his role in ordering that I execute my father, can he make sense of the claim that I am under a duty to do as he commands? Recall that in De Cive, Hobbes supposes there is no duty at all. In contrast, in the passage from Behemoth he says that that I will be 'bound' unless I escape the country before my father's actual condemnation. His vacillations create the kinds of puzzles that Sreedhar invokes Raz to solve. For example, while I am permitted to agree in the covenant that sovereign is entitled to execute me for disobedience to his laws, an agreement not to resist the sovereign when the actual punishment is imminent is void. And it is void because the punishment undermines the end of self-preservation for which I transferred to the sovereign my right to judge how best to preserve myself.[44] In Leviathan, Hobbes calls this the 'true liberty' of the subject, and says that the words of the covenant that give the sovereign a complete authorization to govern cannot 'by themselves' bind a man 'either to kill himselfe, or any other man':

> And consequently, that the Obligation a man may sometimes have, upon the Command of the Sovereign to execute any dangerous or dishonourable Office, dependeth not on the Words of our Submission; but on the Intention; which is to be understood by the End thereof. When therefore our refusal to obey, frustrates the End for which the Soveraignty was ordained; then there is no Liberty to refuse: otherwise there is.[45]

De Cive makes explicit that the 'office' in the example, i.e. taking the official role of being one's father's executioner, is dishonourable. Leviathan sets our more elaborately than De Cive the legalist morality of the official role. Behemoth sets the example in the context of that

40 For Hobbes's account of the rule of recognition, see ibid, 189. Those who think that Hobbes regarded the sovereign as legally unlimited rely on Hobbes's insistence that the sovereign is 'not Subject to the Civill Lawes', ibid, 184:
For having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will: Nor is it possible for any person to be bound to himselfe; because he that can bind, can release; and therefore he that is bound to himselfe only, is not bound.
Compare the similar passage at 224. But they fail to see that for an artificial person to be free 'when he will' he has to will publicly, that is, to express himself in a way that is publicly accessible and recognizable to his subjects as an expression of will. They also fail to notice that in the passage at 224 Hobbes emphasizes that the sovereign is subject to the laws of nature.

41 Joseph Raz, 'The Problem about the Nature of Law' in Raz, Ethics in the Public Domain, 179, at 189-90. Notice that there is an ambiguity here between 'the existence of which can be determined' and the content of which can be determined'. Raz means both.

42 Ibid, 106.

43 Though Mario A. Cattaneo suggests that the logical conclusion of Hobbes's argument is that the death penalty should be outlawed because of its deep irrationality; 'Hobbes's Theory of Punishment' in K.C. Brown, ed., Hobbes Studies (Oxford: Basil Blackwell, 1965) 275.

44 Leviathan, 98.

45 Ibid, 151.

morality and sketches how the office is problematic not only because it is dishonourable but also because it is inherently problematic as an official, that, is a law-constituted role.

Put differently, the command's inhumanity is legally problematic since it undermines the basis for law's claim to authority over me. This basis is not reducible, as is commonly supposed, to my interest in security – a trade of protection for obedience – though even on those terms one might argue that the law undermines security. For Hobbes is clear that a civil society is not merely one in which there is centralized power, since what makes it civil is in large part that the power is exercised through law. To clamour for freedom from the law, he argues, is absurd because that it is to demand a return to the state of nature.[46] This argument is rightly taken to be an attempt to debunk the claim that people may legitimately rise up against their leaders in the name of liberty.[47] But it is not only that, for it is also an argument about the quality of civic liberty, a kind of liberty we can have only when a system of civil law is in place.

The basis for the law's claim to authority is that it serves our interest in civic liberty. This is the liberty one has when one enjoys the security of a stable order of laws, made by a lawgiver whose authority rests on the fact that his subject have authorized him so to act, and who has no interest in making law other than the provision of such security. In addition, the legal subject knows that in cases where the law seems unreasonable because it does not accord with the laws of nature derivable from that interest, he may ask a judge for an authoritative interpretation of the law, which the judge will strive to ensure complies with the liberty-and equality-serving laws of nature.[48]

For Hobbes the paradigmatic way for this authorization to come about is through sovereignty by institution, an agreement between free and equal individuals in the state of nature.[49] Once the sovereign is instituted, the equality of the state of nature is preserved in law 11, the law of equity that requires that those who are 'trusted to judge between man and man' deal equally between them,[50] and in law 10, the law against arrogance, that 'at the entrance into conditions of Peace, no man require to himselfe any Right, which he is not content should be reserved to every one of the rest'.[51] Law 10, says Hobbes, secures for men the liberty to do those things without which 'a man cannot live, or not live well' and it thus amounts to an 'acknowledgment of naturall equalitie'.[52] In addition, liberty is preserved both through the institution of civic liberty and through the residual right to question whether 'the End for which the Soveraignty was ordained' is frustrated.

Now, both liberty (other than the residual right of liberty) and equality are transformed in the transition from the state of nature to civil society through the way in which the conditions for both are determined through enacted law. But, as we have seen, just because it is the task of sovereignty to decide how to effect that transformation, subordinate judges are under a duty to try to ensure that the enacted law lives up to the principles it seeks to effect. Indeed, while it is crucial for Hobbes that when subordinate judges perform this task they do so in an impartial fashion, that is, that they make an independent judgment about what the law (both enacted and natural) requires, they should not be seen as checking sovereignty. Rather they are completing the sovereign act of law-making as part of the artificial person of sovereignty. Judges are, as Hobbes tells us in 'The Introduction' the 'artificall Joynts' of the 'Artificiall Soul' of sovereignty.[53]

In sum, liberty and equality are not smuggled into the laws of nature. Rather, they are built in, since one cannot make sense of the project of erecting the 'firme and lasting edifice'[54] of a civil society—one in which subjects enjoy civic liberty--in the absence of a legal order, which is to say an order of positive law that complies with the principles of natural law. The principles are thus formal or structural in nature. They are the principles with which there has to be conformity in order to have a society in which the exercise of power through law has a plausible claim to the obedience of the individuals subject to the law, such that they may be said to have authorized it. Hence, the task of ensuring that the positive law is interpreted in the light of these principles is inseparable from an inquiry about how the law serves both liberty and equality.

Recall that for Hobbes the sovereign is the supreme judge. However, unlike subordinate judges, he not only declares what the law is, but also has the authority to enact new laws. But, as I have already indicated, his freedom from the law is not a freedom for the artificial person and its agents to act outside of the law, but a freedom to enact new laws that override old laws. Hobbes here makes a great contribution to modern legal theory in beginning to set out an account of how a centralized political power is able to make judgments about the common good, that is, judgments that all legal subjects might reasonably be taken to have authorized as their own. In other words, he begins an account of the conditions for deliberate and legitimate legislative reform.

However, it is within this account that the validity proviso applies. That is, to

46 Ibid., 147.

47 See, for example, Quentin Skinner, Liberty Before Liberalism (Cambridge: Cambridge University Press, 1998) and Hobbes and Republican Liberty (Cambridge: Cambridge University Press, 2008), and Philip Pettit, 'Liberty and Leviathan', (2005) 4 Politics, Philosophy, & Economics 131.

48 The third way in which the quality of the space of civic liberty differs from mere negative liberty is that individuals are enabled both to create juridical relations for themselves and, more generally, to act as just men; Leviathan, 103-4.

49 I will not here go into why I think that sovereignty by institution, in contrast to the alternative method of acquiring sovereignty described by Hobbes--sovereignty by acquisition, is paradigmatic.

50 Leviathan, 108, emphasis removed.

51 Ibid, 107, emphasis removed.

52 Ibid.

53 Ibid, 9.

54 Ibid, 221.

state an obvious but important point, the validity proviso applies only to statutes and to the authority delegated to public officials by statutes. It is thus a necessary condition for an important class of legal statements to be true. But it is not a necessary condition for other statements of what is legally speaking the case to be true. It is, as we have seen, not true about judgments about what the law requires that depend on the subordinate judge arriving at a conclusion about what is warranted by the best interpretation of the laws of nature, or of enacted law interpreted in the light of the laws of nature.[55] Moreover, Hobbes remarks in Leviathan that there are certain essential rights of sovereignty that the sovereign cannot grant away however explicit the grant, including the right to make law and the right of 'Judicature'. The latter is the right

> of hearing and deciding all controversies, which may arise concerning Law, either Civill, or Naturall, or concerning Fact. For without the decision of Controversies, there is no protection of one Subject, against the injuries of another; the Lawes concerning Meum and Tuum are in vaine; and to every man remaineth, from the naturall and necessary appetite of his own conservation, the right of protecting himselfe by his private strength, which is the condition of Warre; and contrary to the end for which every Common-wealth is instituted.[56]

Such a grant, Hobbes says, is 'void',[57] and he must mean void even if it is the case that the grant is explicit and contained in a command that fully complies with the validity proviso.

So here we have an example where subordinate judges would not only be entitled to disregard a perfectly valid command, but under a duty so to do. If they did not, as Hobbes tell us in the quotation, the end of Commonwealth – the preservation of civic peace and security – is subverted. Moreover, they would be under such a duty even if the sovereign included in the law a provision that prohibited subordinate judges from exercising such a review power, the equivalent of the legislative provision called either a privative or ouster clause in the twentieth century.

But recall that for Hobbes it is not order as such – the mere absence of conflict-- that is in issue when it comes to Judicature. Rather, it is the kind of order that makes possible a certain kind of interaction between subjects, one that, as I have argued, requires a stable system of law that makes it possible for individual subjects to live together as equal members of the civic community. This point establishes one end—the 'duty end'--of what we can think of as a continuum of legality where judges are under a duty to strike down a law, even though that law complies with the validity proviso, and even though they are not given any explicit authority by any other kind of enacted law to do so. The other end – the 'aspiration end' – is established by Hobbes's claim in chapter 30 of Leviathan that the sovereign must make 'Good Lawes'. Hobbes does not mean by 'good' 'just' since his view is that all the sovereign's laws are by definition just. Rather, a good law is that which is 'Needfull, for the Good of the People, and withall Perspicuous'.[58] He goes on to say that the use of laws is 'not to bind the People from all Voluntary actions; but to direct and keep them in such a motion, as not to hurt themselves by their own impetuous desires, rashnesse, or indiscretion; as Hedges are set, not to stop Travellers, but to keep them in the way'.[59] Further, while one might think that the true end of a law is the benefit of the sovereign this is not the case, for 'the good of the Soveraign and People, cannot be separated'.[60] Finally, perspicuity consists not so much in the words of the law, but in a 'Declaration of the Causes, and Motives, for which it was made'.[61] And it seems clear that for Hobbes law should have all of these features in order that it might be 'the publique Conscience, by which [the subject] … hath already undertaken to be guided'.[62]

As one moves away from the duty end, matters become complex because when a statute is not clearly void but seems to undermine one or other principle of legality, the judge is under a duty to try to find an interpretation of the statute that will make it less problematic from the perspective of legality. In seeing this we can dispel a possible confusion about the distinction between what we can think of as the morality of duty and the morality of aspiration.[63] The distinction is not one that pertains directly to the judicial role, though it has clear implications for judges; rather, it pertains directly to the role of the lawmaker.

The duty end of the continuum of legality is the end at which the lawmaker has to conform in very particular ways with legality in order for its acts to be recognized as legislative acts. Correspondingly, when the lawmaker fails so to conform, judges are under a duty to declare that the act fails to be law. As one moves away from this end, answers to the question of what legality requires will not be so clear; nevertheless, the judges remain under a duty to interpret the law so as to make it as consistent as possible with the aspirations of legality. There is, in short, a judicial duty to enforce strictly the requirements of legality at the duty end. But as one moves away from that end, there is also a judicial duty to make the law live up to the aspirations of legality, one that is derived from the legislative duty to comply with these aspirations.[64]

55 In this regard, Hobbes differs from the common law tradition in general and from Ronald Dworkin's 'interpretive' account of how judges should reason mainly because he is opposed to any doctrine of precedent; ibid, 101-2.

56 Ibid, 125.
57 Ibid, 127.
58 Ibid, 239.
59 Ibid, 239-40.
60 Ibid, 240.
61 Ibid.
62 Ibid, chap. 29, 223.

63 Here I follow the distinction in Lon L. Fuller, The Morality of Law (New Haven: Yale University Press, 1969, revised edition), 5 ff.

64 Kinch Hoekstra notes in his manuscript, 'Thomas Hobbes and the Creation of Order', that 'valid' in Hobbes's day meant strong as well as

It follows that any of the following examples would be legally speaking problematic from Hobbes's perspective on law: a statute that flatly contradicted the content of one of the laws of nature; a statute that precluded judges from relying on a particular law of nature in interpreting the law; or, even more radically, a statute that prohibited judges from ever relying on the laws of nature. The morality of aspiration requires judges to try to do something in all these cases to preserve the laws of nature even if one thinks they are not under a duty to declare the statute void. And that suffices to show that Hobbes has a rich and complex legal account of law's authority, one in which the complexities are generated from within.

Put differently, the issue is not about whether judges are entitled to exercise (in our terms) 'strong form judicial review', striking down statutes when these conflicts with fundamental legal principles, for example, those contained in an entrenched bill of rights. Rather, Hobbes helps us to understand that the kinds of conflicts that such review might be thought institutionally appropriate to resolve are conflicts that will arise in any legal order, because they are conflicts internal to the exercise of legal authority. Moreover, addressing such conflicts is part of the judicial role even when judges are confined, as Hobbes would prefer, to 'weak form judicial review' and so find on occasion when they are on points of the continuum towards the aspirational end that they are unable to decide a conflict between the two provisos in favour of the legality proviso.

The difference between these two forms of judicial review is in this context is only about whether there is s judicial remedy available in the limit case – when the validity proviso clashes with the legality proviso in such a way that the individual's interests in liberty and equality are threatened. Sreedhar's Razian argument is one way of responding to the limit case through a claim about non-excludable reasons, in essence inalienable rights against the sovereign.[65]

My account is different. The authority of the sovereign is not a matter of his being able to decide as he pleases with each individual subject obliged to obey him unless the decision has a negative impact on the non-excludable reasons of that individual. Rather the limit case reveals the fundamental norms of the moral community of which all legal subjects are members and that make it possible for the artificial person of the sovereign to have and to exercise authority, by which I mean de jure or legitimate authority. Indeed, on this account adding either of these adjectives merely makes explicit what is necessarily implicit, since legal authority is always de jure. Here it is helpful to return to Hobbes's distinction between advice and command because, as he says in De Cive, we 'must fetch the distinction between counsel and law, from the difference between counsel and command.'[66]

The Background Conditions of Authority

In one of the most innovative works in ethics in the last sixty or so years,[67] Stephen Darwall argues that the idea of authority presupposes certain background conditions—the existence of a moral community, whose members have equal standing to hold each other to account for violations of moral norms. Darwall takes Hobbes's distinction between command and advice as central to his own theory of morality as 'second personal', and comments that failure to observe this distinction 'infects Joseph Raz's account of authority'.[68] As Darwall has explained, Raz's Normal Justification Thesis can explain when we should treat someone as a great source of advice, but not why we should treat that person as an authority. Raz has responded that his explanation of authority is not an 'account of [moral] rights and duties in general' but, rather, 'an attempt to explain authority of the kind that governments claim over their subjects, parents over their children, and so on'.[69]

However, on my argument so far Hobbes's account of governmental authority is precisely the kind that Darwall describes, and this is so despite the fact that Hobbes elaborates the distinction between command and advice in Leviathan in what might seem initially an inconsistent fashion. It follows, Hobbes says, 'manifestly' from the distinction that 'he that Commandeth, pretendeth thereby his own Benefit. For the reason of his Command is his own Will onely, and the proper object of every mans Will, is some Good to himselfe'.[70] It may seem, that is, that Hobbes if offering something like a benefit theory of authority: you obey my command because of the benefit to me.

However, Hobbes's point about benefit merely emphasizes a feature of authority that an authoritative directive is not one that I follow because its content is one I inspect and decide offers the best

valid in the sense of 'not void'. Hence, when Hobbes means to use valid at important points in the former sense, he must intend that validity comes in degrees of strength. On this view, a statute can be more or less valid depending on its ability to meet the legality proviso. For a relevant argument in a very different context, see David Dyzenhaus, 'The Juristic force of Injustice' in Dyzenhaus and Mayo Moran, eds, Calling Power to Account: Law, Reparations, and the Chinese Head Tax Case (Toronto: University of Toronto Press, 2005) 256.

65 See Yves Charles Zarka, 'The Political Subject', in Tom Sorell and Luc Foisneau, eds, Leviathan After 350 Years (Oxford: Clarendon Press, 167).

66 Hobbes, De Cive, 14.1.

67 See Gary Watson, 'Morality as Equal Accountability: Comments on Stephen Darwall's The Second-Person Standpoint' (2007) 118 Ethics 37, at 37-8.

68 Stephen Darwall, . See also Darwall, 'Authority and Reasons: Exclusionary and Second Personal' (2010) 120 Ethics 257 and 'Authority and Second Personal Reasons for Acting', in David Sobel and Steven Wall, eds., Reasons for Action (Cambridge: Cambridge University Press, 2009) 135.

69 Joseph Raz, 'On Respect, Authority, and Neutrality: A Response' (2010) 120 Ethics 279, 290.

70 Leviathan, 176. Note that Darwall quotes almost the full passage from De Cive but not the two lines towards the end where Hobbes makes the same point; The Second-Person Standpoint: Morality, Respect, and Accountability, note 25 at 12-13.

course of action to me. Rather, I obey it because of my reason for regarding you as an authority. Thus, the remark is entirely consistent with Darwall's favourite example of my authority to demand that you take your foot off mine thus ceasing to cause me pain.[71] The benefit is to me not to you. But that I'm entitled to demand that you take your foot off mine is not explained by the fact that I benefit, but by our standing vis à vis each other as members of the same moral community.

When one moves from the private context to the public one, from the interpersonal relationship to the relationship of legal subject to public authority, however, the concept of benefit has to be 'fetched' from the interpersonal context and deployed in the public context. Recall that the sovereign is an artificial person and that Hobbes says that it is wrong to suppose that the true end of a law is the benefit of the sovereign but not the people, because 'the good of the Soveraign and People, cannot be separated'.[72] The idea survives from the interpersonal context that the legal subject makes a mistake if he decides whether or not a directive is authoritative on the basis whether he thinks it also serves his benefit.[73] But the idea of one individual making a demand of another that the other is obliged to obey to the demander's benefit is no longer appropriate since the benefit is to the public at large or the Commonwealth.

Raz's account of scope is helpful here.[74] But scope is not a property of exclusionary reasons. Rather scope is a property of authority that is set by reasons, in legal contexts the idea of jurisdiction or bounded authority. Moreover, there is a hard to resist danger in trying to understand the scope of reasons in spatial terms.[75] Rather, scope has to be understood in terms of what is reasonable to infer, given the background conditions of authority. And this requires an interpretation of the reasons in the directive in the light of the reasons for treating the body or person issuing the directive as an authority.

Another way of seeing the problem in the Razian account is in terms of the positivist idea of content-independent reasons. One aspect of this idea is relatively harmless, since it seeks to capture simply the same point Hobbes makes with the idea of benefit to self-- that one does not 'obey' when one's reason is that the content seems right. But the other aspect is where the theory of authority goes wrong – that the content consists of positivist considerations, 'the existence of which can be ascertained without resort to moral argument'.

As we have seen, not only is the case that the laws of nature condition the content of the law, but they do so through their relationship to the reason for obedience. That is, the way in which the laws of nature interact in civil society with enacted law makes the content of enacted law in part dependent on its compliance with the laws of nature. Hence, because the laws of nature are derived from our interest in liberty and equality that leads us in the first place to authorize the sovereign, the content of the enacted law will reflect those interests. And the content should achieve this in a way that is intelligible or 'perspicuous' to the legal subject.

When intelligibility in this sense is not achievable, it will also be the case that the validity and the legality provisos are in conflict. I will not, a I have indicated, attempt here to try to provide an account of how Hobbes or any other legal theorist envisages the resolution of such conflicts. For it suffices to see that the conflicts arise within Hobbes's account of the role of law in sustaining a civil society to establish the contours of a very different account of authority both from that elaborated by contemporary legal positivists and from that commonly attributed to Hobbes. In that account, what is problematic about such conflicts is precisely that they bring into question the most fundamental presuppositions of the well-functioning political community that Hobbes calls a civil society.

71 Ibid, 5-10.

72 Leviathan, 240.

73 Raz's theory of authority seems to make that mistake writ large, in supposing that someone who is a constant source of good advice, that his, his advice always conduces to my benefit, is an authority because he meets the criteria of the Normal Justification thesis.

74 This is perhaps the only idea that Sreedhar means to take from Raz.

75 See Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of Due Deference' in Nicholas Bamforth and Peter Leyland, eds, Public Law in a Multi-Layered Constitution (Oxford: Hart Publishing, 2003) 337.

About the author:

Professor David Dyzenhaus, born in 1957 in Johannesburg, South Africa.

Professional Career
2008, Global Visiting Professor, New York University Law, Fall, 2008.
2006 Herbert Smith Visiting Fellow in the Cambridge Law Faculty/Visiting Scholar at Pembroke College, Cambridge
2002 Associate Dean of Law (Graduate)
2002 Visiting Faculty, Central European University
1999 Fellow of the Royal Society of Canada
1998 Professor of Law and Philosophy, University of Toronto
1993-98 Associate Professor of Law and Philosophy, Law Faculty and Department of Philosophy, University of Toronto
1992-93 Humboldt Fellow, Faculty of Law, University of Heidelberg
1990-93 Assistant Professor of Law and Philosophy, Law Faculty and Department of Philosophy, University of Toronto
1989-90 Assistant Professor and Canada Research Fellow, Law Faculty, Queen's University.
1988-89 Adjunct Professor, Queen's University, Kingston.
1982-83 Full-time lecturer, School of Law, University of the Witwatersrand.

Academic Record
1984-88 University of Oxford, D.Phil.
1979 LL.B.,University of the Witwatersrand.

1977 B.A., University of the Witwatersrand

Books:
Hard Cases in Wicked Legal Systems: Pathologies of Legality (Oxford: Oxford University Press, 2010, second edition).
The Constitution of Law: Legality in a Time of Emergency (Cambridge: Cambridge University Press, 2006).
Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (Clarendon Press: Oxford, 1991).
Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order (Hart Publishing: Oxford, 1998)
Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar (Clarendon Press: Oxford, 1997).

PLENARY LECTURE

The Very Idea of Legal Positivism Prof. Dr. Dr. h.c. mult. Stanley L. Paulson, Washington University in St. Louis / USA	
Date	WED 17 Aug 2011
Time	11.30 h – 12.15 h
Location	HZ 1/2

Abstract:

Legal positivism has been discussed, for the most part, in a vacuum. Still, there is a standing presumption, however rarely articulated, that there are ties between legal positivism and positivism writ large in the greater philosophical tradition, that is to say, between legal positivism and naturalism. What sorts of ties? In the present paper, I offer an answer in two parts. In Part One, I draw on John Austin's legal philosophy, establishing that a positivist legal philosophy fits into the greater rubric, positivism writ large, or – my substitution – naturalism. And, in Part Two of the paper, I address the substitution of naturalism for positivism writ large.

In Part One, two theses are of special interest, with the second thesis following from the first. My first thesis: Austin's naturalism – his "reduction", at two junctures, of ostensibly juridico-normative concepts to matters of fact (namely, to fear and to habit) – is, as he contends, sufficient to make out his case on the nature of law. My second thesis, following from the first: If Austin's move is sufficient, then no thesis respecting a non-contingent link between morality and the law can be necessary to the explication of the nature of law. These two theses, taken together, make a point of genuine significance. That is, if these two theses are indeed correct and if Austin's legal philosophy is representative of legal positivism, then the celebrated "separation principle" is not doing the lion's share of the work in legal positivist circles after all. Rather, the separation principle is but a corollary of naturalism, the overriding view.

Parenthetically, I might add a note on Hans Kelsen. Just as Austin is representative of legal positivism, Kelsen is utterly unrepresentative – and is known to be unrepresentative. In particular, the idea that the separation principle is but a corollary of naturalism can scarcely be attributed to him. Of course Kelsen defends the separation principle, but his position represents, inter alia, a wholesale rejection of naturalism.

In Part Two of the paper, I return to the question posed by my substitution of naturalism for positivism writ large. Is the substitution defensible? This question takes us to the history of ideas and the history of philosophy. A preliminary point is as important as it is obvious: These "ism"-labels in philosophy – "positivism", "naturalism", "empiricism", and the like – are, without exception, very general, and it would be a mistake to contend that this or that definition of an "ism"-label counts as the characterization of the view so labeled. I illustrate the point by turning to Willard Van Orman Quine, the "father of contemporary naturalism". Quine understands naturalism as the appeal to the sciences, contending that naturalism assimilates epistemology to "empirical psychology". "[T]he epistemological question", Quine writes, is "a question within science", the question of "how we human animals can have managed to arrive at science from such limited information. Our scientific epistemologist pursues this inquiry … Evolution and natural selection will doubtless figure in this account, and he will feel free to apply physics if he sees a way." (Quine, "Five Milestones of Empiricism" [first publ. 1975], in Quine, Theories and Things, Cambridge, Mass. 1981, pp. 67-72, at 72). Austin, however, has no concern whatever with the empirical sciences. My point here is that if one were to confine naturalism to Quine's view of it, the idea of bringing Austin within the rubric of naturalism would be well nigh absurd.

To repeat, Quine's naturalism counts against fitting Austin's legal philosophy into a naturalistic framework. Naturalism, however, is greater than Quine, thanks not least of all to the extraordinary role he played in begetting it. Quine's own view counts today as one prominent characterization of naturalism, and David Hume's view, now widely characterized as naturalism but clearly not to be understood as an appeal to the empirical sciences, represents a different species of naturalism. Barry Stroud, in his well-known book on Hume, makes out the case for treating Hume as a naturalist. "Of all the ingredients of lasting significance in Hume's philosophy I think [his]

naturalistic attitude is of the greatest importance and interest … He was interested in human nature, and his interest took the form of seeking extremely general truths about how and why human beings think, feel and act in the ways they do … These questions were to be answered in the only way possible – by observation and inference from what is observed." (Stroud, Hume, London 1977, at p. 222) Austin, too, rests his case on observation and inference. And his ties to the tradition in English philosophy – Jeremy Bentham and John Stuart Mill, to name only the most prominent figures – are well known. And if, beyond the tradition in English philosophy, Austin is also representative of legal positivism generally, then his naturalism reaches to legal positivists generally. At this point, a host of figures on the European continent come into play. My favorite example is Georg Jellinek.

About the author:

Stanley L. Paulson, born in Fergus Falls, Minnesota, in 1941, studied philosophy at the University of Minnesota and at the University of Wisconsin, where he was awarded the Ph.D. He then studied law, completing the professional programme at the Harvard Law School. Paulson has published widely, in both English and German, on issues in European legal philosophy and legal theory, with special attention to the work of Hans Kelsen. Along with other current projects, Paulson, together with Bonnie Litschewski Paulson, has signed a contract with the Oxford University Press for a new translation of the second edition of Kelsen's Reine Rechtslehre (1960). In 2003, Paulson was awarded the Research Prize of the Alexander von Humboldt Foundation (Bonn), and he has held fellowships and grants from the Humboldt Foundation, the Rockefeller Foundation (New York), the Max Planck Society (Munich), the National Endowment for the Humanities (Washington, D.C.), and the Fulbright Commission (Vienna, Paris, Jerusalem, Bonn). For many years Paulson taught at Washington University in St. Louis, where he was Professor of Philosophy, and William Gardiner Hammond Professor of Law. Presently he is Mercator Guest Professor in the Faculty of Law, University of Kiel.

PLENARY LECTURE

Methodologische Klarheit und/oder gegenständliche Reinheit des Rechts? Bemerkungen zur Diskussion Kelsen – Pitamic*
(Methodological Clarity or Substantial Purity? Notes on the Discussion between Kelsen and Pitamic)* Prof. Dr. Marijan Pavcnik, University of Ljubljana / Slowenia

Date	THU 18 Aug 2011
Time	9.30 h – 10.15 h
Location	HZ 1/2

* Note: The Lecture will be held in German.

Abstract:

1. Introduction

In the Preface to the second edition of his Main Problems in the Theory of Public Law, Hans Kelsen (1881-1973) writes that Pure Theory of Law is "the communal work of a constantly expanding circle of men with a congenial theoretical orientation." One person who joined this circle was Leonid Pitamic (1885-1971), who acknowledged the value of its contributions to the project of defining the basic norm as a condition of juridical knowledge. In the Preface to the first edition, Kelsen also speaks of an intimate circle of men striving for univocal aims. The characteristics of his "School", according to him, is that "here, everyone tries to learn from others, without giving up on their own position". In the case of Kelsen and Pitamic, these questions concentrate on the purity of the method of law and of its content.

It would be false to say that Pitamic was not impressed or impassioned by the Pure Theory of Law. As for questions addressing the notion of law as a normative system, Kelsen's normative purism had a visible influence on him. Kelsen's point of departure, his statement that a norm can only arise from norms, not from reality, may have inspired Pitamic's claim that normative properties of law can be deduced only from properties of law. "The cardinal question is the relation between the group of norms determined by formal signs of positive law and superordinate or subordinate groups of positive law, a relation which, in fact, is identical to the legal force of the norm."

Pitamic extended the normative approach to studies of the state, of government bodies and of the relations between them. He already observed in his first paper, Plato, Aristotle and the Pure Theory of Law (1921) that Plato, and most notably Aristotle, had "followed a strict normative model in their exploration of the notions of the state, the citizen, and the law", and had managed to avoid methodological syncretism. Drawing on the example of Aristotle's Politics, he illustrates how "the idea of the state as an order, as a constitutional or legal order" is fundamental to the notion of the state. For any association, what is relevant is "the idea, the system, the nature of the connection, and not what is connected". In the footprint of this pursuit, Pitamic perceives a parallel between the ancient

Greek conception, which was "free from the constructivist auxiliaries of modern jurisprudence" and the Pure Theory of Law, which "dissolves this momentum, materialization and hypostasis of this device and recognizes it merely as an auxiliary for the conceptual economy of juridical thinking."

In the following, I will first briefly touch on one of the starting points of the Pure Theory of Law: the economy of thinking. It was certainly the question of the basic norm which divided Kelsen and Pitamic most incisively. Pitamic transcended the Pure Theory of Law and set out to find a common denominator between the contents of positive and natural law. He sought this common denominator in the nature of law. However, the conclusion from this is not that Kelsen's and Pitamic's conceptions are irreconcilable. Their views certainly differ, but they can complement each other if linked in an appropriate way. The core contribution of the Pure Theory of Law is that it erects a frame of formal law, while allowing for creativity within it.

2. The quest for a juridical basic norm (starting point of the Pure Theory of Law)

2.1. "Economy of thinking as a precondition of jurisprudence"

Law understood as a system of norms would be utopian without some foundation. Kelsen and his circle were searching for this foundation.

In 1917, Pitamic published a paper on the economy of thinking as a precondition of jurisprudence, which played a key role in this quest. Pitamic was particularly interested in the question whether and how Kelsen's purity could be justified. He advocated the scientific principle that an investigation of the process of normative deduction must take into account the development of events as it occurs according to another (causal) method. As he says himself,

> "facing this choice, an economical principle must be observed both with respect to past and to current law; this principle completely disregards subjective political beliefs and is exhausted in the objective statement of the material conditions determining the construction of such legal rules, which are to agree as closely as possible with prevailing conceptions of the ought, i.e. with such conceptions that actually motivate people in the domain and at the time for which the law is to be determined."

Regarding the nature of this principle, he quotes the philosopher and physicist Ernst Mach:

> "This tendency of obtaining a survey of a given province with the least expenditure of thought, and of representing its facts by some one single mental process, may be justly termed an economical use."

Pitamic proposed methodological clarity in legal theory, without altogether reducing Law as a priori to its normativity, and without completely divesting the a priori concept of all its non-normative elements. Pitamic sharply distinguishes between the deductive-normative and the inductive-causal method. The first only provides a way of thinking which enables us "to identify without contradiction the norms of a given material of law in their relations to one other, as well as to apply them in the face of actual events." The centerpiece of this method is the procedure of normative imputation, which is nothing but "the conjunction of one fact of the case with another fact of the case on grounds of a norm." In particular, it is characteristic that a defender of the deductive-normative method would always presuppose the starting point of his enquiry, while the starting point itself (i.e. the legal material as the subject matter of the enquiry) can only be defined by using the inductive-causal method. The latter investigates the concrete point of departure, i.e. a legal order which is to be found "in its concrete, temporally and spatially contingent contents."

This methodological dualism, which jurisprudence is unable to avoid, is illustrated by Pitamic in a metaphorical way:

> "When Kelsen presupposes a given standpoint – a complex of norms – and, from this formal precondition unconcerned with content, derives the consequences in a purely deductive way, he is so to speak on the peak of some mountain, from which he descends by carving a normative way, without asking himself the question how the summit is reached. The 'others' first investigate the material preconditions in order to find a starting point for the norms; they start by looking for the peak of a particular mountain; they carve a way upwards, which is only possible by using the inductive, causally operating method, as it requires (…) stating the psychological effects of conceptions of the ought which fall into the epistemic realm of being."

Pitamic explains that facing a series of ideas arranged by a certain method, one can never escape this infinite series without introducing conceptions arranged by another method. As Pitamic says, we are here dealing with "a leap (emphasis added) across an abyss, which, in its infinite depth, separates the world of the is from the world of the ought." In short: we are here concerned with an unresolved, maybe even unsolvable philosophical, epistemological problem, which may be bridged by a human leap of value [Wertsprung], but which leaves normatively operating deduction "cut off from any fact of being" (emphasis added).

2.2. The object and the method of enquiry

The central question revolves around the relation between the object and the method, or between the method and the object of enquiry. For Pitamic, Kelsen's standpoint that "a specific method determines a specific object" is unacceptable, and he dismisses it with the moderated counter-statement that a specific object also shapes the specific method which is to be used in its exploration. In a way, the investigated object thus presents itself

to the investigator, rather than him being the one who shapes this object.
For Pitamic, the use of the inductive-causal method is justified and completely "legitimate". Kelsen and Weyr were of a different opinion and objected to Pitamic that the use of the inductive-causal method implies a "complete denaturation of juridical understanding". Pitamic's research illustrates that the inductive-causal method is generally necessary when the "normative World of the Law" (i.e. law as an ought) depends on equivalent facts of being and is founded on them.
In this sense, the dispute over the method is an "entirely sterile dispute" (emphasis added), already because it fails to distinguish between the starting points of the enquiry and the normative juridical enquiry itself. The key question is not whether the additional application of the inductive-causal method is "allowed", but whether the two methods are "confounded". The goal is methodological clarity and purity, not a purity of the object, which could only be attained by using the deductive-normative method. Banishing the inductive-causal method would be to ignore, at least to a certain extent, the whole of temporally and spatially given law.

2.3. Kelsen's reaction

Kelsen partly took Pitamic's criticism into account. After all, he took for granted that we can only speak of positive law when its norms are, at least on average, effective in society, and tried to find an adapted theoretical solution. By the time of the publication of Pitamic's Economy of Thinking as a Precondition of Jurisprudence (1971), Kelsen had not been successful in defining such a solution which would remain within the boundaries of the Pure Theory of Law. Kelsen had addressed the problem of the basic norm. In his paper Imperial Law and State Law according to the Austrian Constitution (from 1914), he explicitly states that any juridical construction must "presuppose certain norms as valid legal rules". It is typical for Kelsen that the choice of this starting point is understood not as a juridical, but as a political question, and therefore "must always seem arbitrary from the perspective of juridical understanding."
Pitamic is convinced that Kelsen has borrowed his thoughts on the effectiveness of law, simply expressing them in a modified, more normative form, first in the shape of the norm of international law, then as the content of the basic norm. According to Pitamic, Kelsen has "completed the mentioned idea by introducing as a norm of international law what I had only suggested as a principle of enquiry for concrete national laws."
Kelsen's epistemological principle became "the content of a legal norm" and is therefore supposed to function as a juridical principle.
"By becoming the content of a norm", Kelsen writes, "the factual undergoes a very peculiar change of meaning, it is in a way denaturized, it makes a volte-face and becomes normative itself." Pitamic is not satisfied with this solution, because it only "puts the fundamental epistemological problem back one level, while it must resurface in international law."
He expresses the same concerns with regard to the basic norm as it is formulated by Kelsen in the first edition of his Pure Theory of Law (1934).
The development of Kelsen's theoretical standpoint justifies Pitamic's opinion that Kelsen had (to a certain extent) incorporated his critical remarks on the task of founding the effectiveness of law in a way which would make it acceptable and which would reconcile it with the Pure Theory of Law.
Regardless of the scope of this influence, it is a matter of fact that Kelsen did not develop it in all places where the normative and the factual, the factual and the normative overlap, but absorbed and canalized it in a way which left the starting points of the Pure Theory of Law untouched.

3. Back to the Nature of Law

Pitamic gradually committed himself more and more to the conclusion that law is not and cannot be merely a social technique, because its technique has to be social in order to be legal. He was not interested in law merely as a fleshed-out and fine-tuned normative technique, but saw in it a socially effective legal order, which assumes the character of law when it protects human external behaviour in general and human rights in particular (humaneness as a measure of legality). However, the "preconditions" of positive law are not only situated outside of it, but are also a "different, heterogeneous (emphasis added) system" reaching into the legal system, vitalizing it, and supporting its interpretations of legal norms. The dependence of law on this "different, heterogeneous system" is most delicate and also most obvious in the exegesis of the constitution, which is situated at the top of the pyramid of national law.
His exploration of law and its nature teaches him that its principal elements are order and human behaviour. Order is "so essential for law that it ceases to be law when it is not 'order' anymore". When the norms of a legal order are no more constantly implemented, they cease to serve the 'order' in the society they are designed for; those societies are then ruled by 'disorder', a lawless state; or another legal order has become effective." The order which is of such seminal importance for law is not an order without content, but an order which regulates human conduct and action. This regulation must

> "take account of its object, at least insofar as not to strip it of its character. Thus, in order to remain law, law may only prescribe or allow external human behaviour, not its contrary, 'inhumane behaviour'; otherwise it loses its legal quality."

The order ensured by the law loses its legal nature when its inhumaneness transgresses the boundaries beyond which individuals and social communities cannot exist. This is the minimal content of law, in its most general formulation, acceptable for everyone who recognizes humaneness as a value.

4. Methodological clarity instead of purity of the content of law

4.1. Freedom of scientific enquiry and arbitrariness of the content of law

The choice of the method and the nature of the investigation are also a matter of the freedom of scientific research. It lies in the nature of freedom of research to seek and to open up new aspects and nuances which are not available yet and which will contribute to legal understanding. Kelsen's purely normative understanding of law (cf. normativity thesis) is a creative example of this scientific quest. The quest is creative as long as it is in keeping with law and its nature. Kelsen's understanding of law is purified to such an extent that it is left with nothing but the formal structure of law as a social reality. Law is a pattern of norms embracing humanity (i.e. society) in a web shaped like a pyramid, and displaying their possibilities of action. Kelsen's approach depends on support in the form of facts (i.e. social relations) or values, which are the touchstone for the creation as well as for the understanding of legal contents. The objection which charges Kelsen with consenting to any content, returns like a boomerang. The question is not whether a grosso modo effective legal system could have an arbitrary content according to the Pure Theory of Law. The question is whether a system of norms whose content is arbitrary can actually be law. A system of norms which relies only on authority and tramples human rights under foot cannot be law. The very condition for positive law to function is the legitimacy of its respective content. Hart, for example, is moving in this direction by admitting that positive law has to include at least a minimal content of natural law.

4.2. Creative force of normative purism

Pitamic's assumption was that the method used in exploring law is not independent from the object of the enquiry. The object (i.e. the nature of this object, and thus the nature of law) affects the choice of the method(s) by which jurisprudence understands law. The paper O ideji prava (Of the Idea of Law) includes this interesting passage:

> "As a model should in general be shaped after the object it is made to represent, law as a form must equally, at least in general, be shaped after its object. If a model considerably damages the object rather than harmonizing with it, then it is not a model of this object."

Pitamic's language is symbolical. The model referred to is obviously Kelsen's method which aims at purity of the legal content. Pitamic objects that the ideal of methodological purity overlooks the structure of the legal content, which lends itself to scientific enquiry. This objection does not imply that a partial understanding of law has no creative force. The strength of a partial approach can lie in a clearer image of the points of view which are highlighted with equal strength, for example, by the integrative or integral (synthetic) interpretation of law. On the other hand, however, we also face the substantial danger that a partial approach might exaggerate one aspect of the law, or even distort it in comparison with other aspects. Kelsen's normative purism has a creative effect wherever it unveils a problem area which deserves attention. Kelsen reveals the problem, but his theory does not provide the means required for genuinely tackling it. Especially distinctive revelations of this kind in Kelsen's work can be found in his comparison of natural law with juridical law, in his discussion of the subject of law, of legal loopholes, and of the nature of international law, in his interpretation of legal acts (combined with the hierarchy model of the legal order), and in other places. Due to time constraints we can here only address the questions of the legal loophole and of the interpretation of laws.

A legal loophole is not a gap in the law but a "typical ideological formula"; thinking about it, we realize that in the case of such so-called loopholes, the application of the law in force is not impossible, but 'only' ideologically inappropriate for the defender of the loophole. Kelsen is inexorable: "Any legal dispute consists in one party raising a claim against another one; and whether the decision is favourable or dismissive depends on whether the law, i.e. a valid norm applicable in the concrete case, states the alleged legal duty or not." We find ourselves in an area which is highly susceptible to human freedom; we have to be aware that the so-called legal loophole is thus "nothing but the difference between positive law and an order deemed better, fairer, and more correct".

Next: The interpretation of the law is equally not supposed to determine which meaning of a law is its true meaning. By scientific means, it is not possible to develop a method "which allows to complete the established framework". Kelsen explicitly underlines that the norm only constitutes "a framework, which allows several possibilities of execution." If additionally we combine these findings with the suggested hierarchy of the legal order, we discover that both interpreting and applying legal acts (e.g. laws) are very creative acts; science cannot answer the question which direction we have to take, but it can expose the uncritical ideology upholding that we are merely dealing with a mechanical application of laws.

The productivity I am speaking of is only possible insofar as the form of the law complies with its content. A case in point of a divergence between form and content is Kelsen's conception of the legal norm. The social-teleological purpose of legal norms is to strengthen and to guide the external behaviour and conduct of the legal subjects. Their primary aim is the implementation of permissions, prescriptions and interdictions; the sanction as their secondary aim only comes in when a breach of the law occurs. As already expressed by Modestinus, "The capacity of law is thus: to command, to prohibit, to allow, to punish" (Legis virtus haec est: imperare, vetare, permittere, punire" – Modestinus, D. 1,3,7). Kelsen

has departed from this simple truth. What he treated as primary legal norms in the Pure Theory of Law are norms of sanctioning which are particularly characteristic of criminal law and in general of norms immediately relating to breaches of the law. Norms of conduct stating what we are entitled to do, what is prescribed, and what is prohibited, were only secondary legal norms. For Kelsen, they were norms specifying how people had to behave in order to "avoid the forced act they are threatened with". In the posthumously published work General Theory of Norms, he amended his view and returned to the point from which he should have started. The main capacities of legal norms are their possibilities to command, prohibit, allow, authorize – i.e. authorize an implementation or application of the norms -, derogate already existing norms, and replace them by new ones. At last, these possibilities of action again become the content of primary norms, while the norms dictating sanctions are referred to as secondary norms.

4.3. Kelsen, Pitamic and Radbruch

The question of normative justification is the thread which links Kelsen and Pitamic, even if their points of view were different. To repeat it briefly, Kelsen supported the methodologically pure approach which generates a pure object of enquiry. Its methodological purity is so pronounced that the object of enquiry does not influence the method. The contrary applies: the object interrogated by science depends on the method and its scientific orientation (see paragraphs 2.1, 2.2). Pitamic, from the very beginning, struck a new path: he was convinced that law could not be understood and explored by a single method aiming at a pure object of enquiry. He argued that it is necessary to employ other methods besides the normative method (especially the sociological and the axiological method), which, however, should not be confounded. Methodological syncretism can be avoided by distinguishing clearly between different aspects of law and by allowing the methods to support each other. Step by step, these results prompted Pitamic to combine the positive-law and the natural-law-conception of the nature of law. For Pitamic, to sum it up again, the essential elements of law are order and human behaviour. These elements are interdependent. The order is associated with legal norms regulating external human behaviour. It is so essential that law ceases to be law when its norms cease to be at least grosso modo effective. However, not any order can function as an element of law; the condition is that it be an order, which prescribes "only external human behaviour", and does not prescribe or allow "its contrary, 'inhumane behaviour'; otherwise it loses its legal quality."

However, the legal norm "ceases to be law when its content seriously threatens the existence and social interaction of the people subjected to it." For this, it is not sufficient that there be some kind of inhumaneness in the content of the legal norm (e.g. unjust taxes); there has to be "a conspicuous, obvious, severe case of inhumaneness" (such as mass slaughter of helpless people). It has to be a "crude disturbance" (for instance the extermination of members of another race), which interferes so intensely with law that its nature is negated.

Ulfrid Neumann convincingly observes that Pitamic "does not invoke ethical criteria beyond law, but appeals to elements of the legal concept itself." This form of justification complies to some extent with Radbruch and his formula. The similarities between Radbruch and Pitamic consist predominantly in the fact that their projects both aim at justification of the legal concept, and that they are both, in a similar way, exploring the boundary which may not be transgressed by a conflict between single elements of law. The Rubicon is crossed once the order is "blatantly inhumane". We are here facing an obvious parallel to Radbruch's "formula of intolerability".

It does not arise from Pitamic's oeuvre that he drew on Radbruch's theories. In the already quoted work At the Edges of the Pure Theory of Law, Radbruch's name is only mentioned once and in association with heteronomous obligations. In Pitamic's central book Drzava (The State, 1927), Radbruch is not quoted at all. The majority of reasons for their affinity lie in the fact that Radbruch and Pitamic have undergone a similar development, which ultimately led to similar results. Radbruch as a Neo-Kantian endorsed value-theoretical relativism and held the view that legal values cannot be "known" but only "professed". Given the fact that the supreme value of law cannot be known, it is necessary, for the sake of legal security, that this content be defined by the authority. The experiences with Nazism incited Radbruch to make his points of view complete, and partly also to complement them in the light of the condition of legal values after the Second World War. The definitive deduction states that when the contrast between positive law and justice reaches an "intolerable degree", "the law as an 'untrue law' has to give way to justice" (formula of intolerability). Besides this formula, there is also the formula of deniability; this formula applies when the law consciously denies equality. In this case, the law is not only 'untrue law', but lacks legal character altogether.

Pitamic's development was similar. He first made acquaintance with theory and philosophy of law as Kelsen's disciple and was impassioned by normative purism as a form. He was not very deeply affected by the sharp distinction between the is and the ought, as he also contemplated law sociologically and axiologically. From the very beginning, he was perturbed by the self-sufficiency of law as a normative system. In the face of the assertion that an ought can only be derived from an ought, he advanced the thesis, inspired by Aristotle, that man is by his very nature implanted into normative relations. The experiences with the barbarism of the 20th century certainly had their influence on Pitamic who, just like Radbruch, placed law in relation to values. Radbruch argues that law is striving for justice, while Pitamic seeks the solution in a concept of law which also has to be

humane. Radbruch's formula is articulated more thoroughly than Pitamic's legal concept. Yet, Pitamic can also be understood as saying that conscious disavowal of equality is inhumane, and that an inequality which is intolerably inhumane is lacking legal character.

An in-depth comparison of Radbruch and Pitamic is not the object of this enquiry. Yet a comparison was necessary because it highlighted a parallel with Kelsen's normativity thesis. Kelsen stuck to this thesis until the very end and thus, from the point of view of his theory, he was indifferent to the content of positive law. This content simply was not an object of his formal, normative analysis of law. Radbruch and Pitamic included the content into their arguments and, in their respective way, made it a yardstick for their concepts of law. This enabled them to position their investigative methods outside of natural law and legal positivism. More precisely, in the words of Robert Alexy, their investigative method can be described as dual. This means that, again both in their own way, they combine the factual and the ideal side in their investigation. The factual side encompasses the positive legal order and the effectiveness of this order, while the ideal side addresses the (moral) adequacy of its content. Their common denominator is that law only remains law as long as its content is not extremely unjust or extremely inhumane.

The discovery that the nature of law is dual also opens up the possibility of a dialogue – cf. Peter Koller – between all those who are not radical positivists or moralists. Radical positivists accept any imaginable content of law, while radical moralists grant only a law which conforms to their moral ideal. The Pure Theory of Law is not an example of radical positivism; it only assumes arbitrariness of content in order to authorize an analysis of law irrespective of its content. Kelsen's thesis of normativity is dialogical for all those interested in the content of a normative legal structure. Kelsen's theory (and especially the hierarchy theory of the legal order) reveals (even provokingly, in its own way) where the questions about the legal content are situated. Kelsen, at least in a certain sense, refused to accept this dialogue, because law was for him only a closed system of legal norms. Kelsen's thesis was that a relation is only possible "between elements of one and the same system". The one-sidedness of Kelsen's approach is illustrated very aptly by the already mentioned mountain allegory.

Pitamic contributed to the development of the contents of the Pure Theory of Law. The key argument is that the methods used in investigating and understanding law have to comply with the nature of law. The understanding of the nature of law is a peculiar prior knowledge guiding the scholar in his choice of the method with which he approaches his field of study. By following this guideline, and by arguing according to a clear method, we can also open up space for dialogue and for the juxtaposition of contrasting points of view. "Then", according to Pitamic, "we will see the advent of the object which we have to strive for with all – nota bene, with all – our capacities: knowledge."

Pitamic's enquiries have illustrated that even the purest theory of law cannot confine itself to the subject of law as a normative construction. If we want this construction to be active and legally effectual, it has to rely on facts of being, and it also has to make possible, in compliance with its content, the existence of the individual as well as social interaction. This is naturally a very loose framework to be imposed on law, but it is nevertheless a framework which clearly pronounces itself about the direction law is to assume. This direction is embraced by all those who are interested in law as a living phenomenon.

About the author:

Dr. Marijan Pavčnik, born in 1946 in Ljubljana, is Professor of Philosophy, Legal Theory and General Theory of State at the Faculty of Law of the University of Ljubljana (Slovenia). He was a scholar of the Alexander von Humboldt-Foundation for almost two years and did his research in particular in Munich (at the Institute for Philosophy of Law and Legal Informatics at the University of Munich) and Bielefeld (at the Center for Interdisciplinary Research). His bibliography includes more than 350 publications.

His main publications are: Sources of Law in the Yugoslav Legal System (in Slovenian). Ljubljana 1983, 158 pages; Abuse of a Right (in Slovenian). Ljubljana 1986, 72 pages; Juristisches Verstehen und Entscheiden. Springer: New York, Wien 1993, 182 pages; Argumentation in Law (in Slovenian). Second Edition: Ljubljana 2004, 460 pages; Leonid Pitamic: Na robovih čiste teorije prava/ An den Grenzen der Reinen Rechtslehre (in Slovenian and German). Editor and preparatory studies: Marijan Pavčnik. Academia scientiarum et artium Slovenica, Facultas iuridica: Ljubljana 2005. Reprint: 2009, 350 pages; Theory of Law (in Slovenian). Third edition: Ljubljana 2007, 802 pages; Auf dem Weg zum Maß des Rechts. Ausgewählte Schriften zur Rechtstheorie (in German and English). Franz Steiner Verlag: Stuttgart 2011, 318 pages (in print).

PLENARY LECTURE

How should Legal Philosophers make Use of Economic Thinking? Prof. Dr. Hiroshi Kamemoto, Kyoto University / Japan	
Date	THU 18 Aug 2011
Time	11.30 h - 12.15 h
Location	HZ 1/2

Abstract:

1. Two Types of 'Law and Economics'

Economic policy involves a choice among alternative social institutions, and these are created by the law or are dependent on it. The majority of economists do not see the problem in this way. They paint a picture of an ideal economic system, and then, comparing it with what they observe (or think they observe), they prescribe what is necessary to reach this ideal state without much consideration for how this could be done. The analysis is carried out with great ingenuity but it floats in the air. It is, as I have phrased it, "blackboard economics."(R. H. Coase)[1]
I think 'Law and Economics' as an academic subject can take two forms. The first is the Coasian type, which studies how legal system influences the working of economic system. It belongs to economics, and could be called economic 'Law and Economics.' The second type, by contrast, is engaged by jurists including legal philosophers. It aims at mastering economic way of thinking and making use of it to understand, interpret, and propose law. It could be called juristic 'Law and Economics.'
I shall argue that the latter type is unnecessary or may be harmful, although economics is very useful for legal science. To support this assertion, I shall take Coase's theory as one of the best achievements of economic 'Law and Economics', and make clear how it has been misunderstood by all jurists of 'Law and Economics' as well as almost all economists.

2. Why Juristic 'Law and Economics' Is Not Necessary

If jurists' object in referring to economic theory is to improve law by way of understanding some of the functions of law from an economic point of view, it is obviously better to learn economics from genuine economists than from jurists of 'Law and Economics.'
Some jurists of 'Law and Economics' might insist that it be a division of law which pick out those part of law that connect inseparably with economy and apply economic theory to answer legal problems. This view, however, would make us lose sight of the fact that every legal phenomenon can be analyzed from an economic point of view.

3. Why Juristic 'Law and Economics' Is Sometimes Harmful

Economics as a science is neutral to any ideology. It argues neither for nor against so-called market economy. In fact both economists who supported socialist planned economy and those who supported free enterprise system believed in the same micro-economic theory. There are no top-class economists such as Milton Friedman and F. A. Hayek who use Pareto or Kaldor-Hicks efficiency in order to vindicate free market system.
Nevertheless some jurists such as Richard Posner of 'Law and Economics' have contributed to making widely known the falsehood that micro-economics endorses market economy. It is said market equilibrium is efficient, because it maximizes consumer's and/or producer's surplus. But the well-known graph of demand and supply curves seen in every standard textbook is no more than a model for beginners in learning economics. It cannot be an object of vindication. There is no market or market economy as an institution or system in such a graph.

4. Transaction Cost and Law

It is Coase who called on economists to pay attention to the significance of market as an institution. He says "Markets are institutions that exist to facilitate exchange, that is, they exist in order to reduce the cost of carrying out exchange transaction."[2]
Any exchange transaction always entails some positive cost, though standard economics assumes transaction cost is zero. Coase says the following.
[F]or their operation, markets … require the establishments of legal rules governing the rights and duties of those carrying out transactions … Such legal rules may be made by those who organize the markets, as it is the case with commodity exchanges … Agreement [of the rules] is facilitated in the case of commodity exchanges because the members meet in the same premises and deal in a restricted range of commodities; and enforcements of the rules is possible because the opportunity to trade on the exchange is itself of great value and withholding of permission to trade is a sanction sufficiently severe to induce most traders to observe the rules… When the physical facilities are scattered and owned by a vast number of people with very different interests, as is the case with retailing and wholesaling, the establishment and administration of private legal system would be very difficult. Those operating in these markets have to depend, therefore, on the legal system of the State.[3]
Markets in this description have concrete forms and substance, and are not abstract concepts as in the explanation of price mechanism. Here it is explained in view of transaction costs why there are many kinds of markets and why forms of markets are so different. More interest-

1 R. H. Coase, The Firm, the Market, and the Law, the University of Chicago Press, Chicago and London, 1988, p. 28.

2 Ibid., p. 7.
3 Ibid., p. 10.

ing for legal philosophers, it makes clear why private legal systems are sometimes established and administrated by private people for all that legal systems are a kind of public goods. If the cost of self-regulation of the market, a kind of transaction cost, is lower than the gain from the working of the market, the market would be regulated by the practitioners themselves of the market. If, on the contrary, the former is higher than the latter, state law would be necessary to maintain and promote market exchange for the public good.

5. Externality and Reciprocity

Coase's theory of transaction cost should be treated in the context of exchange in market. But in fact it is discussed in that of externality. An externality is "the effect of one person's decision on someone who is not a party to that decision."[4]

I think externality is a strange idea, because economists study how economic actions of independent agents such as firms and consumers influence indirectly, as it were, those of other independent agents. If we understood externality in the sense of the definition above, externalities would emerge in almost all economic behaviors. When a person out of work is seeking a job, she would give other job seekers negative externalities. When a shop shows prices of its commodities, it would give positive externalities to the potential purchasers including those who would not buy them. The shop owner takes such a behavior seeing that it is more profitable than alternative behaviors. To explain her behavior we do not need such a concept of externality.

Too often as it is ignored, Coase rejects the concept of externality and uses the words "harmful effects"[5] instead of negative externalities in such a case of pollution. He makes a point of reciprocal character of the problem. People including economists would suppose a factory owner is liable for the damages, if the smoke from it has harmful effects on neighbors. But if this legal policy were adopted, the neighbors in turn would damage the factory owner. Coase says the following.

To avoid the harm to B would be to inflict harm on A. The real question that has to be decided is, Should A allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.[6]

It matters not only whether the factory owner in production does not consider the costs for neighbors but also whether the neighbors do not consider the costs for the factory when they continue to live there.

Coase objects to so-called Pigovian taxes for the same reason. The basic idea of Pigovian tax is the following. When a factory harms the neighbors through smoke, for example, if they do not have rights to the same amount as the damages suffered in effect, the production would be too much because it would continue to produce without regard for the costs accruing to the neighbors. To prevent such a state of affairs government should lay on the factory a tax amount to the damages suffered by the neighbors.

But this way may not be optimal according to Coase. When such taxes are imposed, the factory will try to decrease the harms through the smoke-preventing system, for example, to avoid taxes in as much as the costs for it is lower than the amount of the tax. If the number of neighbors increases, the factory will be willing to pay more cost to prevent smoke for the same reason. The neighbors, however, would not consider the cost borne by the factory. As a result the population of neighbors would be too much. Coase contends that it is better to tax not only the factory but also neighbors, if the former shall be taxed.[7]

Many economists as well as jurists of Law and Economics are thinking like a lawyer , the polluter is always liable, when they see the case of negative externalities such as pollutions. It is strange for me.

5. Coase Theorem

As far as zero transaction costs are assumed, the value of production is maximized, whoever has the rights which matter.[8] This is Coase theorem well-known among even jurists who are not interested in Law and Economics. It implies that the distribution of rights does not influence the allocation of resources at all under the zero-transaction-cost assumption. But many economists who perhaps do not have read Coase's essays add that the distribution of rights influence the distribution of incomes. Almost all jurists of Law and Economics follow them. Coase objects to such an interpretation.[9]

Let us suppose first that a rancher produces something with cattle and a neighboring farmer produce crops, and that some crops would be destroyed by the roaming of the cattle. Suppose second that among the factors employed for the rancher's production only the ranch accrues to the rents, and among the factors employed for the farmer's production only the farm accrues to the rents. The term "rent" means the difference between what a factor of production earns in the activity under discussion and what it could otherwise earn.[10] Suppose at last that the lands of ranch and farm are rented from the same owner.

When the damage the cattle bring to corps is smaller than either the rents of the ranch or those of the farm, both the rancher and the farmer would continue to operate, whether the rancher is liable for the damage or not. When the rancher is liable, the sum he is willing to pay for renting the land would decrease by an amount of the value of the damage. If the

4 Ibid., p. 24.

5 Ibid., p. 95 et passim.

6 Ibid., p. 96.

7 Ibid., pp.151-152. and 181.

8 Ibid., p. 158. An assumption of perfect competition is not necessary, because under the zero- transaction- cost assumption any seller can find without costs the buyer who is willing to pay the highest price.

9 See ibid., pp. 163-170 for the following.

10 Ibid., p. 163.

rancher is not liable, the sum the farmer willing to pay for renting the land would decrease by an amount of the value of the damage. The wealth of each producer (and also the land owner) is, therefore, the same regardless of liability rules. This is the case when the relative sizes of those rents and the value of damage are otherwise. The rentals so adjust themselves to the liability rules as to keep the wealth of each party the same.
The conclusion that wealth is constant whoever has the rights is correct even if the liability rule would be changed in the future. For zero transaction costs imply that parties could contract without costs in any further detail for the future change of rules.

6. Coasian World

Coase theorem can be derived from common sense in standard economics. Zero transaction costs imply every seller of her own rights to some resources can always and immediately find the purchaser who is willing to pay the higher sum than any other purchasers. As a result the value of production is maximized. As to the right to pollute or stop pollution, this is also the case, for it is a kind of right to resources, not different in essence from the other kinds of rights to goods.
Coase's contribution to economics consists rather in laying stress on positive transaction costs in reality and no application of Coase theorem.
The world of zero transaction costs has often been described as a Coasian world. Nothing could be further from the truth. It is the world of modern economic theory, one which I was hoping to persuade economists to leave.[11]
A theoretical economist as he is, Coase recommends economists to investigate transaction costs in reality. The idea of transaction cost will help them study real costs. We cannot say anything determinative about which legal rule is better than the alternatives until we know how much it costs to adopt it. It does not mean jurists have to examine the costs by themselves, but they can use the achievements of positive economists. Many jurists of Law and Economics, however, seem to be discussing what the best rule is from an economic point of view without even the rough data. It is true that we can use and need some assumptions to construct models for analyzing reality, but we need minimal data at least in order to make some proposal about law, if we should talk about law in action rather than law in books or law on blackboards.

About the author:

Hiroshi Kamemoto. Birth year: 1957.
Professor of Kyoto University, Graduate School of Law, Japan.

11 Ibid., p. 174.

PLENARY LECTURE

The philological Turn: History and Metaphysics in Savigny Prof. Dr. Olivier Jouanjan, University of Strasbourg / France	
Date	FRI 19 Aug. 2011
Time	9.30 h – 10.15 h
Location	HZ 1/2

About the author:

Professor Olivier Jouanjan was born in 1961 in Lille / France and studied in Lille, Paris 2, Dijon.

Professional Career:
1992: Professor for public law, Dijon University/ France
1994: Professor, Strasbourg University / France
1996-2001: Member of the Institut Universitaire de France
2004: Honorary Professor, Albert-Ludwigs-University Freiburg (Breisgau) / Germany
2007: Winner of the Humboldt-Prize
2011-2012: Fellow at the Institute for Advanced Study in Berlin (Wissenschaftskolleg zu Berlin)

Main Publications: Le principe d'égalité en droit allemand (Paris, 1992); Figures de l'Etat de droit (Strasbourg, 2001); Une histoire de la pensée juridique en Allemagne – 1800/1918 (Paris, 2005); L'esprit de l'école historique du droit (Strasbourg, 2005); Hans Kelsen, forme du droit et politique de l'autonomie (Paris, 2010).

PLENARY LECTURE

How Should We Legal Philosophers Make Use of Economics? Prof. Dr. Carl Wellman, Washington University in St. Louis / USA	
Date	FRI 19 Aug. 2011
Time	10.15 h – 11.00 h
Location	HZ 1/2

Abstract:

The founders of the IVR believed that progress in the philosophy of law and social philosophy required the cooperation of scholars from many nations. Hence in 1907 they created an international journal to be a central organ for the consideration of scientific investigation of the entire civilized world concerning those disciplines. And two years later they established an international association for the care and furthering of philosophy of law and social philosophy in all civilized countries. Although all three of the original presidents were German, indeed all Berliners, the membership list of 1909 features a committee of fifteen representatives of countries outside of Germany, including the United States, Argentina, Brazil and India. Clearly their intention was to create a world-wide scholarly organization.
However, the process of building a global association began slowly and is still unfinished. The IVR held its first congress in Berlin in May of 1910. The academic program consisted of fewer than a dozen presentations followed by discussions

from the floor. Of the 76 participants, only thirteen were from outside Germany and none from outside Europe.

The first IVR World Congress was held in October 1957 in Saarbrücken. Its size and format were essentially the same as the previous congresses. The academic program consisted of a small number of presentations followed by discussion, and there were about 100 participants in all.

The 1975 Saint Louis World Congress, organized by Gray Dorsey, introduced a radically new kind of international congress. In addition to a somewhat larger number of lectures followed by discussions in plenary sessions, it included working groups in which a rapporteur summarized a set of papers on a general theme to set the stage for more extensive discussion. Thus, more than 120 papers were presented and subsequently published. There were more than 275 participants representing at least 48 countries. The Saint Louis congress served as a pattern for the world congresses that followed in a way that has greatly increased the internationalization of the IVR. About 550 members participated in the 2003 Lund World Congress and over 600 in the 2005 Granada World Congress. With this increase in numbers of participants came a greater diversity of nations with a voice in IVR congresses.

Although during the first half-century of its existence several groups of German members of the IVR became subordinate sections of the International Association, there was no provision for the formation of national sections until the Constitution of 1959. Almost immediately national sections were founded in Finland and Germany. By 1964, there were national sections in Australia, Austria, Brazil, Finland, Germany, Mexico, The Netherlands, Spain, Turkey and the United States. These sections contributed to the internationalization of the IVR in two important ways. First, they distributed the activities of the IVR more widely in the world by organizing their own conferences and publishing collections of papers presented. Second, they recruited members from a variety of nations into the International Association. Thus, by 1978 the number of national sections had doubled to twenty and the membership of the IVR had grown to more than 700. Although the majority of these members were European, the Japanese section had 78 members and the North American section 150. Today the number of national sections has more than doubled again so that there are now over forty, including 16 outside Europe. Thus, the IVR has national sections on every continent except Antarctica.

Some of these national sections have introduced a new dimension of internationalization by organizing regional conferences. For example, members of the Danish, Finnish, Norwegian and Swedish sections have met together to hold Nordic conferences. For several years the Austrian and Hungarian sections held joint meetings and published the papers presented and discussed. And in 2000 the Chinese national section hosted members of the Japanese and Korean sections in the Third Asian Symposium in Jurisprudence.

The internationalization of the IVR has been reflected in its organizational structure. Before the introduction of national sections, the administration of the IVR was carried out by its three presidents. Although there was an advisory committee that would normally represent a number of nations, it had no control over the administrative actions of the Presidents. The constitution of 1959 introduced a new administrative body, an Executive Committee consisting of a President, two Vice-Presidents and six additional members. It specified that the membership of this Committee must be international, and in practice this has meant that only under special circumstances could more than one of its members be from the same country. The constitution of 1979 recognized the increased number of national sections by enlarging the Executive Committee to include the President, four Vice-Presidents and twenty additional members. But because its membership remained relatively fixed, an increasing number of national sections felt excluded from any significant voice in the administration of the International Association. Therefore, the constitution of 1987 introduced a Nomination Committee consisting of the members of the outgoing Executive Committee, a member from each national section that has no member on the Executive Committee and one member to represent the members of the IVR who do not belong to any national section. Thus, although not all national sections can have a member on the Executive Committee, they can all take part in selecting those who will serve in this capacity.

Creating and maintaining an effective international association requires solutions to a number of serious practical problems. One problem that has confronted the IVR is the limited competence of its members and administrators in foreign languages. For over three decades, almost all of the articles published in its journal were written in German. Only in volume 38 were articles in French and English as well as German regularly accepted for publication. Although these are the only constitutionally established languages, articles in Spanish have been published since 1991. Obviously, this excludes the native languages of a great many members, but it has proven impractical to increase the number of languages beyond these four.

The problem of limited competence in foreign languages is much more serious in conducting congresses. Reading a paper in a foreign language is one thing; listening to a lecture in a foreign language another. One can read at one's own pace, perhaps consulting a dictionary from time to time, but the flow of spoken words moves forward irresistibly, often too rapidly to be comprehended by many members of the audience. Participating in the give and take of discussion requires an even higher level of linguistic competence. At least by the 1971 Brussels World Congress, there was simultaneous translation of the main lectures into the three official languages of the IVR—German, French and English. Occasionally there was also translation into the language of the host country, for example Japanese in the 1987 Kobe World Congress. However, simultaneous translation has never been

available in the many working group discussions where it is most needed. More recently organizers of world congresses have found themselves unable to raise funds sufficient to pay the very high cost of professional translators and the necessary equipment. Therefore, world congresses are now conducted almost entirely in English. Fortunately, English is increasingly becoming something like a global language.

When he was President of the IVR, Chaim Perelman decided that the business of the Executive Committee should be conducted entirely in English. I have always been grateful that this decision was made before the administration of the IVR moved to the United States, for the only languages in which I am competent are English and American. However, this is the only practical policy, for English is the only language which all the members of an international group, like the Executive Committee, can speak and understand easily.

A second practical problem that arose in the internationalization of the IVR is maintaining effective communications. It is obviously essential to keep the members of any international association informed of its activities. From the first, future congresses were announced in the Archiv and members invited to attend. Soon other information for members was added, especially reports on past congresses, reports on the election of officers of the IVR and occasionally membership lists. Subsequently announcements of forthcoming conferences organized by sections of the IVR and reports of their past conferences and other activities were published in this journal. However, this method of communication was not very effective. Not many members of the IVR subscribed to its journal and because it was very expensive only a minority of academic libraries did either. Moreover, there was a considerable time-lag between the preparation of copy for publication and the arrival of the journal in any library. Hence, published information was often out-of-date by the time members of the IVR had access to it.

Therefore, the IVR introduced a Newsletter in 1976. Originally it was printed by the Secretary General four times each year, mailed in batches to the national sections and sent by them to its members. The general policy was that official documents and information that ought to be on record would be published in the Archiv and information of more immediate but perhaps less lasting interest would be circulated more rapidly in the Newsletter. Although this improved communication with the members of the IVR, international postal service was not always prompt and some national sections failed to forward copies of the Newsletter to their members. Today Newsletters are posted on the official IVR website so that they are immediately available to all members who own or have access to computers.

Unfortunately, this does not completely solve the problem of communication within the IVR. Editors of the Archiv and the Newsletter can publish only as much information as they receive. Some national sections never send information about their officers and activities to either publication, and others do so infrequently. Even the Secretary General sometimes neglects to forward important information about the IVR to the editors of its journal or its Newsletter.

One especially important sort of information concerns invitations to future world congresses. This includes the location and dates of the congress, the topics for submitted papers, when and how to register for participation, and information about available accommodation. Originally, members of the IVR had to ask the organizing committee about these matters by mail or, more often, telephone. Today each organizing committee establishes its own website, linked to the official IVR website, that contains this information and often enables members to register for the congress and reserve accommodation on-line. Although this is a vast improvement in communication, it, together with the posting of Newsletters on the IVR website, does pose the problem of finding persons with the technical competence to create and update websites.

A central part of the problem of communication within the IVR is that of maintaining effective interchange between the International Association, in practice its Executive Committee, and its national sections. Originally this took place primarily by international mail and, if speed mattered, by telephone. The new technologies of e-mail and the world-wide web have transformed international communication for the better. However, any medium of communication is only as effective as those who employ it. Twice in the history of the IVR communication almost completely broke down because of the lack of an active and responsible Secretary General. And even the most conscientious Secretary General cannot keep in touch with national sections that do not have either a President or Secretary that sends and responds to communications. Here and elsewhere the administration of any international association depends upon finding and enlisting able administrators.

A third practical problem created by the internationalization of the IVR is the increasing complexity of its administration. According to the constitution of 1909, its three Presidents together governed all of its activities. This arrangement seems to have worked well, for it was retained in the two following constitutions. However, the constitution of 1959 introduced a new administrative body, an Executive Committee. It authorized the Executive Committee to appoint a Secretary General to manage the affairs of the IVR. Because the Executive Committee meets only once a year, in practice it is the President and Secretary General who carry most of the administrative burden. From 1975-1979 when I was Secretary General, I sent and received almost all the correspondence, wrote official documents such as reports on the meetings of the Executive Committee and General Assembly, requested and received the dues, paid the bills, and wrote, printed and mailed the newsletters. Subsequent experience demonstrated that the IVR could not rely upon a single Secretary General to perform all of these administrative

functions. Therefore, Aulis Aarnio created an administrative team consisting of a Secretary General, a Treasurer and the Editor of the Newsletter. This is a much more satisfactory arrangement provided that the President can find persons willing and able to serve efficiently in each of these capacities.

Probably the most arduous task in the administration of the IVR is organizing its congresses. In the early days when these were relatively small, this was easily managed. The organizer or organizers needed only to select a few main speakers and find places to carry out the academic program together with a few receptions. These were typically readily available at some host university, and accommodation for the participants was near at hand. Participants could register upon arrival and local logistics were minimal. But after the 1975 Saint Louis World Congress introduced a new paradigm for congresses, the demands upon the organizing committee, especially its chairperson, became much more pressing. An auditorium to hold plenary sessions attended by hundreds of people and a considerable number of smaller rooms for discussions of working group and workshop papers were usually to be had only in some large hotel or conference center. Also the organizers had to negotiate special rates with hotels in several price ranges to accommodate the various needs of the participants. Arrangements had to be made to receive and circulate hundreds of papers. And, of course, there was the invitation of and providing for the needs of the main speakers. Today it is necessary to set up and frequently update a website to convey information about the forthcoming congress to prospective participants and to enable them to register in advance, know when and how to submit their papers, and to enable them to reserve accommodation. All of this must be done in co-ordination with the IVR Executive Committee.

A fourth and eminently practical problem arising from the internationalization of the IVR is the rapidly increasing costs of carrying out its activities. When the IVR was a small association with the majority of its members in or near Germany, its expenses were modest. Normally the university or universities with which its president or presidents were affiliated could be expected to provide postal and telephone service and occasional secretarial assistance for correspondence. The first few congresses of the IVR had only a few main speakers and relatively few participants. Facilities for the academic program and any receptions were available on the campus of the host institution and provided at little or no expense. And since most of the participants were European, they could afford to pay their own train or other travel fares.

After the 1975 Saint Louis World Congress, the costs imposed upon the organizing committees have grown exponentially. Much larger and more complex facilities, usually with sound systems and other technical equipment, are required for plenary sessions with an audience of several hundred and a large number of conference rooms for working groups and, more recently, workshops. The organizing committee is expected to pay the travel expenses, often from distant lands, and provide accommodation for the main speakers and to provide for the accommodation of the members of the Executive Committee as well. It must set up and frequently update a congress web-site. It must deal with a mass of correspondence through its web-site, by e-mail and even snail-mail. And, of course, the social program including receptions for hundreds of participants and accompanying persons are not inexpensive. Over the years the task of raising the funds necessary to host an IVR world congress has become formidable indeed.

The IVR Executive Committee meets even in years when there is no world congress. Since 1978, it has been customary for one of the national sections to host these business meetings in conjunction with an associated academic conference. Although the expenses incurred in this way are much less than those of organizing a world congress, they are not negligible. Accommodation and most of the meals for any invited speakers and the members of the Executive Committee must be provided. And facilities for the meetings of the EC and for the sessions of the conference may be costly. Fortunately, the national section hosting these interim meetings of the Executive Committee are not expected to pay the travel expenses of the participants.

However, the expenses of travel from one's home university to events sponsored by the IVR have increased dramatically with the internationalization of the International Association. When the majority of the members of the IVR were German and most of the others European, its members were able to travel very short distances at very little cost to participate in its activities. But as its membership grew in countries far from Europe, it became much more costly for non-European members to travel to world congresses or other conferences held on the Continent. Conversely, after world congresses became common on other continents, it was much more expensive for European members to take part in them. Many members of the IVR, especially its younger members, now find they cannot afford to participate in its activities.

Is internationalization worth so much expense and effort? Is the ideal of a global association leading us astray? There have long been those who have challenged the wisdom of pursuing this goal. In 1976, the German national section urged the Executive Committee to cancel the Australian World Congress, but it refused. In 1977, the Swiss organizing committee presented its plans for the 1979 World Congress. It rejected the Saint Louis model and insisted on holding a much smaller congress with only a few plenary lectures. At this point, the Executive Committee withdrew authorization from the original Swiss committee and Professor Trappe organized the 1979 Basel World Congress with many more invited lectures and a large number of working groups. Although the Executive Committee thus persisted in the further internationalization of the IVR, not all of its members thought this wise. Professors Cotta and Raphael, in particular, argued that this was a mistake.

What reasons might one have for resisting the ideal of a truly global IVR? One is that this is incompatible with maintaining the quality of its intellectual intercourse and its publications. Some argued that membership in the IVR and participation in its congresses ought to be limited to those with demonstrated competence in philosophy of law or social philosophy. Even more insisted that only genuinely important papers ought to be published under its auspices. Although I favored open membership in the IVR and the policy that any paper submitted by a member for discussion in a congress working group would be accepted, I did side with those who wished to publish only the best papers. To my mind the flood of mediocre publications was distracting serious thinkers from the relatively few original and important books and journal articles. However, Professor Klenner disagreed with me. He argued that there are no truly objective standards of philosophical quality so that in practice selective publication would reflect the philosophical prejudices of the most influential members of the Executive Committee and thus be incompatible with the constitutional principle that in the IVR no philosophical orientation is excluded. As usual, Hermann was wiser than I. I find that I learn very little when I read the publications by or discuss philosophical issues with those whose opinions are similar to mine. It is those with whom I disagree, often radically, that force me to rethink my theses and reexamine my arguments and who suggest new and more illuminating approaches to the philosophical problems with which I am struggling. The principle that no philosophical orientation is excluded from the IVR proved most valuable during the cold war when members from both sides of the iron curtain could meet in world congresses and discuss their very different philosophies of law and social philosophies frankly and in a spirit of collegiality.

No doubt openness to diverse philosophical and cultural perspectives is of value, but there are limits to our mutual understanding. A second reason for resisting the ideal of a global IVR is the diminishing philosophical utility of expanding one's intellectual horizons. Some members of the Executive Committee argued that any full understanding of a lecture or worthwhile discussion with a colleague required a familiarity with his or her presuppositions and a sympathy with the approach taken that are lacking when the participants have radically different philosophical orientations, especially when these reflect deep cultural differences. Therefore, they favored restricting the IVR to a Euro-centric association with a few colonies in countries such as the United States or Argentina with close cultural ties to Europe.

I feel the force of this objection to the internationalization of the IVR also. Among my most valued colleagues are members of the IVR that I meet regularly at its world congresses and with whom I have penetrating discussions of philosophical issues. At the same time I often find myself frustrated when I attempt to discuss theoretical problems with members whose perspectives are radically different from any of those with which I am familiar. It is not that we disagree and are unable to reach agreement. It is that I cannot understand their reasoning or why they would accept assumptions that seem wildly implausible to me. In fact, I sometimes wonder if we are both talking about the same subject. Nevertheless, I persist in attempting to comprehend diverse perspectives because I find success, even when partial, well worth the effort.

But does this really imply that the internationalization of the IVR is valuable to us as philosophers of law and social philosophers? If so, how? For one thing, our goal is to develop and defend theories of law and other social institutions. This requires generalization. To explain any social phenomenon, one must subsume it under some general principle; and to evaluate any law, legal system or other institution, one must apply general norms. However, generalization on the basis of a limited sample of one's subject matter is unreliable at best and often highly misleading. This is not to say that one ought to try to obtain an unlimited number of instances. Much more important is the diversity of examples, for increasing the number of very similar instances seldom disconfirms a mistaken generalization. And finding a wide variety of kinds of social institutions, legal or non-legal, is best achieved by learning about societies with very different cultures and that have developed institutions appropriate to very different conditions on the six inhabited continents. Unless one has the time and energy to devote many years to field work throughout the world, the easiest way to accomplish this is to learn from colleagues from many countries. The internationalization of the IVR enables each of us to meet with and learn from those who are willing and able to provide information about diverse legal and social institutions with which we are unfamiliar.

Secondly, philosophy is, or at least ought to be, a critical enterprise. Although we need not emulate Socrates by drinking hemlock, we are committing philosophical suicide if we do not question the beliefs commonly accepted in our societies. And as philosophers of law and social philosophers, we should challenge the presuppositions of the relevant sciences, such as sociology, anthropology, political science and legal theory. Above all, we need to question our own assumptions and methodologies. This is especially difficult for these tend to be shared by most of our colleagues. Only by frank and incisive discussion with philosophers with radically different systems of beliefs and ways of thinking, typically from distant lands, will we be forced to rethink our own views. The world congresses of the IVR enable us to do this by its internationalization and its principle that no philosophical orientation is excluded.

A third reason we need the internationalization of the IVR is that our subject matter is itself increasingly internationalized. We are engaged in applied philosophy, philosophy of legal and other social institutions. Centuries ago the legal systems, economies, family structures and other social institutions of each nation were largely independent of those in other countries, but that is a bygone

era. Today international treaties greatly modify our national legal systems, our economies depend upon importing and exporting goods and services, and many persons not only travel to distant lands but reside in more than one country. International corporations deeply influence our lives as do other international organizations such as NATO or the World Bank. The United Nations and its many agencies today have a global reach. It is one thing to read about these international institutions, but much more is required to understand their influences globally and in various nation states and to evaluate them. If we are to develop philosophies of law and social philosophies that realistically reflect our subject matter, we need colleagues from around the world to inform us of how these institutions interpenetrate their diverse social systems and to correct the biases of the media in our own countries. If my reasoning is valid, we ought to welcome and move forward with the internationalization of the IVR.

But before we congratulate ourselves for being members of an international, almost a global, association, let us ask an awkward question. Why should anyone pay us for doing what we love? What value, if any, do our disciplines, philosophy of law and social philosophy, have for our respective societies and for our world? Far too often none at all, for typically we choose to think and write about esoteric subjects with no discernible practical relevance and of interest only to a few colleagues in our narrow specializations. Nevertheless our disciplines do have the potential to improve the lives of our fellow citizens and even all humanity. As philosophers seeking to generalize about diverse legal systems and social institutions, we should be able to suggest alternative legal or social institutions that might be more beneficial than the existing ones. As critical thinkers who question the generally accepted norms and propose new normative legal and social theories, we are in a position to evaluate social institutions, both national and international, more adequately than politicians answerable to their constituents.

I do not believe, as Plato did, that philosophers are necessarily best qualified to rule. But I am suggesting that as philosophers of law and social philosophers, we have a responsibility to address the practical problems that the rulers of our nation states and the officials in the international organizations that influence our lives must solve. In our time these include the collapse of our interdependent financial institutions with resulting massive unemployment, international terrorism and the military intervention it engenders, the protection of international human rights and preventing the destruction of our global environment. To address such issues in our increasingly global world, we need the assistance of colleagues in a fully international IVR. So let us be grateful that the internationalization of the IVR could enable us to fulfill its constitutional purpose, the cultivation and promotion of legal and social philosophy on a national and international level, in a way that is of value to others not merely profitable to ourselves.

About the author:

Prof. Carl Wellman; born in 1926.

Academic career: Lawrence University, 1953-1968, Washington University, 1968-1999, emeritus 1999-present

Major publications: Welfare Rights, 1982; Theory of Rights, 1985; Real Rights, 1995; Approach to Rights, 1997; The Proliferation of Rights, 1999; Medical Law and Moral Rights, 2009; Moral Dimensions of Human Rights, 2011.

IVR PRIZE LECTURE

Cost-Benefit-Analysis and the Quest for Wealth Maximization: How to Embrace Complexity and Uncertainty Dr. Adrian Künzler, Yale Law School / USA	
Date	FRI 19 Aug. 2011
Time	12.15 h – 13.00 h
Location	HZ 1/2

Abstract:

The application of cost-benefit analysis to regulation is widely believed to provide for a disciplined method of rationally assessing the consequences of proposed courses of action. This paper exposes a critical flaw in the neoclassical welfare economic paradigm of cost-benefit assessment and argues that it is insufficient to apply a single value framework to reality. Taking account of the complexity and uncertainty of certain aspects of real-world phenomena, the paper describes the way some common understanding of an underlying concept of 'reality-based' regulatory economics can be reached. The paper thereby indicates how related behavioral sciences can deepen our understanding of regulatory law."

About the author:

Adrian Kuenzler grew up in Lucerne and Zurich (Switzerland) and studied law at Zurich University School of Law. He was Assistant Lecturer in Private Law and Legal Theory at the Faculty of Law of the University of Zurich where he also wrote his Ph.D. dissertation, entitled "Efficiency or Freedom to Compete? On the Goals of the Law against Private Restraints on Competition" (2008). From 2008 to 2009 he served as a Law Clerk at the District Court of Zurich, and subsequently became a Robert Schuman Centre Research Fellow at the European University Institute in Florence (Italy). From 2010 to 2011 Adrian Kuenzler completed his LL.M. studies at Yale Law School (USA), where he was Senior Editor of the Yale Journal on Regulation and Information Society Project Fellow. Since 2011, Adrian Kuenzler has been a J.S.D. scholar at Yale Law School and Branco Weiss Fellow of Society in Science at the Swiss Federal Institute of Technology Zurich (ETH). His research interests are Behavioral and Institutional Law and Economics, Legal Theory and Philosophy, Intellectual Property, Competition and Financial Market Regulation.

Overview

SW 1	'Dialogue' in public decision-making
SW 2	Human Rights and Human Nature
SW 3	Law, morality and democracy. The legacy of Carlos S. Nino
SW 4	Theology and the Political: a new debate on community, politics, and law
SW 5	Junge Rechtsphilosophie
SW 6	The Theory of Legal Scholarship
SW 7	Gustav Radbruch's Concept of Law – A 'Conversion' from Positivism to Natural Law?
SW 8	AICOL – Artificial Intelligence Approaches to the Complexity of Legal Systems
SW 9	Regulierung von Technisierung – die Rolle des Rechts am Beispiel der Biomedizin im Spannungsfeld von Recht und Ethik
SW 10	Gegenwärtige Juristische Hermeneutik zwischen Vergangenheit und Zukunft
SW 11	Aristotle and the Philosophy of Law – Theory, Practice and Justice
SW 12	The Natural Law Tradition
SW 13	Cancelled.
SW 14	Theoretical and Methodological Foundations of Law and Economics
SW 15	Legal Argumentation
SW 16	Legal Fictions
SW 17	Criminalization
SW 18	Coexisting Normative Orders: Natural and Positive Law, from the Classical Tradition to Modern Global Law
SW 19	Sustainability, Intergenerational Justice, and Global Justice
SW 20	The Role of Lawyers in Interaction: Influences of ADR practice on Legal Thinking and Legal Education
SW 21	H.L.A. Hart's The Concept of Law Reconsidered
SW 22	New Developments in Technology: challenges for the law and ethics of privacy and confidentiality
SW 23	Normative and epistemological implications of data science, profiling and smart environments 'Code as Law' meets 'Law as Code and Law as Literature'
SW 24	Law as Literature: memory and oblivion

SW 25	The Latin American Legal Thinking in front of the challenges of Globalization
SW 26	Between interpretation and intuition: cognitive sciences and the model of decision making process in law
SW 27	Exemplary Narratives: Interdisciplinary Perspectives
SW 28	Human Rights, Global Justice, and Democracy: Issues at their Intersection
SW 29	Legal Philosophy of Nikolai Alekseev and European scientific tradition
SW 30	Legitimacy 2.0. E-democracy and Public Opinion in the Digital Age
SW 31	Recht am technisierten Körper / Recht an verkörperter Technik
SW 32	Methodology of Jurisprudence and the impact of new technologies
SW 33	Person, Verantwortung, Grenzen des Rechts – alte Debatten im neuen Kontext „Robotik und Künstliche Intelligenz“
SW 34	Menschenwürde – Menschenbild – Verantwortung: Analyse von Leitbegriffen der bioethischen Debatten
SW 35	Epistemische Unsicherheiten und das Recht
SW 36	Orthos logos, Recta ratio, or Right Reason in the Philosophy of Law from Aristotle to Dworkin
SW 37	Cultural Turn and Philosophy of Law and State
SW 38	Cancelled.
SW 39	Constitutional Reasoning: Theoretical Perspectives
SW 40	The Language of Law: Classical Perspectives
SW 41	Disciplinary Perspectives and Legal Truth
SW 42	Sterbehilfe aus ethischer und rechtlicher Sicht / Die Religion im öffentlichen Bereich
SW 43	Wirtschaftsethik und Rechtsquellenlehre (Cooperating Special Workshop)
SW 44	Business Ethics and Law
SW 45	Public Legal Reason
SW 46	Law and Economics – Foundations and Applications
SW 47	When is the exercise of an interest a human right? Secular and religious responses to the legitimacy question
SW 48	The Philosophy of Home Schooling and Its Legal Implications Today
SW 49	Producing Justice: social responsibility of the legal profession in the age of globalization
SW 50	The Fusion of law and Information Technology

SW 51	Freedom of Speech and Intellectual Property: Conceptualizing the conflict(s)
SW 52	Roles of Citizen/ Civil Society and Responsibility of State
SW 53	Rethinking the foundational concepts of constitutional and legal theory from ‚the semi-periphery‘
SW 54	The Relevance Of African Legal Theory To Contemporary Problems
SW 55	Hart and Kelsen
SW 56	Meaning, Truth and the Concept of Law
SW 57	Cancelled.
SW 58	Workshop on Biopolitics
SW 59	Objectivity in Legal Discourse. The Comparative Perspective
SW 60	Net Neutrality or Not Neutrality? Law, Politics & Internet
SW 61	Legal Normativity and the philosophy of practical reason
SW 62	Philosophy of science and legal philosophy – a blending or a clash?
SW 63	The Scope of Liberalism in Bioethics; the limit of concenting will
SW 64	Analogical and Exemplary Reasoning in Legal Discourse
SW 65	Recht, Wissenschaft und Technik: phänomenologisch-hermeneutischer Ansatz
SW 66	Dynamics of Law and Society: The Promise of Interactionism and Pragmatism
SW 67	The Fact/Value Separation and its Relevance for Interdisciplinary Research in Law
SW 68	Political Obligation
SW 69	Genetically Modified Organism and Different Legislations
SW 70	Legal Discourse and Human Rights
SW 71	Involving the Experts – A Critical Analysis of the Role of Expert Committees in Legal Decision Making concerning Complex Technological Issues with a Strong Moral Impact
SW 72	Legal Theory and Education: The Way Ahead
SW 73	Transitional justice in Legal Philosophical Perspective
SW 74	Private Law Theory (PLT) – Politics of Private Law in a Technological Age
SW 75	Legisprudence – Rethinking Legislation and Regulation in the Light of Legal Theory
SW 76	Legal recognition of minority groups in light of social sciences

SW 77	Cancelled.
SW 78	Constitutionalism After Communism: Author meets her critics
SW 79	Neo-Communitarian approach on the human rights in the East Asia

Disclaimer: This abstract book has been produced using texts submitted by authors until June 2011. No responsibility is assumed for the content of abstracts.

SPECIAL WORKSHOP

SW 1 'Dialogue' in public decision-making	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 3.45 / Sydney
Organizers	Prof. Dr. Maurice Adams, Tilburg University, Law School / The Netherlands

About the workshop:

Traditional constitutional legal scholarship has hit a dead end. There is increasing acknowledgement for the importance of informal processes in shaping and controlling public power, but so far we have not managed to get a grip on these processes that will allow us to appraise their implications and significance.
One emerging topic in the periphery of legal scholarship is 'dialogue'. This is a phenomenon that has been extensively studied in other disciplines, but which is still relatively new to legal researchers. Legal scholarship is still unsure what qualifies as a 'dialogue' and what implications to attach to this qualification.
The potential of 'dialogue' as a mode of public decision-making has been discussed tentatively in various scholarly areas that are concerned with legitimacy, accountability and quality of regulation. When classical methods fail, calls for 'dialogue' tend to follow rapidly. But what constitutes a 'dialogue'? What are the risks and opportunities of employing a non-legal term in situations where the legal system is clearly in trouble? Do other – less deliberative – modes of decision-making hide behind the metaphor? Or would 'networks', 'consultations' and other processes related to public decision-making benefit from being cast more in terms of 'dialogue', possibly because this mode of communication comes with its own inherent 'rules of the game'?
In this special workshop we:

- bring together researchers using the device of 'dialogue' in their research, in order to come closer to an understanding of the concept that is not tied to a particular discipline;
- trigger a multidisciplinary debate between researchers from different disciplines and even interdisciplinary as far as the efforts to define 'dialogue' go;
- establish the relevance of 'dialogue' as a key concept for constitutional legal scholarship (without necessarily juridifying the concept).

List of Lectures:

1. Sven Braspenning (Antwerp University / Belgium)
The normative force of dialogue in contexts of moral standoff

2. Gökçe Çataloluk and Barkin Asal (Faculty of Law, Istanbul Bilgi University / Turkey)
Constitutional amendment process in Turkey in context of "dialogue" and consensus in a highly polarized society

3. Petra Gümplova (Justus-Liebig-University, Gießen / Germany)
Deliberation and the Politics of the Extraordinary: The Constitution Making in Czech Republic, 1992

4. Elaine Mak (Erasmus University Rotterdam / The Netherlands)
Dialogue in Judicial Decision-Making

5. Maurice Adams (Tilburg University / The Netherlands)
Judicial transnational dialogue: a tale of two democratic stories

6. Karlijn van Blom (Tilburg University / The Netherlands)
The use of foreign sources of law, an historical approach

7. Ólafur Ísberg Hannesson (European University Institute/Italy)
Legal Pluralism in the EEA legal order: The role of the EFTA Court and the Icelandic national courts in the European Judicial Dialogue

8. Bartosz Greczner (Wroclaw University / Poland)
The influence of judges' responsibility for the dialog and judicial independence on providing justice to the society in the European Union

SPECIAL WORKSHOP

SW 2 Human Rights and Human Nature	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 454
Organizers	Prof. Dr. Marion Albers, University of Hamburg, Faculty of Law / Germany Dr. Thomas Hoffmann, University of Magdeburg, Faculty of Philosophy / Germany Dr. Jörn Reinhardt, University of Hamburg, Faculty of Law / Germany

About the workshop:

Natural sciences have not only changed our understandig of what the human being is. They have also made it possible to change the very nature of the human. Medical and biotechnical interferences as well as the developments in the life and neuro-sciences are questioning central legal concepts and categories. This applies especially to the human rights discourse. It is obvious that the recourse to human nature as a line of argument becomes problematic if human nature itself is the subject of continual transformation and transgression. The vanishing line between the natural and the artificial, challenges common (metaphysical) explanations of human rights as natural rights. Nevertheless, "human nature" is still an attractive argument in contemporary human rights theory. The special workshop will address the role that human nature plays (and can possibly play) for the foundation and exemplification of human rights positions. We will consider not only naturalistic positions in the strict sense, but also anthropological and quasi-anthropological lines of argument as well as the recourses to "second nature". How do the transformations of the human affect the idea of a human right? How do they change our understanding of particular basic and human rights?

List of Lectures:

1. Marion Albers (University of Hamburg / Germany)
Fundamental Rights and Values in the Discussions about Genetic Engineering and Enhancement

2. Frederik von Harbou (University of Zurich / Switzerland)
Bridging the Moral Gap: Cosmopolitan Empathy and Human Rights

3. Thomas Hoffmann (University of Magdeburg / Germany)
Human Dignity and Human Nature

4. Jörn Reinhardt (University of Hamburg / Germany)
From Naturalism to Political Anthropology.The Role of Nature in Kant's Theory of Rights

5. Tetsu Sakurai (Kobe University / Japan)
Should Society Guarantee Individuals a Right to Keep 'Normal Functioning'? Liberal Eugenics Is Confronted With the Challenge of Global Justice

6. Mateusz Stepien (Jagiellonian University Krakow / Poland)
The Relation between Human Nature and Human Rights. The Confucian example

7. Harun Tepe (Hacettepe University Ankara / Turkey)
A New concept of Human Nature as a Basis for Human Rights

SPECIAL WORKSHOP

SW 3 Law, morality and democracy. The legacy of Carlos S. Nino	
Date	THU 18 Aug 2011 + FRI 19 Aug 2011
Time	THU 14.30 h – 18.30 h + FRI 15.30 h – 18.00 h
Location	RUW 3.102
Organizers	Lucas Arrimada, University of Buenos Aires / Argentina Gustavo Beade, Christian-Albrecht-Universität zu Kiel / Germany

About the workshop:

Carlos S. Nino (Buenos Aires, Argentina 1943 – La Paz, Bolivia 1993) was one of the most influential legal philosophers

and public intellectuals in the past century. His ideas are worldwide recognise and his work is continuously translated into different languages, such as Italian, Portuguese and Chinese.
Throughout his short but intensive academic life, he published several books and articles related to legal education, legal theory, criminal law, political philosophy, constitutional law and moral philosophy. Above everything, he wrote some classic pieces of constitutional interpretation, presidentialist government, transitional justice, human rights and deliberative democracy.
His sudden death left many young researchers without the opportunity of meeting him. But this was not an excuse to move him from the scene of studies; his influence, through his books, papers, conferences, disciples or academic histories, is still part of the present. That is the reason why we would like to assemble all kind of researchers – seniors and juniors – in any field, that are related and interested – or simply curious – in some aspect of his vast literature. Our purpose is to show the relevancy (relevance) of Nino's thoughts today. In addition, the huge fields of law and morality in which Nino has extensively worked, prevent us from being restrictive in the possible topics of the workshop.
We would be delighted to discuss in depth every aspect of Nino's legacy, making a public and an academic tribute to an intellectual who also attended, as a former participant, to the IVR Congresses.
It's interesting to know that in 2011 Nino should have the age of 68, being this same year the 18th. Anniversary of his tragic lost. Following the most classic academic traditions in Germany – country that holds the Conference – we seek to review his career and start preparing a Festschrift, the usual gift that every influential Legal Scholar receives in his 70th birthday, which would be at the beginning of 2013.
That is our main purpose.

List of Lectures:

Lucas Arrimada (Universidad de Buenos Aires – CONICET / Argentina)
Nino on theory and practice: A legacy review

Gustavo A. Beade (Christian-Albrechts-Universität zu Kiel / Germany)
Nino on Subjetivism, retribution and perfectionism

Stanley Paulson (Washington University in St. Louis / USA)
Nino on 'Justified Normativity' and a Reply

Miroslav Imbrisevic (Heythrop College, University of London / UK)
Hart and Nino on Punishment

Rinat Kitai Sangero (The Academic Center of Law and Business / Israel)
Does and should the State forgive perpetrators of heinous crimes via statutes of limitations?

Thomas Obel Hansen (United States International University / Kenya)
Revisiting Nino's Justifications for Punishing State-Sponsored Violence

Eduardo Rivera López (Universidad Torcuato Di Tella – CONICET / Argentina)
Subjective and objective moral duties. Further thoughts Carlos Nino's Quatrilemma of Consequentialism

Walter Carnota (Universidad de Buenos Aires / Argentina)
Nino: (Talking Social) Rights Seriously

Abraham Peréz Daza (Universidad Nacional Autónoma de México / México)
Justification of the moral discourse in Carlos Nino. On purpose of the liberalism's fundamentation

Miguel Godoy (Universidade Federal do Paraná / Brazil)
Constitutionalism and deliberative democracy in Nino

Federico Thea (Universidad de Buenos Aires / Argentina)
A deliberative conception of authority

Sebastian Pagano (Universidad Nacional de La Plata / Argentina)
Interpretation, truth and the imperative need to live with each other

José Arthur Castillo de Macedo (Unibrasil / Brazil)
Deliberative democracy and hiperpresidentialism in Brazil

Laura C. Roth (Universidad Pompeu Fabra / Spain)
Towards a deliberative criminal process

Fabio Enrique Pulido Ortiz (Universidad Católica de Colombia / Fundación Derecho Justo, Colombia) + Juan Carlos Lancheros Gámez (Universidad de La Sabana /Fundación Derecho Justo, Colombia)
The construction of democracy in Colombia: synthesis and evaluation of the Constitutional Court activity regarding legislative processes (1992 to 2010)

Matías Parmigiani (UNC/Conicet / Argentina)
The Consensual Theory of Punishment: A Justificatory Theory or an Interpretative Scheme?

Pedro Caminos (Universidad de Buenos Aires / Argentina)
The status quo paradox of Deliberative Democracy

Roberto Carlés (Universidad de Buenos Aires, Argentina – Università degli Studi di Ferrara / Italy)
The crisis of the legitimating function of the legal good (Rechtsgut) concept and its consequences for the Criminal Law theory

SPECIAL WORKSHOP

SW 4 Theology and the Political: a New Debate on Community, Politics, and Law	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 0.251
Organizers	Ass.Prof. Bethania Assy, Pontifical Catholic University of Rio de Janeiro / Brazil Ass.Prof. Florian Hoffmann, University Erfurt / Germany

About the workshop:

The panel gives particular attention to three main branches on the linkage between theology and politics. Firstly, it deals with a general discussion on the notions of time and history, mainly considered by the central European Jewish intellectuals from the 1920´s. It is particularly interesting the role Messianic idea plays in order to articulate a (post-)modern new political community. The key-point is to approach an anti-evolutionist idea of politics. The unpredictability of Messianism, the extra-historical Irruption in the immanent history, is precisely the meaning of messianic history, namely, the break with the historical linearity of the events. The second branch relies on the intersection on the notions of community, singularity, and freedom. The suggestion is to think over the notion of singularity as a new way of approaching subjectivity beyond the well-known binary debate between the community of identity (Sittlichkeit) versus neo-Kantian universalism. The core is to open up a new debate on the notion of subjetivity based on a singularity without inward concepts, without properties. The last section leads the discussion towards the implications between politics and law. The effect of historical rupture rises up a nomos´ internal tension between the stability of the Constitution and the extraordinarity of the political action (the constituent power). The tension between law and politics through the notions of nomos pisteos and Agora (the political). It will be thought-out the crucial discussion on transcendental legitimacy of violence within/without the scope of law, as well as, the debate on decision, sovereignty and political action and the connection to distinct accountings on exception and natality

List of Lectures:

1. Rafael Rodriguez Pietro (University of Pablo de Olavide de Sevilla / Spain)
Toward a Complex Approach to Subjectivity. The Common, Constituent Power and Human Needs

2. Willis Santiago (Pontifical Catholic University of São Paulo / Brazil)
Antigone or the Poetical Dissolution of Politics

3. Petra Gumplova (Liebig University Gießen / Germany)
Carl Schmitt: Democracy and Sovereign Constitutional Politics

4. Kinga Marulewska (Academic Institution: Nicolaus Copernicus University / Poland)
Delegate or Trustee? Carl Schmitt and Eric Voegelin's Theories of Representation

5. Leticia Dyniewicz (Academic Institution: Federal University of Santa Catarina / Brazil)
Carl Schmitt and Walter Benjamin: the Rescue of Non-rational Ideas for a Disruption

6. Bethania Assy (Pontifical Catholic University of Rio de Janeiro / Brazil) and Florian Hoffmann (Universität Erfurt / Germany)
Another Time for Justice: Singular Event, Deviation of Law, and Judgment of the Defeated

7. Luís Pedro Pereira Coutinho (Lisbon University / Portugal)
Theology and the foundational: the American foundation in Hannah Arendt

SPECIAL WORKSHOP

SW 5 Junge Rechtsphilosophie	
Date	TUE 16 Aug 2011; THU 18 Aug 2011; FRI 19 Aug 2011
Time	TUE 14.30 h – 18.30 h; THU 14.30 h – 18.30 h; FRI 15.30 h – 18.00 h
Location	HZ 10
Organizers	Dr. Carsten Bäcker, Kiel / Germany Dr. Sascha Ziemann, Frankfurt am Main / Germany

About the workshop:

Der Special Workshop Junge Rechtsphilosophie (SW) ist konzeptuell angelehnt an das Junge Forum Rechtsphilosophie (JFR) in der IVR, welches sich die Förderung des rechtsphilosophischen Nachwuchses in eigener Organisation zur Aufgabe gesetzt hat.
Der SW präsentiert originäre Ideen des deutschsprachigen rechtsphilosophischen Nachwuchses. Der Titel lässt erkennen, dass die Referate in deutscher Sprache gehalten werden sollen. Diese Beschränkung entspricht dem Grundsatz des JFR, sich als Nachwuchsorganisation deutschsprachiger Rechtsphilosophie zu verstehen. Dahinter steht das Ziel, Deutsch als klassische Sprache der Rechtsphilosophie nicht weiter aufzugeben, sondern wieder zu stärken. Daraus resultiert freilich eine Beschränkung des SW auf deutschspra-

chige Teilnehmer. Der SW hat kein Generalthema. Stattdessen stellen die Referenten ihre Rechtsphilosophie, in den meisten Fällen gegründet auf die Dissertation, vor. Ziel des SW ist es, auf dem Frankfurter Weltkongreß ein Forum zu bieten, in dem über gegenwärtige Entwicklungen in der jungen deutschsprachigen Rechtsphilosophie informiert und diskutiert wird.

List of Lectures:

1. Dr. iur. Tilmann Altwicker, LL.M. (Zürich / Switzerland and Budapest / Hungary)
Rechtsethik als Common Law-Philosophie – Die Methode der rechtsethischen Rekonstruktion von Menschenrechten

2. Dr. iur. Carsten Bäcker (Kiel / Germany)
Rationalität ohne Idealität. Eine relativistische Diskurstheorie des Rechts

3. Daniel Gruschke, M.A. (Aachen / Germany)
Zur vagheitstheoretischen Modellierung unbestimmter Rechtsbegriffe

4. Dr. phil. Bernhard Jakl, M.A. (Münster / Germany)
„Rechtsentwicklung" in Rechtstheorie und Rechtsphilosophie. Ein Vergleich am Beispiel der Transnationalisierung des Rechts

5. Prof. Dr. Klaus Mathis (Luzern / Switzerland)
Ökonomische Analyse des Rechts

6. Sabine Müller-Mall (Berlin / Germany)
Performative Rechtserzeugung

7. Christian Nierhauve (Hagen / Germany)
Zur Rechtsklugheit

8. Dr. phil. Jörn Reinhardt (Hamburg / Germany)
Transformationen der Demokratie

9. Ralf Seinecke, M.A. (Frankfurt am Main / Germany)
Recht und Rechtspluralismus – Perspektiven von Rechtsphilosophie und Rechtswissenschaft?

10. Dr. iur. Nils Teifke (Kiel / Germany)
Menschenwürde als Prinzip

11. Dr. iur. Friederike Wapler (Göttingen / Germany)
Pluralismus und Toleranz in liberalen politischen Gemeinschaften

12. Mônica Danielle de Castro Weitzel, LL.M. (Bremen / Germany)
Agrobusiness vs. kleinbäuerliche Landwirtschaft: Zum Schutze alternativer Lebensformen jenseits des liberalen Regierens

13. Tim Wihl (Berlin / Germany)
Menschenwürde als praktische Wahrheit

14. Magdalena Zietek, M.A. (Aachen / Germany)
Über die technokratischen Grundlagen des modernen Rechtsverständnisses

SPECIAL WORKSHOP

SW 6 The Theory of Legal Scholarship	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HZ 15
Organizers	Senior Lecturer, Dr. Habil. Mátyás Bódig, University of Aberdeen, School of Law / UK

About the workshop:

The special workshop sets out to explore the functional ties between legal theory and legal scholarship (and doctrinal scholarship in particular), as well as the ability of contemporary legal theory to address the methodological concerns of legal scholarship.
There are recurrent complaints that mainstream Anglo-American legal theory has turned away from the substantive and methodological concerns of legal scholarship. The primary purpose of the workshop is to offer a forum to discuss whether it is really the case. Does contemporary legal theory have the theoretical resources to shape the agenda of scholarship? And if Anglo-American legal theory is losing touch with legal scholarship, can we say that Continental scholars (like Alexy) are doing better in this respect?
The workshop would also address issues concerning the very character of legal scholarship. It is often noted that legal doctrinal scholarship has never been properly integrated into the social sciences. Some have argued (like Tushnet) that legal scholarship is isolated from the intellectual tendencies of the social sciences by its strong functional ties to legal education and its ideological commitment to the ideal of the rule of law. The uncertainties about the methodological profile of legal scholarship and its epistemological worth raise a challenge for legal theory: that of clarifying the character of the doctrinal knowledge legal scholarship represents. The workshop would seek to face up to that challenge.

List of Lectures:

1. Dr. Mátyás Bódig (University of Aberdeen / United Kingdom)
Doctrinal Knowledge, Legal Doctrines and Legal Doctrinal Scholarship

2. Dr. Thomas Bustamante (Federal University of Minas Gerais, Belo Horizonte / Brazil)
Comment on Mátyás Bódig's Paper
3. Dr Mátyás Bencze (University of Debrecen / Hungary)
The Use of Doctrinal and Conceptual Theoretical Knowledge in Legal Reasoning

4. Krisztina Ficsor and Ágnes Kovács (University of Debrecen / Hungary)
The Limits of Legal Doctrinal Knowledge

SPECIAL WORKSHOP

SW 7 Gustav Radbruch's Concept of Law – A 'Conversion' from Positivism to Natural Law?	
Date	THU 18 Aug 2011 + FRI 19 Aug 2011
Time	THU 14.30 h – 18.30 h + FRI 15.30 h –18.00 h
Location	HZ 9
Organizers	Priv.-Doz. Dr. Martin Borowski , Birmingham Law School, University of Birmingham / Great Britain

About the workshop:

Gustav Radbruch was Germany's most famous legal philosopher in the twentieth century. According to the orthodox reading, he supported a positivistic position in his pre-War writings, most notably in section 10 of his treatise 'Rechtsphilosophie' (1932). Against this backdrop, the well-known nonpositivistic 'Radbruch formula' introduced in one of his post-War essays suggests that he underwent a conversion from positivism to natural law. In alluding to Radbruch's 'conversion', H.L.A. Hart speaks of it having the 'special poignancy of a recantation'.On closer inspection, however, it is less than clear that the orthodox reading, giving rise to the 'conversion thesis', is convincing. To be sure, there can be little doubt that Radbruch's concept of law, in so far as it can be characterised by his 'formula', is nonpositivistic. What is more, Radbruch himself later explicitly classified his own position before the war as positivistic. This is, however, hard to reconcile with the for the most part unknown fact that Radbruch had repeatedly criticized 'positivism' in his earlier writings. What is more, Radbruch argued from the outset that law is 'the reality whose meaning it is to serve the legal value.' The legal value is none other than 'justice', Radbruch's contribution to Neo-Kantian value theory. Such a concept of law certainly transcends traditional legal positivism, characterized by the separability thesis. This raises questions about the classification of Radbruch's pre-War position as positivistic and about the 'conversion thesis' generally.The special workshop is devoted to a comprehensive enquiry into Radbruch's concept of law. Even though the 'conversion thesis' will inevitably play an important role in this enquiry, contributions to any other aspect of the debate on Radbruch's concept of law are most welcome.

List of Lectures:

1. Prof. Dr. Michael Anderheiden (Universität Heidelberg)
Why We Should (Largely) Forget Radbruch's Formula

2. PD Dr. Martin Borowski (Birmingham Law School, University of Birmingham)
On the Conversion Thesis

3. Daniel Deba (Universität Kiel)
Gustav Radbruchs gerechtigkeitsorientierter Rechtspositivismus

4. Prof. Dr. Ralf Dreier (Universität Göttingen)
Kontinuitäten und Diskontinuitäten in der Rechtsphilosophie Radbruchs

5. PD Dr. Andreas Funke (Universität Köln)
Radbruchs Rechtsbegriff und Radbruchs Methode zur Bestimmung des Rechtsbegriffs

6. Prof. Dr. Hidehiko Adachi (Universität Kanazawa)
Die Freiheitslehre von Gustav Radbruch

7. Prof. Dr. Stephan Kirste (Andrássy Universität und Universität Heidelberg)
Radbruch's Idea of Law and the Elements of Justice

8. Prof. Dr. Thomas Mertens (Universität Nijmegen)
Betrayal and Continuity in Radbruch's Formula

9. Prof. Dr. Dr. h.c. mult. Stanley L. Paulson (Washington University in St. Louis, MO)
Zur nichtpositivistischen Kontinuitätsthese bei Gustav Radbruch

10. Prof. Dr. Joachim Renzikowski (Universität Halle)
Die Hart-Radbruch-Kontroverse – nur eine Frage der Kompetenz?

11. Prof. Dr. Hubert Rottleuthner (Institut für Rechtssoziologie und Rechtstatsachenforschung, Freie Universität Berlin/Germany)
Gustav Radbruch und der ‚Unrechtsstaat'

12. Prof. Dr. Torben Spaak (Uppsala University)
Robert Alexy, the Radbruch Formula, and the Separation Thesis

13. Prof. Dr. Alexandre Travessoni (Universidade Presidente Antônio Carlos)
Gustav Radbruch's (Supposed) Turn against Positivism: a Matter of Balancing?

SPECIAL WORKSHOP

SW 8 AICOL – Artificial Intelligence Approaches to the Complexity of Legal Systems	
Date	MON 15 Aug 2011 + TUE 16 Aug 2011
Time	MON 14.30 h – 18.30 h + TUE 14.30 h – 18.30 h
Location	HZ 8
Organizers	Prof. Danièle Bourcier, CERSA-CNRS, Paris / France Prof. Pompeu Casanovas, UAB Institute of Law and Technology, Barcelona / Spain Prof. Ugo Pagallo, University of Turin / Italy Prof. Monica Palmirani, CIRSFID - University of Bologna / Italy Prof. Giovanni Sartor, European University Institute and University of Bologna / Italy

About the workshop:

Today there is a strong need not only to integrate research in AI and law within legal theory, but also to encompass the different branches of research in AI and law. In fact research in AI and Law is developing so quickly, that there is a risk of missing the opportunities to exchange knowledge and methodologies.
The aim of the workshop ¾ after a first experience in Beijing (IVR XXIV, Beijing, Sept. 15-20, 2009, China), and the successful second edition in Rotterdam (JURIX-09, Rotterdam, Nov. 16-18, The Netherlands)¾ is thus to support for exchange of knowledge and methodologies approaches between scholars from different scientific fields, by both highlighting their similarities and differences and preparing the scientific community to a common ground beyond the state of the art of any individual discipline.
Besides providing advanced computer applications for the legal domain such as knowledge based systems and intelligent information retrieval, research on AI and law has developed innovative interdisciplinary models for understanding legal systems and legal reasoning, which are highly significant for philosophy of law and legal theory. Among such models, we can mention logical frameworks for defeasible legal reasoning and dialectical argumentation, logics of normative positions, theories of case-based reasoning, and computable models of legal concepts. Other topics involved in this process of integration are 'multiagent systems', multilingual ontologies, complexity theory, graph theory, game theory, cognitive science and any other contribution from those disciplines that could help to formalize the dynamics of legal systems and to capture the relationships between norms.

List of Lectures:

1. AI Approaches to the Complexity of Legal Systems

Casanovas, P.; Pagallo, U.; Sartor, G.; Ajani, G. (Eds.), International Workshops AICOL-I/IVR-XXIV, Beijing, China, September 19, 2009 and AICOL-II/JURIX 2009, Rotterdam, The Netherlands, December 16, 2009 Revised Selected Papers. Springer Series: Lecture Notes in Computer Science, Vol. 6237 Subseries: Lecture Notes in Artificial Intelligence, 1st Edition., 2010, X, 243 p., ISBN 978-3-642-16523-8

2. Approaches to Legal Ontologies
Sartor G., Casanovas P., Biasiotti M., Fernandez-Barrera M.(Eds.), Springer, Theories, Domains, Methodologies, Series: Law, Governance and Technology Series, Vol. 1, 1st Edition., 2011, XIII, 279 p. 15 illus.

SPECIAL WORKSHOP

SW 9 Regulierung von Technisierung – die Rolle des Rechts am Beispiel der Biomedizin im Spannungsfeld von Recht und Ethik	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 1.102
Organizers	Prof. Dr. Michael Anderheiden, Ruprecht-Karls-Universität Heidelberg / Germany lic.iur. LL.M. Peter Bürkli, Juristische Fakultät der Universität Basel / Switzerland

About the workshop:

Kaum ein anderes Gebiet der Medizin entwickelte sich in den vergangenen Jahren derart rasant wie die Biomedizin. Zu denken ist etwa an Innovationen in der Fortpflanzungstechnologie, an Gendiagnostik und Gen-Therapie oder an die Stammzellenmedizin. Im Grenzbereich zwischen Biologie und Medizin bedient sich die Biomedizin modernster Technik, um Krankheiten erkennen und zu heilen. Die Biomedizin ist somit ein paradigmatisches Beispiel für das Zusammentreffen von Technik und Wissenschaft. Durch die Voraussetzungen und die Folgen der Biomedizin sehen sich Recht und Ethik immer wieder von neuem herausgefordert. Nicht nur, dass sich der Regelungsgegenstand selbst in stetem Wandel befindet, auch vermeintliche Grenzen der Biomedizin werden immer weiter gezogen. Welche Rolle kommt dabei dem Recht zu? Welches sind die spezifischen Aufgaben des Rechts und der Rechtsethik in der Regulierung der Biomedizin? Wie kann das Recht im Feld der Biomedizin seine Steuerungsfunktion wahrnehmen? Woran orientiert sich das Recht, wenn es im Bereich der Regulierung der Biomedizin Wertungen vornimmt? Wie wirkt sich die Technisierung der Medizin auf Menschenbilder aus? Wie können im Gebiet der Biomedizin verbindliche rechtliche Normen geschaffen werden? Welche Rolle kommt dabei dem Soft Law zu? Können aus dem Zugang des Rechts zur Technisierung der Medizin allgemeine Schlüsse auf das

Verhältnis von Recht, Wissenschaften und Technik gezogen werden?

List of Lectures:

1. Dr. iur. HSG Julia Hänni (Oberassistentin am Institut für Europarecht der Universitäten Bern, Neuenburg und Fribourg / Schweiz)
Recht, Biomedizin, Technik und die autonome Leiblichkeit des Menschen

SPECIAL WORKSHOP

SW 10 Die Gegenwärtige Juristische Hermeneutik zwischen Vergangenheit und Zukunft	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 3.36 / Chicago
Organizers	Dr. Gaetano Carlizzi, Università Suor Orsola Benincasa di Napoli / Italy

About the workshop:

Das Rechtsurteil ist ein zentrales Thema der Rechtstheorie und kann unter vielen Gesichtspunkten erforscht werden.
Viele Rechtstheoretiker haben sich auf den Aspekt der juristischen Argumentation konzentriert. Unter „juristischer Argumentation" kann man u.a. Folgendes verstehen: die Explikation der Gesamtheit der Gründe, die für geeignet gehalten werden, ein Rechtsurteil zu rechtfertigen. Im Hintergrund steht oft die Annahme, dass ein strenges theorein nur das untersuchen kann, was „sichtbar" ist.
Damit kann auch die derzeitige marginale Position der „gegenwärtigen juristischen Hermeneutik" (g.j.H.) als eine Theorie der rechtlichen Urteils-herstellung erklärt werden. Es bleibt jedoch festzustellen, ob diese marginale Position auch wohlverdient ist. Denn die g.j.H. (z.B. mit Kaufmann, Hassemer, Hruschka und Esser) hat zuerst gezeigt, dass die Herstellungsphase eines Rechtsurteils nicht nur gleich bedeutend wie seine Rechtfertigungsphase ist, sondern auch die notwendigen Bedingungen des echten secundum ius Urteilens impliziert. Da diese Bedingungen als solche weder psychologisch noch normativ sind, können sie prinzipiell und auf andere Weise, als die der Theorie der juristischen Argumentation theoretisiert werden.
Schließlich sollte der Special Workshop ein Gespräch über diese Fragen und somit die eigentümliche Funktion der g.j.H. fördern, indem er versucht, einerseits ihre Ursprünge hervorzuheben, anderseits ihre Beiträge zur Rechtswissenschaft und -praxis herauszuarbeiten.

List of Lectures:

1. Martin Avenarius (Universität zu Köln / Germany)
Universelle Hermeneutik und rechtshistorisches Verstehen: die Entwicklung der Kontroverse zwischen Gadamer und Wieacker

2. Gaetano Carlizzi (Università Suor Orsola Benincasa di Napoli / Italy)
Historische und theoretische Hauptfragen der gegenwärtigen juristischen Hermeneutik

3. Stephan Meder (Leibniz Universität Hannover / Germany)
Francis Lieber (1800-1872) und die Begründung der modernen Hermeneutik

4. José Antonio Seoane (Universidad de A Coruña / Spain)
Hermeneutik und Typus

SPECIAL WORKSHOP

SW 11 Aristotle and the Philosophy of Law – Theory, Practice and Justice	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 1.301
Organizers	Prof. Dr. Nuno Coelho, University of São Paulo (USP) / Brazil Dr. Liesbeth Huppes-Cluysenaer, University of Amsterdam / The Netherlands

About the workshop:

This workshop aims to join researchers interested in the contribution of Aristotle to developments in Philosophy of Law. Aristotle has attracted the attention of philosophers in very different ways in Western philosophy. Many well known works in Ethics, Political and Legal Philosophy may be read as maintaining a dialogue with him. The relation between theory, practice and justice is one of the fundamental issues of Aristotle and links this workshop to the conference theme (i.e. Law, Science and Technology). The workshop intends to motivate studies about the way Aristotle may still inspire contemporary discourse in this respect.

Selection of presentations

The language is English. A Program Committee will select papers for presentation. The committee consists of the coordinators and invited members, scholars specialized in Aristotelian Philosophy and/or Political Science and Ethics: Marcel Becker, Radboud University (Netherlands), António de Castro Caeiro, Nova University of Lisbon (Portugal); Oliver Lembcke, University of Jena (Germany); Carlo Natali, University Ca'Foscari Venezia (Italy); Diego Poole, University Rey Juan Carlos II (Spain); Jonathan Soeharno, University of Utrecht (Netherlands); Marco Zingano, University of São Paulo (Brazil).

Community of researchers

This will be the third edition of the workshop, the first meetings being held at Cracow (2007) and (Beijing (2009). A community of researchers interested in Aristotle and the Philosophy of Law is emerging; a reunion of the participants took place in Brazil, in August 2010, with the support from the Brazilian IVR Section.

List of Lectures:

1. Clifford Angell Bates (Uniwersytet Warzawski / Poland)
Law and the rule of law and its place relative to politeia in Aristotle's Politics

2. Eric Engle (Pericles-Able Moskow / Russia)
Aristotle and Post-Positivism

3. Iris van Domselaar (University of Amsterdam / The Netherlands)
Destabilizing Adjudication: where deconstructivism and neo-Aristotelianism meet

4. Jesús Vega (University of Oviedo / Spain)
Aristotle vs. Schauer on Rules as Generalizations

5. Liesbeth Huppes-Cluysenaer (University of Amsterdam / The Netherlands)
Reasoning against a deterministic/ mechanistic conception of the world

6. Samuli Hurri (Helsinki / Finland)
Justice kata nomos and justice as epieikés (legality and equity)

7. Nuno M.M.S. Coelho (USP, UNISEB-COC, UNIPAC / Brazil)
Psyche as Agora: the rhetorical structure of phronesis

8. Mariusz Jerzy Golecki (University of Lodz / Poland)
Synallagma as a paradigm of exchange: from Aristotelian to Game Theoretic Categorisation in Contract Law

9. Ekow N.Yankah (Cardozo School of Law New York / USA)
Legal Vices and Civic Virtues

10. António de Castro Caeiro (Universidade Nova de Lisboa / Spain)
The concept of value in Aristotle's Nicomachean Ethics

SPECIAL WORKSHOP

SW 12 The Natural Law Tradition	
Date	THU 18 Aug 2011 + FRI 19 Aug 2011
Time	THU 14.30 h – 18.30 h + FRI 15.30 h – 18.00 h
Location	HOF 2.45 / Boston
Organizers	Dr. Francisco José Contreras, University of Seville / Spain

About the workshop:

The expression ius naturale evokes, in its apparent simplicity, the existence of a relation between Law and Nature. This relationship between the normative and the natural—despite being affirmed in diverse and sometimes incompatible ways—was, for centuries, a relatively pacific question. Criticism of natural law theory, or iusnaturalism, became common in the 19th century, when, under the influence of positivism, the conviction prevailed that natural law theory lacks the capacity to clarify the concept of law, and still less, to project itself onto the concrete practice of law.

The 19th century critique of iusnaturalism traces its roots to the rationalism of the 18th century. During the 18th century, a view of natural law as a rational code arose. This code was to be accurately formulated by the study of human nature. But this study of human nature took the form of an individualistic analysis of man from the perspective of modern rationalism. This perspective (rationalist iusnaturalism) supplanted what might be called a 'classical' perspective (classical iusnaturalism), which took man's finality as the fundamental explanatory criterion, by instead prioritizing material and formal causality as the principal explanatory criteria.In other words, the rationalist perspective is characterized by the conviction that reality is better understood by unraveling the internal composition of its elements and analyzing the relation between them, rather than by investigating the end or purpose of its existence. An investigation into the 'why' of reality (the classical perspective) was virtually replaced by an investigation into the 'how' of reality (the rationalist perspective). As a result, reflection on natural law lost touch with teleology. Rationalist iusnaturalism became, in turn, legal positivism: the first European legal codes appeared as compendiums of all the natural rules that had to govern human relations. In this sense, the sentence of Cambacérès, when he presented the second project of Civil Code for France, is emblematic: "Our laws will not be but the code of Nature, sanctioned by reason and guaranteed by freedom". This rationalist iusnaturalism is the principal form of iusnaturalism that has stood in opposition to the later positivism of the 19th and 20th centuries, presenting, it as it were, classical iusnaturalism by antonomasia.

This image, represented by rationalist iusnaturalism, is not the object of the proposed Workshop, but rather the classical iusnaturalism that is presently identified as the Aristotelian-Thomistic Natural Law Tradition. This Aristotelian-Thomist jurisprudence developed from a rehabilitation of the study of practical reasoning, in dialogue with the contemporary philosophy. On this perspective, natural law is not reduced to its mere historical formulations. If there is a natural law, it exists independently of the theories that we could develop about it. Nevertheless, when we talk about natural law we necessarily refer to a specific doctrine, a theory formulated under the philosophical debate surrounding the foundations of the moral order. Although the ancient antecedents of this doctrine are found in Stoicism, its more classic formulation is owed to Aquinas. It is to this version of the natural law that the contemporary efforts at rehabilitating the study of practical reasoning are referred.

List of Lectures:

1. Anna Taitslin (University of Canberra / Australia)
The competing sources of Aquinas' Natural Law: Aristotle, Roman Law and early Christian Fathers, and the vitality of Suarez' critique

2. Caridad Velarde (Universidad de Navarra / Spain)
Borders, Political Community, and Natural Law Tradition

3. Diego Poole (Universidad Rey Juan Carlos / Spain)
Democracy and Moral Relativism: A Reply to Hans Kelsen

4. Fernando Llano (Universidad de Sevilla / Spain)
Cicero and Natural Law

5. Francisco José Contreras, Universidad de Sevilla / Spain)
The Finnis-Veatch Controversy on the „Naturalistic Fallacy"

6. Ignacio Sánchez Cámara (Universidad de La Coruña / Spain)
Perspectivism and Natural Law

7. Julio Oliveira (Pontificia Universidade Catolica de Minas Gerais / Brazil) and Barbara Lessa (Pontificia Universidade Catolica de Minas Gerais / Brazil)
Hans Kelsen and the Tradition of Natural Law: Why Kelsen's Objections to the Natural Law Doctrine Do Not Apply Against Aquinas' Theory of Natural Law

8. María Elósegui, Universidad de Zaragoza / Spain)
The Thought of Legaz Lacambra and the Natural Law Tradition

9. Marta Albert (Universidad Rey Juan Carlos / Spain)
Natural Law and the Phenomenological Given

10. Paloma Durán (Universidad Complutense / Spain)
Universality of Human Rights, Natural Law, and Human Condition

11. Rafael Ramis (Universidad de las Islas Baleares / Spain)
Alasdair Macintyre: "Legal Philosophy and Natural Law Tradition"

SPECIAL WORKSHOP

SW 13
(cancelled)

SPECIAL WORKSHOP

SW 14 **Theoretical and Methodological Foundations of Law and Economics (Second MetaLawEcon Workshop)**	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HZ 11
Organizers	Dr. Péter Cserne, Tilburg University / The Netherlands

About the workshop:

While law and economics seems to have become the lingua franca of US legal scholarship and is increasingly popular in Europe and elsewhere in the world, there are still significant misunderstandings surrounding its theoretical status, methodology and normative commitments. This calls for a renewed focus on foundational issues of the discipline.
The workshop addresses meta-theoretical and epistemological questions of law and economics scholarship; some contributors elaborate on various aspects of the contrast between philosophical and economic approach to law; others enter normative debates (related to efficiency, welfare, justice, and consequentialism), still others discuss the relevance of an economic approach to comparative law and various doctrinal legal areas.
The workshop is a follow-up of the First MetaLawEcon workshop (Tilburg, November 2010).

List of Lectures:

1. Helen Eenmaa (Yale / USA)
Normative differences among forms of liability and the limits of the economic analysis of law

2. Carsten Gerner-Beuerle (London School of Economics / UK)
Comparative Corporate Governance for the 21st century

3. Mariusz Golecki (University of Lódz / Poland)
Foundationalism vs. Antifoundationalis: some remarks on law and economics as jurisprudential theory

4. Alon Harel (Hebrew University Jerusalem / Israel)
Commensurability and Agency: Two Yet-To-Be-Met Challenges for Law and Economics

5. Szabolcs Hegyi (University of Miskolc / Hungary)
The scope and limits of consequencitalist reasoning: a philosophical approach

6. Régis Lanneau (Université Paris X / France)

What is 'law' from the law and economics point of view?

7. Diego Moreno-Cruz (University of Genoa / Italy)
Three Explanatory and Predictive Realistic Strategies Confronted

8. Aurélien Portuese (Université Paris II / France)
The case for a principled approach to law and economics: efficiency analysis and general principles of EU law

9. Endre Stavang (University of Oslo / Norway)
Some experience-based thoughts on the relevance of economic analysis of law

SPECIAL WORKSHOP

SW 15 Legal Argumentation	
Date	THU 18 Aug 2011; FRI 19 Aug 2011
Time	THU 14.30 h – 18.30 h; FRI 15.30 h – 16.30 h; 17 h – 18 h
Location	HZ 15
Organizers	Prof. Dr. Christian Dahlman, Lund University / Sweden Dr. Eveline Feteris, University of Amsterdam / The Netherlands

About the workshop:

Topics include balancing, argumentation fallacies, coherence, dialogue in the law, strategic maneuvering and the distinction between context of discovery and context of justification.

List of Lectures:

1. Jan Sieckmann (Bamberg / Germany)
Is Balancing a Method of Rational Justification?

2. Christian Dahlman / David Reidhav / Lena Wahlberg (Lund / Sweden)
Fallacies in ad Hominem Arguments

3. Antonino Rotolo / Corrado Roversi (Bologna / Italy)
Constitutive Rules and Coherence in Legal Argumentation

4. Thomas Bustamante (Aberdeen / UK)
On the Argumentum ad Absurdum in Statutory Interpretation

5. Harm Kloosterhuis (Rotterdam / The Netherlands)
The Pragma-Dialectic Perspective on Legal Argumentation and the Rule of Law

6. Eveline Feteris (Amsterdam / The Netherlands)
Strategic Maneuvering with Argumentation in the Case of the Unworthy Spouse

7. Jaap Hage (Maastricht / The Netherlands)
Legal Constructivism and the Institutional Theory of Law

8. Flavia Carbonell (Univ. Alberto Hurtado / Chile)
Reasoning by Consequences

9. Bruce Anderson (Saint Mary's Univ. / Canada)
Balancing in the Discovery Process

10. Bruce Chapman (Toronto / Canada)
Pluralism, Proportionality and Process

11. Stanley L. Paulson (St. Louis / USA)
Is Kelsen Caught between Discovery and Justification?

12. Marko Novak (Nova Gorica / Slowenia)
The (Ir)rationality of Judicial Decision-Making

13. Virgilio Afonso da Silva (São Paulo / Brazil)
Dialogue and Deliberation in Constitutional Courts

14. Giovanni Tuzet (Bocconi / Italy)
Truth on Trial – Inquiry or Advocacy in Legal Argumentation?

SPECIAL WORKSHOP

SW 16 Legal Fictions	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 457
Organizers	Dr. Maksymilian Del Mar, Queen Mary, University of London / UK

About the workshop:

In his unduly neglected series of articles on 'Legal Fictions' (Illinois Law Review, 1930-1), Lon Fuller noted that 'the fiction has generally been regarded as something of which the law ought to be ashamed, and yet with which the law cannot, as yet, dispense' (1930, 364). The role of 'fictions' in the law is a topic of direct relevance to this year's IVR Congress theme, 'Law, Science and Technology.' The workshop will ask the following questions: are Fuller's arguments relevant today? Can we still, in this era of enthusiasm for naturalism, speak of legal fictions? And if we can speak of legal fictions, then what does this show us about the limits of science, or the aims of law? Are legal concepts tests in wholly different ways to scientific hypotheses? Is legal reasoning, partly as a result of the employment of legal fictions, a world apart from scientific reasoning? If they are worlds apart, can law and science ever learn from each other, and if so how exactly? What do legal fictions tell us about the increasing reliance

placed, in some domains of the law, on expert scientific witnesses? Are legal fictions the last bastion of defence against the inroads of science in law, e.g. of the uses made of neuroscience in the criminal law? Or does talk of 'inroads' smack only of traditionalism and conservatism, or, worse, unseemly protection of legal professional interests?

List of Lectures:

1. William Twining (University College London / UK and Miami / USA)
Fuller's Legal Fictions: Introductory Remarks

2. Michael Quinn (University College London / UK)
Fuller on Legal Fictions: A Benthamic Perspective

3. Burkhard Schafer (University of Edinburgh / UK)
Bentham and Zalta on Reasoning with Fiction

4. Kristen Rundle (London School of Economics / UK)
Pathology as Teacher: Fuller's Distinctive Starting Point

5. Maksymilian Del Mar (Queen Mary, University of London / UK)
Fuller on Legal Fictions

6. Randy Gordon (Gardere Wynne Sewell LLP / Southern Methodist University / USA)
Fictional Fraud: Reliance and the Myth of Efficient Markets

7. Nancy Knauer (Temple University / USA)
Legal Fictions and the Constitutive Power of Law: Slavery and the Doctrine of Discovery

8. Karen Petroski (Saint Louis University / USA)
Legal Fictions, Legal Facts, and the Limits of Legal Communication

SPECIAL WORKSHOP

SW 17 Criminalization	
Date	TUE 16 Aug 2011 + THU 18 Aug 2011
Time	TUE 14.30 h – 18.30 h + THU 14.30 h – 18.30 h
Location	HOF E.22 / Commerzbank
Organizers	Prof. Andreas von Hirsch, University of Frankfurt / Germany and University of Cambridge / UK Prof. Antony Duff, University of Stirling / UK and University of Minnesota / USA

About the workshop:

It is often said that contemporary societies face a crisis of over-criminalization: too much conduct is criminalized, too hastily, without adequate thought about the principles that should guide criminalization or the aims it should serve; the result is a disorganized, unprincipled, over-expansive criminal law, which subjects too many people to the threat of punishment. (One question is how widespread this problem is: does it, e.g., affect chiefly certain western democracies, such as the United States and Britain; or does it reach further than that?) But normative criminal law theorists, who have made advances in systematic work on such issues as punishment and criminal responsibility, have made comparatively little systematic progress on this central problem of criminalization. Some recent work, especially in Germany, Britain and the US, has begun to remedy that lack; this workshop provides an opportunity to advance the international debate. It will involve six papers, each addressing a central aspect of this large question. The papers will be available in advance, and the sessions will proceed on the assumption that all participants have read the papers. Each session will begin with a brief comment on the paper by a respondent, followed by a very brief response from the author, leaving ample time for open discussion.

List of Lectures:

Tuesday 16 August
1. Dr Antje du Bois-Pedain (University of Cambridge / UK)
The wrongfulness constraint in criminalisation

2. Professor Antony Duff (University of Stirling / UK and University of Minnesota / USA)
Towards a modest legal moralism

3. Professor Kimberly Ferzan (Rutgers University / USA)
Inchoate offenses at the prevention/punishment divide

Thursday 18 August
4. Dr Ignace Haaz (University of Fribourg / Switzerland)
Eduard von Hartmann and criminalization

5. Dr Claes Lernestedt (University of Örebro / Sweden)
Victim, offender, and society: sharing wrongs, but how, and in which roles?

6. Professor Andreas von Hirsch (University of Frankfurt / Germany and University of Cambridge / UK)
The roles of harmfulness and wrongfulness in crimalisation theory

SPECIAL WORKSHOP

SW 18 Coexisting Normative Orders: Natural and Positive Law, from the Classical Tradition to Modern Global Law	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	HZ 14
Organizers	Prof. Dr. Thomas Duve, Max Planck Institut for European Legal History / Germany

About the workshop:

Die Überlagerung verschiedener normativer Ordnungen ist eine Grundkonstante der Geschichte der Gerechtigkeit und des Rechts. Hatten in europäischer Antike und Mittelalter stets verschiedene normative Sphären nebeneinander existiert, so wurden im frühmodernen Staat „Staat" und „Recht" immer enger aufeinander bezogen. Das „Gesetz" begann viele andere Rechtsquellen zu absorbieren. Der Wille des Gesetzgebers wurde zum wichtigsten Geltungsgrund, man beobachtet in der Geschichte der Rechtsquellenlehre zu Beginn des 17. Jahrhunderts einen Aufstieg des sog. voluntaristischen Gesetzesbegriffs, die Transformation einer Rechtsquellenvielfalt zu einem Dualismus von „positivem" und „natürlich-vernünftigem" Recht. Doch das ist nur ein Bild auf die Geschichte – ein überdies von einem Kerneuropa aus in den Westen hineingeschriebenes. Nicht-rechtliche normative Sphären verschwanden aber selbst in Europa niemals, und die immer deutlichere Präsenz von Rechtspluralismus und der Überlagerung normativer Ordnungen in der Gegenwart sensibilisiert auch für deren Bedeutung in der Geschichte. Dies wiederum bietet Reflexionschancen für heute: denn wenn in Bezug auf die zukünftige normative Ordnung in einer globalen Welt irgendetwas sicher ist – dann wohl, dass es sich um eine Welt unabgestimmter Geltungsansprüche und konkurrierender normativer Systeme handeln wird.
Der workshop nimmt diese Situation als Ausgangspunkt, um in Auseinandersetzung mit einigen Thesen von John Finnis – der seine Teilnahme an dem workshop bereits zugesagt hat und eine einleitende Stellungnahme abgibt – nach verschiedenen historischen Artikulationen dieser Überlagerungen in unterschiedlichen Regionen zu fragen.

List of Lectures:

1. John Finnis (Notre Dame / USA and Oxford / UK)

2. Roberto Hofmeister-Pich (Porto Alegre / Brazil)

3. Santiago Legarre (Buenos Aires / Argentinia)

4. Mathias Lutz-Bachmann (Frankfurt / Germany)

5. Merio Scattola (Padua / Italy)

6. Paul Yowell (Oxford / UK)

SPECIAL WORKSHOP

SW 19 Sustainability, Intergenerational Justice, and Global Justice	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HZ 10
Organizers	Prof. Dr. Felix Ekardt, LL.M., M.A., University of Rostock / Germany Dr. Herwig Unnerstall, M.A., Evangelische Akademie Hofgeismar / Germany

About the workshop:

The liberal framework of western societies has resulted in most inhabitants of modern-day western states being able to enjoy an extent of liberty and wealth which would have been inconceivable for human beings in former times. But it is still a matter of fact that the law as well as the philosophy of justice are more or less restrained to the resolution of conflicts between contemporaries and between people living in the same country. This is a crucial problem since the western way of life and its technological basis can probably not be continued (a) in a long-term perspective and (b) on a global level. If countries like China or India succeeded in copying our model of wealth and 2.3 billion Indian and Chinese people were one day to own 1.2 billion cars, fridges, air conditioners, washing machines, and have food imported by plane, etc., it wouldn't work. The global climate and the natural resources probably would just collapse – at least they will, if we don't optimise our energy and resource efficiency standards radically. This poses big challenges, especially in consideration of the fact that some kind of measures of global justice (e.g. accelerating economic growth to combat misery in the developing countries) can affect intergenerational justice – and vice versa. The intention of the concept of sustainability, which has increasingly been gaining popularity as an overarching political aim since the 1990s, is exactly to fight this "global-intergenerational" dilemma.

List of Lectures:

1. Prof. Dr. Felix Ekardt LL.M., M.A. (University of Rostock / Germany)
Freedom and sustainability

2. Dr. Herwig Unnerstall M.A. (Evangelische Akademie Hofgeismar / Germany)
Legal and philosophical problems of intergenerational justice

3. Prof. Dr. Klaus Mathis (University of Lucerne / Switzerland)
Sustainability, efficiency, and the law

SPECIAL WORKSHOP

SW 20 Legal Theory, Negotiation and Interaction: Influences of ADR on Legal Thinking and Legal Education	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	HZ 11
Organizers	Prof. Dr. Frank Fleerackers, Ph.D, B.Phil, L.Iur, LL.M (Harvard), KU Brussels University / Belgium

About the workshop:

ADR practices in legal negotiation and mediation may serve as paradigms for a new way of legal thinking. If difference and conflict are indeed irreducible, then legal thinking may only be effective if the dynamics of interaction are fully endorsed. Through interaction, mankind appears to be able to generate a concept of meaning that lives up to a dynamic, yet defendable notion of truth. Surely, the classic archeological notion of truth is far gone and its postmodern successor could not prevail. Yet human interaction allows us to engender instances of truth and certainty, by way of juxtaposition and concurrence. Such is the scope of interaction as conflict resolution, at the heart of critical legal thinking, conducted by lawyers as directors of conflict. Lawyers direct the interaction of conflicting parties by æffectively analyzing the effects of dynamic conflict affectors, i.e. anything that may affect the parties' conflict positions. Through interaction, an æffective concept of truth and certainty can be generated, surpassing individual convictions because of its affective effect on the parties at hand. For that reason, such concept of truth and certainty is highly effective, as it wields its indispensable effect, while at the same time upholding an interactive and dynamic stance. Or, as Deleuze puts it: "il n'y a que des mots inexacts pour désigner des choses exactement." Only in and through interaction between parties will lawyers succeed in directing the dynamics of conflict affectors in order to generate legal meaning, truth and even certainty. As such, nor legal meaning nor legal certainty even remotely refer to the rationalized constructs of classic legal thought. Hence, legal education opens the way to a new definition of meaningful legal analysis as a reflection of human interaction.

List of Lectures:

1. Frank Fleerackers (Brussels / Belgium)
Legal Education, Negotiation and Conflict Analysis

2. Stefan Häußler (Göttingen / Germany)
Early 20th Century Theories of Legal Education: Psychology and "Civilpolitik"

3. Samuel Dahan (Paris / France)
The Governance of Social Policy: From Open Coordination to Financial Stabilisation

4. Diederik Vandendriessche (Brussele / Belgium)
Tax havens, ADR and legal theory

5. Romina Amicolo (Napoli / Italy)
The Italian Law on the mediation in civil and commercial matters: the problems of its italian unconstitutionality and its European accordance. The philosophical implication of a possible conflict

6. Ewa Kurlanda (London / UK)
ADR clauses – The effects of changing relationships between parties"

7. Peter Kamminga (Stanford / USA)
Toward a new kind of highly interactive lawyer: The promise of collaborative Lawyering?

8. Paola Cecchi Dimeglio (Stanford / USA)
The Role of lawyers in Designing Conflict Management

SPECIAL WORKSHOP

SW 21 H.L.A. Hart's The Concept of Law Reconsidered	
Date	TUE 16 Aug 2011 + THU 18 Aug 2011
Time	TUE 14.30 h – 18.30 h + THU 14.30 h – 18.30 h
Location	HZ 12
Organizers	Professor Dr. Imer Flores, Instituto de Investigaciones Jurídicas (Legal Research Institute) & Facultad de Derecho (Law School) / Mexico

About the workshop:

Reconsider the influence of H.L.A. Hart's The Concept of Law in its golden anniversary, in particular, and the legacy of his work, in general, is the main aim for this special workshop. Actually, Hart is among the jurists that did contribute more to the subject of jurisprudence in the second half of the Twentieth Century, by restoring legal philosophy to a central place in the study of both law and general philosophy. Certainly, The Concept of Law was quintessential for that purpose and has been highly influential ever since its publication in 1961. It contains an authoritative critique of a simple model of a legal system constructed along the lines of John Austin's command theory and an equally powerful analysis of the concept of law and of a

complex legal system through a discussion of the way in which rules of human conduct are used as social practices or standards of behavior. Hence, the idea is to encourage the revision not only of distinctions between "being obliged" and "having an obligation", "primary and secondary rules", "external and internal points of view", but also of his original contributions regarding the "rule of recognition", the idea of a "critical reflective attitude" and his main theses, including "law as the union of primary and secondary rules", "the open texture of language" and "the indeterminacy of law", "the separation of law and morals", among others.

List of Lectures:

1. Tom Campbell (Charles Sturt University / Australia)
Hart's Normative Concept of Law

2. Pierluigi Chiassoni (Universitá degli studi di Genova / Italy)
The Simplest and Sweet Virtues of Analysis. A Plea for Hart's Philosophy of Jurisprudence"

3. Imer B. Flores (Universidad Nacional Autónoma de México / Mexico)
H.L.A. Hart's The Concept of Law: Between the Nightmare and the Noble Dream

4. Diego López-Medina (Universidad de los Andes / Colombia)
Hart in Latin America: Toward a Diffusionist Map of (Mis)Readings of his Work

5. Margaret Martin (Western Ontario University / Canada)
Hart's The Concept of Law: Between Fact and Value

6. Roger A. Shiner (University of British Columbia Okanagan and Okanagan College / Canada)
Hart and the Senses of Discretion

SPECIAL WORKSHOP

SW 22 New Developments in Technology: Challenges for the law and ethics of privacy and confidentiality	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 1.302
Organizers	Prof. Leslie Francis, University of Utah / USA

About the workshop:

Many new technological developments – from surveillance cameras, to search engine techniques, to cloud storage, and beyond – raise significant challenges for privacy and confidentiality. These technologies make it far simpler to locate, gather, store, and analyze information about individuals. At the same time, risks from the global transmission of pandemic disease to terrorism place increasing pressures on the desire to keep information confidential. Moreover, the benefits of assembling information are also impressive: benefits to public health, to education, to environmental understanding, and much more. The EU and the US have taken very different legal approaches to the difficult problems of protecting privacy and confidentiality in light of these concerns. This special workshop brings together a experts from a variety of disciplines and countries to address issues in protecting privacy and confidentiality raised by these new technologies. Workshop papers will be the basis for a special issue of the Journal of Social Philosophy to be published in 2012.

List of Lectures:

1. Melike Akkaraca (Istanbul Kultur University / Turkey)
Judicial Balancing Between Civil Rights and National Security in Turkey

2. Angus Dawson (Keele University / UK)
Trust, Privacy and Public Health: In Defence of Biobanking

3. Martijn Blaauw & Jeroen van den Hoven (Delft University of Technology/ Netherlands
Privacy and Knowing Who

4. Leslie Francis and John Francis (University of Utah / USA)
Surveillance without borders

5. Anita Ho (University of British Columbia / Canada), Anita Silvers (San Francisco State University / USA), and Tim Stainton (University of British Columbia / Canada)
Continuous Surveillance of Persons with Disabilities: Conflicts and Compatibilities of Personal and Public Goods

6. Alan Rubel (University of Wisconsin / USA)
Information Access, Privacy, and Positive Intellectual Freedom

SPECIAL WORKSHOP

SW 23 Normative and epistemological implications of data science, profiling and smart environments. 'Code as Law' meets 'Law as Code and Law as Literature'	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	HZ 15
Organizers	Prof. Jeanne Gaakeer, Erasmus University Rotterdam / Netherlands Prof. Mireille Hildebrandt, Erasmus University Rotterdam and Radboud University Nijmegen / Netherlands

About the workshop:

Data science, profiling and/or smart environments help (re)shape our current ideas of knowledge and challenge traditional forms of legal concepts and thought. They affect our perception of the world and the manner in which human behavior can be regulated. In the case of smart environments we witness an extension of our visual and auditory perception via Internet and mobile communication technologies and a blurring of the borders between the public, the private and the social. Established balances between societal actors are challenged.The normative implications of these developments seem paramount.
This raises questions as to the theoretical assumptions underlying both scientific and legal practice.
This special workshop brings together two different angles from which to shed light on the subject, the one starting from a theoretical reflection on the normative impact of these technologies and the other building on contemporary legal theory in the field of Law and Literature, or, more generally, Law and the Humanities. The focus will be on the hermeneutic and epistemological implications of data science, profiling and smart environments for democracy and the Rule of Law.

List of Lectures:

1. Shulamith Almog (University of Haifa / Israel)
Where Law is an Invisible Maker – Blade Runner as a Legal Dystopia

2. Maria Aristodemou (Birkbeck College, London / UK)
Bare Law between Two Lives: José Saramago and Cornelia Vismann on Naming, Filing and Cancelling

3. and 4. Niels van Dijk and Katja de Vries (Free University Brussels / Belgium)
The Hydra of Legal Practice

5. Jeanne Gaakeer (Erasmus School of Law / Netherlands)
Control, Alt and/or Delete? Some observations on new technologies and the human

6. Mireille Hildebrandt (Erasmus School of Law and Radboud University Nijmegen / Netherlands
From Galathea 2.2 to Watson – and back?

7. and 8. Ronald Leenes and Bibi van den Berg (Tilburg University / Netherlands)
Abort, Retry, or Fail: Scoping techno-regulation and other techno-effects

9. Arild Linneberg (University of Bergen / Norway)
The Rhetoric of the Data Retention Directive; Hermeneutic and Epistemological Implications

10. Aernout Schmidt (Leyden University / Netherlands)
Aiming for evidence-based legal theory (with an application to legal domestication of a multi-phenomenon, co-emerging with data storing, -mining and – processing capabilities)

SPECIAL WORKSHOP

SW 24 Law as Literature: memory and oblivion	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 3.101
Organizers	Prof. Dr. Marcelo Campos Galuppo, Pontifícia Universidade Católica de Minas Gerais / Brazil

About the workshop:

Since its dawn, the studies in Law and Literature have offered a deeper comprehension of Law and Jurisprudence, through the analysis of Law in Literature as well as through the analysis of Law as Literature. In many countries, such as United States, Brazil, Portugal, Belgium and Netherlands, these studies has reached a so developed stage that graduation courses on Law have offered disciplines which deal with this kind of subject.
A specific research on Law as Literature can be found on Narratology and investigate the relation between memory and oblivion in novels, as well as in Law. To which extent rules and judicial decisions represent the memory of a nation? And to which extent the establishing power of Law can break with Past and relegate it to oblivion? Can Law be understood as the narrative of one people, of one culture?

List of Lectures:

1. Martin Škop (Czech Republic)
Milan Kundera and Franz Kafka – How not to Forget the Everydayness

2. Andityas Soares de Moura Costa Matos (Universidade Federal de Minas Gerais – FEAD / Brazil)
From Literature to Cinema, from Cinema to Reality. Law and Dystopia in Contemporary World

3. Marcelo Campos Galuppo (Universidade Federal de Minas Gerais – Pontifícia Universidade Católica de Minas Gerais / Brazil)
The Judge as Storyteller

4. Anthony Amatrudo (United Kingdom) and Fritz Wefelmeyer (United Kingdom)
Nazi Law: the Censuring of Modernist Culture and the Elimination of Memory Formation

5. Monica Lopes Lerna (Finland)
From Amnesty to Memory

6. Jorge Douglas Price (Universidad de Comahue / Argentina)
Law and Literature

7. James Gray (United Kingdom)
The presence of the past: Law, Literature and Cynthia Ozick

8. José Garcez Ghirardi (Brazil) and Juliana Neuenschwander Magalhães (Universidade Federal do Rio de Janeiro / Brazil)
Your Husband, your Sovereign: the Violent Prince in the Taming of Shrew

9. João Pinheiro Faro (Brazil) and Daury César Fabris (Faculdade de Direito de Vitória/Brasil)
How to do Thing with the Constitution

SPECIAL WORKSHOP

SW 25 The Latin American Legal Thinking in front of the challenges of Globalization	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 3.201
Organizers	Prof. Dr. Marcelo Campos Galuppo, Pontifícia Universidade Católica de Minas Gerais / Brazil Jorge Douglas Price / Argentina

About the workshop:

Since its constitution in the XVII century, the Latin American thought has resisted the cultural domination imposed by the North to the South and the adoption of a lifestyle and of a worldview typically Eurocentric. In the twentieth century, thinkers like Enrique Dussel and Eduardo Galiano have even called into question the universalizing pretensions of this kind of thought, leading authors such as Apel and Vattimo to redesign their systems to include philosophical concepts such as global responsibility and liberation.
Since the claim of universality of European thought is a phenomenon parallel to globalization, these authors are very critical of the assumptions, methods and results of globalization operated from the North perspective.
This workshop intends to recover such criticism, particularly in its implications for contemporary legal theory

List of Lectures:

1. Aloísio Krohling (Faculdade de Direito de Vitória / Brazil) e Ricardo Maurício Freire Soares (Universidade Federal da Bahia / Brazil)
Dussel's ethics of liberation as rhizomatic matrix and original source of human fundamental rights as root principles of postpositivistic philosophy of law

2. Monica Hermann (Universidade de São Paulo / Brazil) and Rubens Beçak (Universidade de São Paulo / Brazil)
The XXIth Century Juridical Literature. A new command for the establishment of public policies. The emergence of a new decision maker body. The politisation of the justice. The Brazilian experience

3. Paulo César Corrêa Borges (Universidade Estadual Paulista / Brazil)
The Brazilian ecletism on criminal law against sexual crimes

4. Carlos Alberto Rohrmann (Faculdade de Direito Milton Campos / Brazil)
On line Privacy Protection under a Brazilian Court Perspective: A Case Study

5. Julio Aguiar de Oliveira (Pontifícia Universidade Católica de Minas Gerais and Universidade Federal de Ouro Preto / Brazil) and Rodolpho Barreto Sampaio Júnior (Pontifícia Universidade Católica de Minas Gerais and Faculdade de Direito Milton Campos / Brazil)
Good fences make good neighbors: an investigation on the place of law and its limits in the context of the Brazilian private law movement Escola do Direito Civil-Constitucional

6. Graziela Bacchi Hora (Universidade Federal de Pernambuco / Brazil)
Fragmentation and Eristic in the Escola do Recife: A Rethorical Reading of Tobias Barreto's Philosophy

7. José Renato Gazziero Cella (Brazil) and Paola Bianchi Wojciechowski (Brazil)
The Dispute Between Universalism and Relativism: Is it Possible a Cosmopolitan Project of Human Rights?

8. Marco Amaral Mendonça (Brazil)
On the Direito Achado na Rua

9. María Guadalupe Trujillo (México)
Critic to the Human Rights concept in a Globalised Right

10. Ramiro Contreras Acevedo (México)
The Right in a new Globalization

11. Ronaldo Porto Macedo (Universidade de São Paulo and Fundação Getúlio Vargas / Brazil)
Overcoming orientalizing views of Latin American Law. New Approaches to the new Legal Experiences in Brazilian Law

SPECIAL WORKSHOP

SW 26 Between Interpretation And Intuition: Cognitive Sciences And The Model Of Decision Making Process In Law	
Date	THU 18 Aug 2011
Time	14.30h – 18.30h
Location	HOF E.21 / Paris
Organizers	Dr. Mariusz Golecki, University of Lodz, Faculty of Law and Administration / Poland

About the workshop:

Until recently descriptive models of human decision making process did not play an important role in jurisprudential

agenda. Commonly accepted models of decision making process were normative rather than descriptive.
A very peculiar case for this process concerns some models of legal interpretation. Legal interpretation as such seems to be modelled by some legal and extralegal directives, shaping the practices of actors and institutions such as courts and administrative bodies.
Some of those models rest upon the assumption about practically unlimited access to knowledge and unrestricted rationality of decision makers. These conditions can hardly be satisfied in a real world, where human cognitive capacities are restricted and particularly structured by neuropsychological characteristics of human body.
Under these assumptions, the descriptive model of human decision making process plays an increasingly significant role in legal theory and legal sciences. Accordingly there has been considerable interest recently in empirical approaches to legal interpretation and application of law.
Many authors presented research agenda pertaining to the investigation of adjudication in cognitive legal studies (G. Lekoff, L. M. Solan, S. Winter) and psychology of legal process based behavioural decision theory (A. Tversky, D. Kanheman, C. S. Sunstein, R. Korobkin, J. Rachlinski).
This special workshop will focus on current research into these approaches and their relevance to a legal theory and philosophy of law. The questions about the biological, cultural and psychological factors that explain the shape of the decisions, norms and practices of Hominis Iuridici are supposed to be a main field of interest.

List of Lectures:

1. Dr Matyas Bencze (University of Debrecen / Hungary)
Burden of reasoning. Some psychological obstacles to coherent interpretation

2. Ms. Anna Ronkainen (University of Helsinki, Department of Modern Languages / Finland)
Dual-process cognition and legal reasoning

3. Ms. Magdalena Małecka (Polish Academy of Science, Graduate School for Social Research / Poland)
Towards neuro-law and economics? Neuroscience and its application to law and economics

4. Ms. Loisima Miranda Schiess (Brasilianischer Richterverband / Brazil) and Mr. Lossian Miranda (Bundesinstitut für Eziehung, Wissenschaft und Technologie Piauí / Brazil)
Physikalische und Matematische Verbindungen von Justiz Division

5. Mr. Marcin Romanowicz (University of Warsaw / Poland)
Psycholinguistic perspective and the positivist idea of legal interpretation"

6. Mr. Paweł Soluch (University of Warsaw / Poland)
The perspectives of eyetracking research in legal sciences

7. Dr. Mariusz Golecki (University of Lodz, Faculty of Law and Administration / Poland)
Homo Oeconomicus vs. Homo Iuridicus. Towards a General Theory of Linguistic Categorisation Within the Law and Economics Scholarship

SPECIAL WORKSHOP

SW 27 Exemplary Narratives: Interdisciplinary Perspectives	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 251
Organizers	Dr. Randy Gordon, Gardere Wynne Sewell LLP, Southern Methodist University / USA Dr. Maksymilian Del Mar, Queen Mary, University of London / United Kingdom

About the workshop:

This workshop – in the tradition of narrative-based legal epistemology – welcomes contributions from a variety of disciplines, including legal theory, literary theory, history and theology, to explore the notion of 'exemplary narratives'. 'Exemplary' is here understood in two senses: first, the sense in which certain narratives take on a paradigmatic, leading or model status and function; and second, the sense in which narratives can, and arguably often do, have a normative content, inviting or inciting, and thereafter guiding, persons to certain beliefs, attitudes and actions.
The first sense of exemplary may be explored in a variety of ways, including: the way in which certain cases, understood as narrative fact-complexes, constitute the epicentre of certain areas of the law (e.g. see Simpson, Leading Cases in the Common Law, 1995); the way in which the authoritative content of leading cases changes as a result of encounters with new facts; the history of narrative revolutions, or the way in which previously-exemplary narratives are replaced by new ones; and the way in which certain narrative fact-complexes are more memorable than others, and thus may offer a particularly effective mode of transmission of certain content, e.g. rules or principles.
The second sense of exemplary offers an equally rich opportunity, enabling, for instance, research into: the varying degrees of prescriptivity in different literary forms or genres, e.g. compare fables and parables, where the former tend to be more moralistic and the latter more normatively ambiguous; the ways in which certain narratives are drawn on as sources for analogical extension, featuring as part of the discourse of justification in conflict resolution; and the ways in which certain narratives may

come to structure the cognitive attention of decision-makers, guiding them to notice and classify as important or significant certain kinds of fact-complexes.

List of Lectures:

1. Maksymilian Del Mar (Queen Mary, University of London / UK)
Introducing Exemplary Narratives

2. Randy Gordon (Gardere Wynne Sewell LLP and Southern Methodist University / USA)
Institutionalizing Exemplary Narratives: A Kansas Case

3. Zenon Bankowski (University of Edinburgh / UK)
On Parables and Law

4. Scott Veitch (University of Hong Kong/ China)
Binding and Loosing: Exemplary Narratives and the 'Vinculum Iuris'

5. Audun Kjus (The Norwegian Museum of Cultural History / Norway)
Lucifer and Adam: A Royal Example

6. Moshe Shoshan (The Rothberg School, Hebrew University of Jerusalem / Israel)
Between Structure and Subversion: The Two Faces of Legal Exemplary Anecdotes

7. Lena Salaymeh (University of Berkeley / USA)
Narrating Legal Change: An Exemplary Story from Rabbinic Historiography

8. Ralph Grunewald (University of Wisconsin-Madison / USA)
The Narrative of Innocence, or: Lost Stories

9. Nahel AsFour (University of Vienna / Austria)
Sanctity, Propriété and Greed: One Case, Three Stories. The Wrongful Enrichment Case in Ottoman, Continental and American Legal Traditions

10. Diana Young (Carleton University / Canada)
Law, Film and the Abject: Representing the Unknowable

SPECIAL WORKSHOP

SW 28 Human Rights, Global Justice, and Democracy: Issues at their Intersection	
Date	MON 15 Aug 2011 + TUE 16 Aug 2011
Time	MON 14.30 h – 18.30 h + TUE 14.30 h – 18.30 h
Location	RUW 2.102
Organizers	Prof. Dr. Carol Gould, City University of New York / USA Prof. Dr. Alistair Macleod, Queen's University / Canada

About the workshop:

This workshop focuses on a set of interrelated normative conceptions that are highly relevant to contemporary philosophy of law and its global import. In particular, the distinguished participants in this workshop have a shared interest in three clusters of questions, concerning: a) the normative basis of the doctrine of human rights (as legal and moral rights); b) the content and scope of principles of distributive justice (particularly in the context of increasing global responsibilities); and c) the contours of the democratic ideal and the conditions for its effective implementation. While careful specification of these issues is crucial to progress towards their resolution, there can often be disagreement both about how this should be done and about how the favored formulations relate to broader normative concerns. The primary aim of the workshop is to provide a forum for critical exchanges on papers that reflect particular ways of focusing normative inquiry in these areas. A secondary goal is to enable participants to develop an enhanced sense of whether – and if so, of the ways in which – there are instructive overlaps and interconnections between questions about human rights, justice, and democracy.

List of Lectures:

1. Andreas Follesdal (University of Oslo / Norway)
The Principle of Subsidiarity as a strategy for legitimate international problem-solving, for and against: The case of human rights treaties

2. Carol C. Gould (City University of New York / USA)
Is there a Human Right to Democracy?

3. Thomas Christiano (University of Arizona / USA)
State Consent and the Legitimacy of International Institutions

4. Andrew Lister (Queen's University / Canada)
Reciprocity, Relationships, and Global Justice

5. Rainer Forst (University of Frankfurt / Germany)
Transnational Justice, Democracy and Human Rights

6. Alistair Macleod (Queen's University / Canada)
Human Rights, Equality of Opportunity, and Justice

7. Darrel Moellendorf (San Diego State University / USA)
Rights and Climate Change

8. Omar Dahbour (City University of New York / USA)
Radical Approaches to Global Justice: Is There a New Paradigm?

SPECIAL WORKSHOP

SW 29 Legal Philosophy of Nikolai Alekseev and European scientific tradition	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 4.101
Organizers	Prof. Dr. Vladimir Grafsky, Institute for State and Law, The Russian Academy of Science / Russia Associate Professor Dr. Mikhail Antonov, The Higher School of Economics, St.-Petersburg / Russia

About the workshop:

The Workshop's activity will be focused on the ideas of the Russian legal philosopher of the XXth century Nikolai Alekseev This theorist's work is as original and important as the constructions of the other "Russian Europeans" – Georges Gurvitch, Leon Petrazycki, Pitirim Sorokin. Alekseev's world outlook expressed in his multiple works can be considered as an attempt to draw up the preliminary results of the controversies between Slavophiles and Occidentalists, between the liberal democrats and the "Eurasians". The participants will discuss the different applications of Alekseev's theory to the contemporary legal problems. Vladimir Grafsky deliberates on the axiological image of law, stressing actuality of Alekseev's ideas for the philosophy of law. Mikhail Antonov intervenes with an allocution on impact of Alekseev's conception of law for development of the sociology of law. Irina Borsch focuses her attention on correlation between the image of a human being and the image of law, and investigates methodological quest in social and legal philosophy of Alekseev. Aleksei Stovba suggests discovering some elements of the phenomenological philosophy of law in the ideas of this philosopher. Mikhail Milkin-Skopets discusses the relation between methods of law and of mathematics using Alekseev's legal theory as a starting point for his reflections. Sergei Maksimov takes on importance of Alekseev's conception for the actual discussions about the methodological perspectives of the legal philosophy.

List of Lectures:

1. Vladimir Grafsky (professor, senior research fellow, Institute of State and Law of the Russian Academy of Sciences Moscow / Russia)
Axiological image of law: Nikolai Alekseev's contribution

2. Mikhail Antonov (associate professor, research fellow, Higher School of Economics, Saint-Petersburg / Russia)
Impact of legal conception of Nikolai Alekseev for development of sociology of law in the XXth century

3. Irina Borsch (research fellow, Urbaniana University / Italy)
The image of a human being and the image of law: a methodological quest in legal philosophy of Nikolai Alekseev

4. Aleksei Stovba (associate professor of Kharkov's National University / Ukraine)
N.N. Alekseev: special way in the phenomenology of law

5. Mikhail Milkin-Skopets (lecturer, Yaroslavl State University / Russia)
Law and Mathematics. On the relation of their methods

SPECIAL WORKSHOP

SW 30 Legitimacy 2.0 E-democracy and Public Opinion in the Digital Age	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 4.201
Organizers	Ass. Prof. Andrea Greppi, Law School, University Carlos III, Madrid / Spain Ass. Prof. Patricia Mindus, Philosophy Faculty, University of Uppsala / Sweden

About the workshop:

E-democracy has been cutting the edge in fields connected to legal, political and social theory over the last two decades but cross-fertilization and transdisciplinary approaches are still scarce: stock-taking from previous IVR meetings show no record of work on e-democracy, notwithstanding the increasing interest for ICTs' impact on law and IA in the digital society.
The starting point is that the impact of digital technology in political and governance processes seem elusive to be framed into the traditional theoretical settings based on legitimacy, normative authority, enforcement, nature of norms etc.
The aim of the workshop is to integrate the current state of the art with the

toolkit of the analytical and normative perspectives of legal and political theory. E-democracy aims for broader and more active Internet-enhanced citizenship involvement but can there be any "democracy" after representative democracy? Should we understand it in terms of deliberative and/or participative democracy? How is e-government impacting on transparency and accountability? What role does mediation play in communication technologies? Should it be institutionalized? How is the repertoire of civil disobedience changing (ECD)? What kind of e-governance processes enhance legitimacy in complex legal systems entangled at the supranational level? How should we scientifically frame complexity in information society?
The purpose is to go beyond the polarization between the apologists that hold the web to overcome the one-to-many architecture of opinion-building in traditional democratic legitimacy, and the critics that warn cyberoptimism entails authoritarian technocracy.
The workshop offers a meeting point for scholars eager to share their findings in the field, enhancing comprehension between different approaches to law.

List of Lectures:

1. Patricia Mindus
(Uppsala Universitet / Sweden)
Updating Democracy Studies: Outline of a Research Program

2. Andrea Greppi
(Universidad Carlos III Madrid / Spain)
Ignorance and Representation in the Net

3. Massimo Durante
(University of Torino / Italy)
E-Democracy as a Frame of Networked Public Discourse

4. Massimo Cuono
(University of Sassari / Italy)
Election and Electioneering in the Digital Era. Relation between Representative and Electronic Democracy

5. Nazanin Ghanavizi, Arash Falasiri
(University of Sidney / Australia)
From E-citizenship to E-democracy? Case study of Internet Use in Iran

6. Marco Goldoni (University of Antwerp / Netherlands)
Code as Undemocratic Law? An Assessment from a Legal Theory Perspective

6. Judith Simon (Institut Jean Nicod, ENS Paris / France)
E-democracy and Values in Information Systems Design

7. Pedro Salazar (UNAM / Mexico)
Democracy, Transparency, and Public Opinion in the "Latin American Triangle"

8. Thomas Fossen (Utrecht University / Netherlands)
The Virtual Reality of Voting Advice Applications

9. Javier Lorenzo (Universidad Carlos III, Madrid / Spain)
ICT and Voting Abroad. An Analysis of 30 Countries

10. Giovanni Allegretti (CES, Coimbra / Portugal)
ICT Technologies within the Grammar of Participatory Budgeting: Tensions and Challenges of a Mainly "Subordinate Clause" Approach

11. Juan Pablo Serra (University Francisco de Vitoria, Madrid / Spain)
Epistemic Justification of Democracy: A Hidden Epistemocracy or Just Another Legitimization of Democracy?

12. Mateusz Klinowski (Jagiellonian University Krakow / Poland)
Title t.b.a.

13. Gloria Origgi (CNRS Paris / France)
Title t.b.a.

SPECIAL WORKSHOP

SW 31 Recht am technisierten Körper / Recht an verkörperter Technik	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	HZ 11
Organizers	Dr. Malte Gruber, Universität Frankfurt / Germany Ass.-Prof. Dr. Vagias Karavas, Universität Luzern / Switzerland

About the workshop:

Technik und Wissenschaft erzeugen ständig neue Rechtsgegenstände, die als eigentumsfähige Sachen oder Immaterialgüter wirtschaftlich verwertbar sind. Gegenwärtig richten sie ihre Produktivkraft allerdings nicht mehr nur auf das Material einer außermenschlichen Natur, sondern auch auf den Menschen selbst, auf seinen lebendigen Körper und seinen Geist. Bio-, Neuro- und Informationstechnologien machen Körperteile, genetische Information oder auch neuronale Daten isoliert verfügbar und konfrontieren das Recht mit der Frage, was von alledem als verkehrsfähige Sache und vermögenswertes Gut anzuerkennen oder aber als „ideeller" Teil der Persönlichkeit zu schützen sei. Mitunter betrachten sie Menschen und Maschinen sogar als informationstheoretisch vergleichbar. Künstliches Leben und künstliche Intelligenz erscheinen demnach als technisch machbar, menschliches Leben

als technisch manipulierbar. Damit verändert sich auch der Begriff des lebendigen, natürlichen Körpers. Dessen Bild einer organischen Einheit weicht dem einer in eine Vielzahl natürlicher und artifizieller Bestandteile fragmentierten, technischen Assemblage. Die Möglichkeiten und Grenzen dieser „Technisierung" sind nicht bloß eine Frage der Angewandten Ethik, sondern auch des Rechts. Alte anthropologische Gewissheiten vermögen hier kaum weiterzuhelfen. Vielmehr muss das Recht im Zusammentreffen von „technisierten Körpern" und „verkörperter Technik" versuchen mit der Auflösung der tradierten Dichotomien umzugehen. Der Workshop soll der Reflektion und Diskussion über die genaue Form eines solchen Rechts am technisierten Körper / eines Rechts an verkörperter Technik dienen.

List of Lectures:

1. Dr. Susanne Beck (Universität Würzburg / Germany)
Title t.b.a.

2. Prof. Dr. Jochen Bung (Universität Passau / Germany)
Title t.b.a.

3. Prof. Dr. Dr. Eric Hilgendorf (Universität Würzburg / Germany)
Title t.b.a.

4. Dr. Hyo Yoon Kang (Universität Luzern / Switzerland)
Title t.b.a.

SPECIAL WORKSHOP

SW 32 Methodology of Jurisprudence and the impact of new technologies	
Date	TUE 16 Aug 2011 + THU 18 Aug 2011
Time	TUE 14.30 h – 18.30 h + THU 14.30 h – 18.30 h
Location	HOF E.01 / Deutsche Bank
Organizers	Prof. Dr. Miracy Gustin, Federal University of Minas Gerais / Brazil Prof. Dr. Mônica Sette Lopes, Federal University of Minas Gerais / Brazil

About the workshop:

In Contemporary times, the study of the relations among ethics, law and technology assumes methodological tools for the apprehension of reality in order to define their objects of study and theoretical support of knowledge. Jurisprudence did not sufficiently face the problem of science as "ideology" proposed since the last century until now. A rational Science of Law could become a system of domination and legitimation by demanding for itself the claims of an exact and complete reliable modern science. This Special Workshop will discuss the most relevant theoretical and methodological contributions to make the Jurisprudence capable to understand the new changes that science and technology have caused whereas seeking to understand the role of law in contemporary societies. It will debate as well the consequences of legal research for the politicization of societies, emancipator movements and their refusal to accept social and state domination. Some questions that have already been raised by legal theory in different historical moments, are still being debated in the scientific sphere , such as:
1) the question about the scientific status of Law; 2) the approximation regarding the methods and techniques of research toward other sciences; 3) a theoretical construction that combines critical theory and methodology of Law, 4) the possibility of developing legal methodologies for the production of knowledge on equal terms with other scientific fields 5) the inter/transdisciplinarity as mechanisms of reshaping Jurisprudence as a human knowledge of great axiological and factual value, 6) the science of law as ideology that adds value to the knowledge of contemporary times.

List of Lectures:

1. Prof. Dr. Mônica Sette Lopes (UFMG / Brazil)
Jurisprudence under the perspective of the new media and its effect on the communication of Law

2. Prof. Dr. Miracy Barbosa de Sousa Gustin (UFMG / Brazil)
The Science of Law as ideology: the consequences of legal research for the politicization of excluded social group

3. Prof. Dr. Josefa Dolores Ruiz-Resa (University of Granada / Spain)
Jurisprudence and the society of knowledge (how to adapt a dogmatic knowledge to the demands of the collective intelligence)

4. Prof. Dr. Andityas Soares de Moura Costa (UFMG / Brazil)
For a legal ideology criticism: State and Law as a theological and conservative concept

5. Prof. Dr. Mariá Brochado (UFMG / Brazil)
A redefinition of law ethics as a break out with the positivist and neo positivist ideas and ideologies

6. Prof. Dr. Clodomiro José Bannwart Júnior e Carlos Frederico Oléa (UEL, Universidade Estadual De Londrina / Brazil)
Duality of reading in relation to judicialization and the reflexes of new technologies

7. MSc Gustavo Silveira Siqueira and MSc João Andrade Neto (UFMG / Brazil)
The revolution will be tweeted: how the Internet can stimulate the public exercise of freedoms

8. Mila Batista Leite Corrêa da Costa (UFMG / Brazil)
Science of law and anthropology: methodology of otherness

9. Aline Pereira (UFMG / Brazil)
Law, language and science

10. Rafael Soares (UFMG / Brazil)
The law and ethical act of judging as a guideline for harmonious relations between the values: a phenomenological view

11. Prof. Dr. Maria Tereza Fonseca Dias (Federal University of Ouro Preto, UFOP / Brazil)
How researches are done in the field of Law? Reflections from the study of monographs of the undergraduate course.

12. Prof. Dr. Maria Teresinha Pereira e Silva (PUC, Rio de Janeiro / Brazil)
The evolution of Supreme Federal Court (STF) of Brazilian system of justice concerning social rights and the philosophical and social approach

13. Prof. Dr. Maria Fernanda Salcedo Repolês (UFMG / Brazil)
Law in theory and law in practice with the recognition of new social actors

14. MSc Aparecida de Carvalho Liz (UFMG / Brazil)
Deployment of Electronic Process in Brazilian Labor Court

15. Prof. Dr. Fabiana de Menezes Soares (UFMG / Brazil)
The production of law, legisprudence and the circulation of juridical models: the role of dialogue about the sources of law in the framework of information society

16. Prof. Dr. Gregório Assagra de Almeida (University of Itaúna / Brazil)
The new Summa Divisio of the Brazilian Law: individual and collective laws

SPECIAL WORKSHOP

SW 33 Person, Verantwortung, Grenzen des Rechts – alte Debatten im neuen Kontext „Robotik und Künstliche Intelligenz“	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 3.36 / Chicago
Organizers	Prof. Dr. Dr. Eric Hilgendorf, Universität Würzburg / Germany Dr. Susanne Beck, Universität Würzburg / Germany

About the workshop:

Die Entwicklung im Bereich „Robotik und Künstliche Intelligenz“ führt schon jetzt zu praktischen rechtlichen Schwierigkeiten und theoretischen Fragen.
So ist zu klären, wie weit die Verantwortung für eine Maschine, die innerhalb eines vorgegebenen Rahmens eigenständige Entscheidungen trifft, reicht. Verträge werden von elektronischen Agenten geschlossen, ohne dass geklärt ist, wie mit diesen möglicherweise teilrechtsfähigen Akteuren umzugehen ist. Dies schließt die Frage an, ob es Bereiche gibt in denen eine Übertragung der Entscheidung auf Maschinen unvertretbar scheint.
Auch die Entwicklung von Robotern, die menschenähnlich aussehen und sich menschlich verhalten, ist in greifbare Nähe gerückt. Gleichzeitig nimmt die Maschinisierung der Menschen durch Prothesen, künstliche (Sinnes-)Organe, etc. zu. Das Recht muss sich der Einordnung und Kategorisierung derartiger Phänomene stellen.
Einige der elektronischen Agenten haben bereits jetzt eine Teilrechtssubjektivität inne, die jedoch in ihren Voraussetzungen und Konsequenzen noch ungeklärt ist. Doch nicht nur mit bestehenden, auch mit künftigen Entwicklungen wird sich der workshop beschäftigen. So stellt sich die Frage, wie sich derzeit das menschliche Verhalten von dem Verhalten der Roboter unterscheidet und wie sich diese Unterschiede in Zukunft verändern könnten. Diese Änderung macht es auch erforderlich, Roboter und Cyborgs im Licht der Grundrechtsordnung zu betrachten. Schließlich wird zu analysieren sein, wie weit die menschliche Autonomie beim Vorantreiben dieser Entwicklungen reicht oder ob ihr rechtliche Grenzen zu setzen sind.

List of Lectures:

1. Dr. Malte Gruber (Universität Frankfurt / Germany)
Teilrechtssubjekte des elektronischen Geschäftsverkehrs

2. Dr. Jan Schuhr (Universität Erlangen / Germany)
Willensfreiheit, Roboter und Auswahlaxiom

3. PD Dr. Tade Spranger (IWE Bonn / Germany)
Roboter und Cyborg in der Grundrechtsordnung

4. Dr. Beatrice Brunhöber (HU Berlin / Germany)
Autonomie und Biomacht am Beispiel von Mensch-Maschine-Systemen

SPECIAL WORKSHOP

SW 34 Menschenwürde – Menschenbild – Verantwortung: Analyse von Leitbegriffen der bioethischen Debatten	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 1.27 / Dubai
Organizers	Prof. Dr. Jan C. Joerden, Universität Frankfurt/Oder, Deutschland

About the workshop:

Mit der rasanten Entwicklung des medizintechnischen Fortschritts vermögen die überkommenen Vorstellungen von Menschenwürde und Menschenbild und der damit verbundenen Verantwortung kaum noch Schritt zu halten. Denn heute muss ernsthaft über früher völlig utopisch erscheinende medizintechnische Handlungsoptionen nachgedacht werden, z.B. über die Veränderung des Erbgutes zum Zwecke der „Verbesserung" des „menschlichen Programms" (sog. Enhancement); das Klonen von Menschen; die Vorhersage von Krankheiten anhand einer Genanalyse; die Möglichkeiten der Präimplantationsdiagnostik; die Bildung von Chimären und Hybriden zu Zwecken der Forschung und zur Behandlung von Krankheiten; die Herstellung von embryonalen Stammzellen durch Klonprozesse und von Stammzellen durch „Reprogrammierung" adulter Zellen; die Züchtung von menschlichen Zellen und Gewebestrukturen, ja von ganzen Organen; die Möglichkeiten der Nanobiotechnologie im Bereich der medizinischen Diagnose und Therapie; die Erzeugung und Verwendung von Mensch-Maschine-Schnittstellen, nicht nur im Rahmen des (zeitweiligen) Organersatzes, sondern auch zur dauerhaften Funktionsergänzung und -verbesserung insbesondere der Sinnesorgane; Eingriffe in das Gehirn (etwa sog. Gehirnschrittmacher); die ständige Verbesserung von Organtransplantationen; die Möglichkeiten und Gefahren der Xenotransplantation; die Entwicklungen der sog. synthetischen Biologie.
Ziel des Workshops ist es, auf der Basis der überkommenen Konzepte von Menschenbild, Menschenwürde und Verantwortung zu untersuchen, ob diese überhaupt auf die moderne medizintechnische Entwicklung anwendbar und noch geeignet sind, unsere Antworten auf die damit zusammenhängen ethischen Fragen zu steuern.

List of Lectures:

1. Dr. Daniel C. Henrich (IZEW, Universität Tübingen / Germany)
Bioethik und Selektion. Die Herausforderung der ‚neuen' Eugenik

2. Dr. Dr. Altan Heper (Universität Würzburg / Germany)
Brauchen wir einen Menschenwürdebegriff in einer pluralistischen Gesellschaft?

3. Prof. Dr. Jan C. Joerden (Universität Frankfurt/Oder / Germany)
Könnten dereinst auch Maschinen Würde haben?

4. Prof. Dr. Andrzej M. Kaniowski (Universität Lodz / Poland)
Kants Konzept der Menschenwürde und die Zuständigkeit des Staates in bioethischen Fragen

5. Prof. Dr. Peter Schaber (Universität Zürich / Switzerland)
Würde und Lebensschutz

6. Dr. Dr. Paul Tiedemann (Verwaltungsgericht Frankfurt/Main / Germany)
Gibt es ein Menschenrecht auf Leben?

SPECIAL WORKSHOP

SW 35 Epistemische Unsicherheiten und das Recht	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 1.27 / Dubai
Organizers	Prof. Dr. Dr. Rafaela Hillerbrand, Human Technology Centre (HumTec), RWTH Aachen / Germany M.A. Magdalena Zietek, Human Technology Centre (HumTec), RWTH Aachen / Germany

About the workshop:

Unsicherheit hinsichtlich des (künftigen) Verhaltens technischer und ökologischer Systeme sowie die Unbestimmtheit von Begriffen in Rechtsnormen, die der Regulierung dieser Systeme dienen, stellen das Technik- und Umweltrecht vor zwei aufeinander bezogene Problemkomplexe: Zum einen stellt sich für den Gesetzgeber die Frage, wie unter Bedingungen unvollständigen Wissens – etwa über die Auswirkungen menschlicher Eingriffe in Ökosysteme oder über das Verhalten neuer, bislang nicht zum Einsatz gekommener Technologien – eine rechtliche Regelung erfolgen kann, die sich erstens auf dem Stand von Wissenschaft und Technik befindet, zweitens Risiken minimiert und drittens mit rechtsstaatlichen Erfordernissen wie dem der Normenklarheit, der Rechtssi-

cherheit und der Einzelfallgerechtigkeit vereinbar ist. Zum anderen sehen sich die mit der Rechtsanwendung befassten Behörden sowie die mit der Überprüfung des behördlichen Handelns befassten Verwaltungsgerichte vor die Schwierigkeit gestellt, die oftmals vagen Vorgaben des Gesetzgebers in konkrete Maßnahmen umzusetzen bzw. zu entscheiden, ob eine Maßnahme im Sinne der Vorgaben des Gesetzgebers erfolgt ist.
Aus rechtsdogmatischer Sicht sind hier die Begriffe der Gefahr und des Risikos zentral, deren juristische Abgrenzung bislang noch nicht befriedigend gelungen ist. Eine konzeptuelle Schärfung der Begriffe Risiko, Unsicherheit und Ungewissheit fand in den vergangen Jahrzehnten allerdings im Rahmen der Technikfolgenforschung statt. Im Rahmen dieser Sektion soll erörtert werden, inwieweit die rechtsdogmatische und rechtsphilosophische Debatte um Unsicherheit und Risiko von den neueren Erkenntnissen in der Technikfolgenforschung profitieren kann. Konkret gilt es zu eruieren, ob und inwieweit diese Unterscheidungen zwischen Risiko, Unsicherheit und Ungewissheit für die Rechtswissenschaft, insbesondere im Umweltrecht, fruchtbar gemacht werden können. Da auch die besten wissenschaftlichen Prognosen hochgradig unsicher sind, wenn es darum geht, die Entwicklung realweltlicher Systeme wie spezifischer Ökosysteme oder des Klimasystems als Ganzem zu prognostizieren, so betrifft eine Abgrenzung von potenziellem Schaden und Gefahr dabei im Kern ein epistemisches oder wissenschaftstheoretisches Problem. Die in diesem Workshop geführte Debatte wird daher die aktuelle Forschung innerhalb der Wissenschafts- und Erkenntnistheorie zum Umgang mit epistemischen Unsicherheiten in wissenschaftlichen Prognosen berücksichtigen.

List of Lectures:

1. Liv Jaeckel (Universität Leipzig / Germany)
Neutralisiert das Recht das Risiko – eine Reise ins Ungewisse?

2. Susanna Much (Universität Bremen / Germany)
Der Umgang mit den Risiken der CCS-Technologie in der Gesetzgebung

3. Eva Lohse (Friedrich-Alexander-Universität Erlangen-Nürnberg / Germany)
Gesetzgeberische Pflichten für den verantwortlichen Umgang mit (noch) ungewissen Risiken am Beispiel der Regelungsoptionen für die Nanotechnologien

4. Guoqiong Sun, Alessandro Ianniello Saliceti (EC, European Union, Brüssel / Belgium)
Precautionary principle, uncertainty and the principle of legal certainty in EU Law and in China

5. Rafaela Hillerbrand (RWTH Aachen / Germany)
Risiko, Unsicherheit und Ungewissheit in der Technikfolgenforschung

6. Magdalena Zietek (RWTH Aachen / Germany)
Über den verantwortlicher Umgang der politischen und juristischen Entscheidungsträger mit den Ergebnissen der Natur- und Ingenieurwissenschaften

SPECIAL WORKSHOP

SW 36 Orthos logos, Recta ratio, or Right Reason in the Philosophy of Law from Aristotle to Dworkin	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 3.201
Organizers	Ass. Prof. Ki-Won Hong, City University of Seoul / South Korea

About the workshop:

Our special workshop aims to study the theories of "right reason" in the history of the philosophy of law. Although the topic of "right reason" is a familiar subject for legal philosophers, it has not been fully discussed as an IVR program. The term "right reason" has been used to refer to the foundation of natural law. Our specific focus will be on the right reason as practical reason in various natural law theories. For jusnaturalists like Thomas Hobbes, for instance, right reason dictates what we ought to do and thus establishes a set of rules which are identified with natural laws. A century later, Adam Smith, in his Theory of Moral Sentiments, developed a discussion on right reason, based on the Greek authorities. He said that "Virtue, according to Aristotle, consists in the habit of mediocrity according to right reason." For Smith, right reason helps form the virtue of mediocrity by conforming one's acts to the very virtue.
Papers in our special workshop are expected to contribute to a comprehensive new understanding of the history of right reason theories, ranging from Aristotle to Ronald Dworkin. Some topics suggested are as below:

- recta ratio and arbitrium boni viri in Roman Law
- Thomas Aquinas, Summa theologica, I, QQ.44-49
- William of Ockham, Sent., passim, Reportatio, III, q. 11-12
- Jean Gerson, De vita sprituali anime
- Erasmus, Enchiridion
- More, Utopia
- Hugo Grotius, De jure belli ac pacis libri III, passim
- Thomas Hobbes, Leviathan, I, 5 ("Of Reason and Science"), De cive
- Milton, De doctrina Christiana, passim, Paradise Lost, V, 42
- William Blackstone, Commentaries of the Laws of England, passim
- Adam Smith, The Theory of Moral Sentiments, VII, ii, 1, 12
- Right Reason in the Creation of the American Republic

List of Lectures:

1. Nuno M. M. S. Coelho (University of São Paulo / Brazil)
Orthos logos in Aristotelian Ethics: EN 1144b

2. Anna Taitslin (University of Canberra / Australia)
Right Reason in the Stoic thought from Zeno to Seneca

3. Ki-Won Hong (City University of Seoul / Korea)
Recta ratio in Ciceronian Philosophy of Law

4. Diego Poole (Universidad Rey Juan Carlos / Spain)
Recta ratio in Thomist Philosophy of Law

5. Richard Arnold (Alfaisal University / Kingdom of Saudi Arabia)
Cause and Culpability in the "First Crime" of the Western Tradition

SPECIAL WORKSHOP

SW 37 Cultural Turn and Philosophy of Law and State	
Date	TUE 16 AUG 2011
Time	14.30 h – 18.30 h
Location	IG 0.457
Organizers	Prof. José Luiz Horta, Federal University of Minas Gerais / Brazil

About the workshop:

The cultural turn is one wide movement which takes places on the Humanities from the 1980' years; it seems a critic to the naturalization (materialist and economicist) of the social world, and also the rediscovery of the importance of an interdisciplinary approach. In the frames of a cultural turn, we all look for interconnections between our sciences, even in Law, where the most advanced investigations, the true border investigations, are given in the intersection of Law and Humanities.
On the cultural turn, Law, so as social sciences, has to reinvent itself, incorporating elements of Anthropology, Philosophy, Sociology, Political Science, and building new paradigms for the Compared Law, moved further away of the borders of the occidental culture.
Particularly, interests us to debate the challenges of the knowledge in the era of this Benighted Society, in which knowledge is exponentially bigger, but, in remarkable paradox, generates a progressive absence of culture (kind of a post-modern alienation).
How can Philosophy of Law reinvent itself, away from the old debate naturalism-positivism? Is there really a third way, which can be called a culturalism? How and where the new approaches are been developed? Which impacts would it all represents for the main occidental philosophical movement — the German Idealism — and its greater project — the Rechtsstaat? Can we configure a juridical thought prepared for these modern times?
All these subjects, referred to the dialogue between Law and Humanities, so as between Law and Culture(s), can be carried to the debate, and finally selected for a publication to be planned in Spanish, English and/or Portuguese.

List of Lectures:

t.b.a.

SPECIAL WORKSHOP

SW 38 (cancelled)

SPECIAL WORKSHOP

SW 39 Constitutional Reasoning: Theoretical Perspectives	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 2.101
Organizers	Dr. András Jakab, Catholic University Pázmány Péter Budapest / Hungary Dr. Arthur Dyevre, Center for Political and Constitutional Studies/ Spain

About the workshop:

The focus of this workshop is on how judges think and ought to think about constitutional issues. The discussion will concentrate on the methods rather than on the content of constitutional law: how judges go on to develop the constitution and how they justify their results. We would expect paper proposals to relate to some of the following themes:

- Methods of interpretation and choice of interpretive regimes: original understanding vs. living constitution, textual vs. teleological approaches etc.
- Tests of constitutionality and basic standards of constitutional adjudica-

tion: proportionality, strict scrutiny, balancing …
- Coherence, in the application of constitutional provisions and the observance of precedents.
- Style(s) of constitutional writing, both in scholarship and judicial opinions.
- Implied moral and philosophical presuppositions of judicial discourse: adherence to natural rights or to doctrines claiming the pre-legal existence of the state.
- Choice of conceptualization and choice of constitutional topoi: constitutional conflicts framed as human rights conflicts vs. constitutional conflicts framed as competence conflicts, use of general concepts such as the rule of law vs. use of specific constitutional provisions.

Ideally, contributions of the above topics would discuss the nature of constitutional reasoning as well as the consequences of choosing certain methods over others for judicial activism, democracy and the rule of law. One of the workshop's goals would be to bring the insights of linguistics, meta-logic, and the cognitive sciences to bear on common understandings of constitutional interpretation, inferential reasoning, and the rhetorical dimension of constitutional argumentation.

List of Lectures:

1. Mher Arshakyan (Univ. of Bern / Switzerland)
Common Law and American Constitutional Interpretation

2. Mariusz Jerzy Golecki (Univ. of Łódź / Poland)
The Supremacy Claim within Judicial Rulings of the National Constitutional and Supreme Courts in the EU

3. Maria Isabel Gonzalez Pascual (Univ. Pompeu Farba, Barcelona / Spain)
Interpretation of principles framed as competence conflicts (Spain, Germany and Italy)

4. Tamás Győrfi (Univ. of Aberdeen / UK)
The moral reading of the constitution and its alternatives: methods of constitutional interpretation or judicial strategies?

5. Leszek Leszczynski (Univ. of Lublin / Poland)
The Interpretational Role of Constitutional Principles: Impact on the Process of Interpretation and Scale of Judicial Discretion

6. Lorenzo Maratea (Sapienza Roma / Italy)
New values and order in the examination of the questions before the judge. La «ragione più liquida» in Italian Constitutional Court jurisprudence

7. Fernando Muñoz L. (Universidad Austral de Chile / Chile)
Autonomy and responsiveness as competing forms of constitutional reasoning and rhetoric

8. Raban Ofer (Univ. of Oregon / USA)
Capitalism, Liberalism, and the Constitutional Right to Privacy

9. Cesare Pinelli (Sapienza Roma / Italy)
Constitutional reasoning and political deliberation

SPECIAL WORKSHOP

SW 40 The Language of Law: Classical Perspectives	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HZ 12
Organizers	Miklós Könczöl, Durham University / United Kingdom, Pázmány Péter Catholic University, Budapest / Hungary

About the workshop:

While in recent scholarship there are some signs that 20th-century boundaries between disciplines as Legal Theory, Classics, Legal History and Linguistics become penetrable, interdisciplinary discourse among exponents of these fields is at best sporadic. The aim of the workshop is to bring together scholars working on linguistic aspects of (ancient and contemporary) law from different backgrounds and to facilitate the exchange of ideas through the discussion of their research papers.
The rationale for exploring classical perspectives on the language of law is that encounters of this kind have proven to be mutually enriching: contemporary insights may help to make sense of ancient theories and indeed practices, while the analysis of ancient sources continues to provide useful frameworks for contemporary legal thought.
Papers accepted for the workshop address topics ranging from Greek and Roman legal and/or literary discourses to the different forms of the reception of classical antiquity.

List of Lectures:

1. Marcin Pieniążek (Andrzej Frycz Modrzewski University, Cracow / Poland)
Ricoeur on Sophocles and Aristotle

2. Lára Magnúsardóttir (University of Iceland / Iceland)
Roman legal terms in Mediaeval Iceland: The case of contumacia

3. Annalisa Triggiano (University of Salerno / Italy)
Evidentiary rules in Roman rhetoric and jurisprudence

4. Julen Etxabe (University of Helsinki / Finland)
The originality of Antigone

5. Romina Amicolo (University of Naples Federico II / Italy)
Bellum iustum: War and justice in classical antiquity

SPECIAL WORKSHOP

SW 41 Disciplinary perspectives and legal truth	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF E.21 / Paris
Organizers	Prof. Dr. Katja Langenbucher, Goethe-Universität Frankfurt, House of Finance / Germany Prof. Dr. Scott Brewer, Harvard Law School / USA

About the workshop:

One of the oldest questions in epistemology is whether there is one objective perspective from which factual or normative truths can be judged, or whether there are only different subjective (or perhaps intersubjective) perspectives. Kant gave this question a new and powerful articulation, and the question has continued to surface – for example, in the "perspectivism" of Nietzsche and in the work of many who follow him in the self-styled "post-modern" tradition.
In this working group we will consider this debate with regard to a specific object of explanation: legal rules and institutions. Is there one common or correct perspective that provides the best explanation of legal rules and legal institutions, a perspective that is or could be or should be shared by such disciplines – each with its distinctive epistemic goals and methodology designed to achieve those goals – such as history, economics, and philosophy? Or do those disciplines offer fundamentally different, and perhaps incompatible perspectives? And if they do provide different or incompatible perspectives, is there any way to assess which of them is more accurate without begging the question against the other disciplinary perspectives? Is any more accurate?

List of Lectures:

1. Prof. Scott Brewer (Harvard Law School / USA)

2. Prof. Dr. Bernhard Jussen (Goethe-Universität Frankfurt am Main / Germany)

3. Prof. Dr. Volker Caspari (Technische Universität Darmstadt / Germany)

4. Dr. Isabel Feichtner (Goethe-Universität Frankfurt am Main / Germany)

5. Prof. Dr. Katja Langenbucher (Goethe-Universität Frankfurt am Main / Germany)

6. Dr. Maciej Pichlak (University of Wroclaw / Poland)

SPECIAL WORKSHOP

SW 42 Sterbehilfe aus ethischer und rechtlicher Sicht / Die Religion im öffentlichen Bereich	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 3.201
Organizers	Prof. Dr. Shing-I Liu, National Taipei University / Taiwan Prof. Dr. Kim Young-Whan, Hanyang University / Korea Prof. Dr. Enrique Zuleta, Universität Buenos Aires / Argentinia Prof. Dr. Andrés Ollero, Universität Rey Juan Carlos Madrid / Spain

About the workshop:

Durch die großen Fortschritte der modernen Medizin kann das menschliche Leben heutzutage durch Operationen bzw. Geräte künstlich verlängert werden, was die Diskussion um die Sterbehilfe in den letzten Jahren entfacht. Zwar besteht die wichtige Aufgabe der Medizin in der menschenwürdigen Unterbringung wie der Schmerztherapie für ein zuendegehendes Lebens. Aber in Frage steht, ob und inwiefern künstliche Ernährung wie die Infusion von Flüssigkeiten in recht- und moralischer Hinsicht zugelassen wäre. Mit anderen Worten: Es geht hier um die Sterbehilfe in dem Sinne, dass unheilbar kranke Menschen mindestens dem menschenwürdigen Tod zugeführt werden sollten. Wie bekannt werden dazu folgende Argumente pro und kontra ins Feld geführt: Befürworter vertreten die Ansicht, dass es gerade auf die Menschenwürde verstößt, wenn man ihn möglichst am Leben hält, wie es medizinisch machbar ist. Stattdessen soll dem Betroffenen endlich die Möglichkeit zuerkannt werden, sich über seinen Sterbezeitpunkt selbst zu entscheiden. Dagegen wird behauptet, dass das Sterben ein natürliches Prozess ist, in den künstlich nicht eingegriffen werden soll. Es sei anmaßend, den Sterbezeitpunkt selbst festzulegen, denn das Leben enthält einen intrinsischen Wert. Außerdem wird das Bedenken geäußert, dass die Freigabe des Lebens einen Dammbruch für Willkür und Kostendruck darstellt.
Bei näherem Zusehen ist die Diskussion um die Sterbehilfe mindestens auf zwei theoretischen Ebenen angesiedelt. Auf der konkreten rechtlichen Ebene, wo es sich auf die strafrechtlichen Probleme ankommt, wird dieses Problem mittels der begrifflichen Differenzierung in die indirekte oder passive Hilfe zu einer angemessenen Lösung geführt. Auf der abstrakten rechtsphilosophischen Ebene, wie es um die ethische Fage geht, steht das Spannungsverhältnis zwischen gesetzlichen Vorgaben und der Selbstbestimmung sowie das zwischen medizinischen Möglichkeiten und der Menschenwürde im Vordergrund.
Da es an einem so grundsätzlichen Thema wie die Sterbehilfe kein Patenrezept gibt bzw. geben kann, soll sich jeder

letztlich entscheiden, was höher zu bewerten wäre; das Selbstbestimmungsrecht oder die Erhaltung des Lebens auch unter den sinnlosen Umständen. Aus dem Grund sei es sinnvoll, ein Forum „Überlegungen zur Sterbehilfe aus ethischer und rechtlicher Sicht anzubieten, um vor allem den unsichtbaren Problemkomplex sichtbar zu machen.

List of Lectures:

1. Ken Takeshita (Kansai Universität, Osaka / Japan)
Der kulturelle ethische Hintergrund der Abschätzung des Selbstmords in Japan

2. Shing-I Liu (Taipei University, Taipwi / Taiwan)
Sterbehilfe aus strafrechtlicher und rechtsethischer Sicht

3. Young-Whan Kim (Hanyang Univ., School of Law / Rep. of Korea)
Yue-Dian Hsu (Department of Law, National Cheng Kung University, Tainan / Taiwan)
Religiös-weltanschauliche Neutralität in öffentlichen Räumen

SPECIAL WORKSHOP

SW 43 Wirtschaftsethik und Rechtsquellenlehre	
Date	FRI 19 Aug 2011 + SAT 20 Aug 2011
Time	FRI 15.30 h – 18.00 h + SAT 9.00 h – 14 h
Location	HOF E.22 / Commerzbank
Organizers	Prof. Dr. Klaus Lüderssen, Goethe-Universität Frankfurt am Main / Germany

About the workshop:

Die Frage nach dem Verhältnis von "Law, Science and Technology" betrifft auch das Verhältnis von Ökonomie und Recht. Gibt es beispielsweise eine Sachlogik der Finanzmärkte, die rechtlicher Regulierung feste Grenzen setzt, oder eröffnet umgekehrt die rechtliche Regulierung den Finanzmärkten erst ihr Tätigkeitsfeld? Viel spricht dafür, dass es sich hier um Interdependenzen handelt. Aber wie sie im einzelnen beschaffen sind, bedarf weiterer Klärung. Quelle des Rechts im demokratischen Zeitalter ist das Parlament, konkretisiert wird es durch Justiz und Verwaltung. Alle Instanzen stoßen dabei auf tatsächliche und normative Vorgaben des Wirtschaftslebens. Die Wirtschaftsethik stellt Forderungen an das Recht, sowohl aus der Perspektive einer immanenten ökonomischen wie einer zusätzlichen externen Orientierung. Weil es auch „Verantwortungsethik" gibt, kann sich die Rechtsquellenlehre diesem Appell nicht unter Hinweis auf die autonome Rolle des Rechts entziehen. Vielmehr ist „Folgenorientierung" längst eines der gemeinsamen Segmente von Recht und Ethik. Was insoweit aus der „Natur der Sache" folgen könnte, ist für die Gegenwart interessant, weil auf diese traditionsreiche Konzeption jetzt auch moderne betriebswirtschaftliche Forschungen zurückgreifen. Einen vergleichsweise traditionellen Einstieg in die Ökonomie eröffnen die Äquivokationen des Wettbewerbs. Aber auch hier gibt es erstaunliche Aktualisierungen. Die Geltung des Rechts könnte das Kriterium sein, mit dem alles entschieden wird. Wenn das, was sozial gewünscht wird, den Status der Rechtsgeltung erhält, wird auf den ersten Blick eine eindeutige Fixierung sichtbar; aber-Rechtsgeltung ist im modernen Verfassungsstaat nicht nur etwas Formales; vielmehr wächst die Relevanz der (psychologisch-behaviouristisch aufzuhellenden) Anerkennung des Rechts durch seine Adressaten. Dieser Modalität der Rechtserzeugung entsprechen auf ökonomische Effizienz bezogene Kommunikationen. Verhandelt wird dann zwischen Juristen und Ökonomen nicht mehr über die „Stoffbestimmtheit der Rechtsidee", sondern über „institutionelle Tatsachen", wobei in die Genesis des Institutionellen – durch „gesellschaftlich-staatliche Verbundsprojekte" – Elemente direkter Demokratie eingehen.

List of Lectures:

Freitag, 19. August 2011
Moderation: Klaus Lüderssen (Goethe-Universität Frankfurt am Main / Germany)

1. Dietmar von der Pfordten (Universität Göttingen / Germany)
Die „Stoffbestimmtheit der Rechtsidee" und die „Natur der Sache – Ontologie, Konvention oder Konstruktion?

2. Ernst-Joachim Mestmäcker (Max-Planck-Instituts für ausländisches und internationales Privatrecht, Hamburg / Germany)
Wettbewerbsfreiheit oder Wohlfahrt

Samstag, 20. August 2011
Moderation: Lorenz Schulz (Goethe-Universität Frankfurt am Main / Germany)

3. Armin Engländer (Universität Passau / Germany)
Funktion, Ausgestaltung und Kriterien der Rechtsgeltung

4. Frank Saliger (Bucerius Law School, Hamburg / Germany)
„Institutionelle Tatsachen"

5. Michael Baurmann (Sozialwissenschaftliches Institut, Universität Düsseldorf / Germany)
Die Integration normativer Bindungen in die Nutzenmaximierung

6. Brigitte Haar (Goethe-Universität Frankfurt am Main / Germany)
Anerkennung und Economic Behaviour

SPECIAL WORKSHOP

SW 44 Business Ethics and Law	
Date	MON 15 Aug 2011 + TUE 16 Aug 2011
Time	MON 14.30 h – 18.30 h + TUE 14.30 h – 18.30 h
Location	HZ 9
Organizers	Prof. Dr. Christoph Lütge, Peter Löscher Chair of Business Ethics, TU München / Germany

About the workshop:

The relation between business ethics and the law can be viewed from different angles. First, there are general questions: Are moral norms and conventions strict complements to the legal system or do they overlap in their functions? Which role do liberal principles play in this picture? Does a liberal society need certain taboos, as F.A. von Hayek found necessary?
Second, there are more specific questions regarding corporations: Many corporations, especially multi-national ones, do much more than is required from them by law. More and more, they regard themselves as corporate citizens. How can concepts like corporate citizenship or corporate social responsibility be understood both in legal as well as in ethical terms?
Third, this workshop also aims to discuss the relation between specific national legal frameworks and cultural values.

List of Lectures:

1. Nick Lin-Hi (Universität Mannheim / Germany)
The Market and the Incompleteness of Contracts: Implications for CSR

2. Christoph Lütge (TU München / Germany)
Some Implications of Cultural Differences for Business Ethics

3. N.N. (Japan)
Liberal Business Ethics and Culture

SPECIAL WORKSHOP

SW 45 Public Legal Reason	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 3.102
Organizers	Ph.D. Jon Mahoney, Kansas State University / USA Christopher McCammon, University of Nebraska / USA

About the workshop:

Papers in this workshop address in various ways the question, "what is a public legal reason?" Participants defend different views on this question as well as the general topic of legal authority. The purpose of the workshop is to explore both theoretical and practical aspects of the idea of public reason as it applies to law. Papers in the workshop will cover topics such as pluralism, the treatment of resident workers, the influence of tradition on public reason, constitutional norms, Ronald Dworkin, anarchism and the moral basis for legitimate legal authority.

List of Lectures:

1. Matthew Binney (Eastern Washington University / USA)
Reason and the Tradition in Joseph-François Lafitau's Customs of American Indians

2. Denis de Castro Halis (Faculty of Law, The University of Macau, Macau SAR / China)
Public Justification and Legal Reasoning in the "Las Vegas of the East": The Cases of Non-Resident Workers in Macau, China

3. Szabolcs Hegyi (University of Miskolc / Hungary)
The theoretical grounds of „constitutional matters" and their role in public legal reasoning

4. Win-chiat Lee (Wake Forest University / USA)
Citizens as Appellate Judges: Dworkin's Protestantism about Law

5. Roderick T. Long (Auburn University / USA)
Reasonable Pluralism, Public Reason, and Anarchist Legal Theory

6. Jon Mahoney (Kansas State University / USA
Democratic Equality and Public Legal Reason

7. Christopher McCammon (University of Nebraska / USA)
Republican Foundations for Public Legal Reasoning

8. Elena Pribytkova (Ruhr-Universität Bochum / Germany)
Justice in a Pluralistic World: John Rawls' Ideas of Public Reason and an Overlapping Consensus

9. Ofer Raban (University of Oregon School of Law / USA)
The Legal Principle of Public Reasoning

SPECIAL WORKSHOP

SW 46 Law and Economics – Foundations and Applications	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 1.28 / Shanghai
Organizers	Prof. Dr. Klaus Mathis, Universität Luzern / Switzerland

About the workshop:

This workshop will deal with the economic analysis of law, its methodical and philosophical foundations as well as the possible applications in both legislation and application of law. Fifty years after the famous essay "The Problem of Social Cost" (1960) by the Nobel laureate Ronald Coase, Law and Economics seems to have become the lingua franca of American jurisprudence, and although its influence on European jurisprudence is only moderate by comparison, it has also gained popularity in Europe.
On the one hand this workshop intends to explore both the methodical and philosophical foundations of the economic analysis of law. In doing so, not only will the theories of economics (mostly the principles of microeconomics and welfare economics) be analysed but also the methods behind empirical social research shall be critically reviewed. The findings of behavioural economics, which have called into question the basic assumptions of economic theory – for example the rationality or the selfishness of the players – are also of great significance in this debate.
On the other hand, the question of why the economic analysis of law has developed differently and the diverse impact it has had on America in comparison to continental Europe will also be discussed. The lawfulness of consequence based reasoning in law application may have played an important role in this discrepancy. Furthermore it shall be shown in which fields of law (Civil, Criminal, Public, Competition law etc.) economic based reasoning and methods have – explicitly or implicitly – found their way into continental European law.
Please note that this special workshop is coordinated with the partner workshop "Theoretical and Methodological Foundations of Law and Economics (Second MetaLawEcon Workshop)" organized by Péter Cserne (Tilburg).

List of Lectures:

1. Klaus Mathis (Universität Luzern / Switzerland)
Law and Economics Today – Some Introductory Remarks

2. Tze-Shiou Chien (Academia Sinica / Taiwan)
A Legal Interpretation of Coasean Economics

3. Szabolcs Hegyi (University of Miskolc / Hungary)
The Scope and Limits of Consequentialist Reasoning – a Philosophical Approach

4. Felix Ekardt (Universität Rostock / Germany)
A Critical Review of "Efficiency Ethics"

5. Niels Petersen (MPI Bonn / Germany)
The Role of Law and Economics in Constitutional Adjudication

6. Kai P. Purnhagen (Ludwig-Maximilians-Universität München / Germany)
Never the Twain Shall Meet – Cultural Limits Between Continental Dogmatism and Law and Economics Theory?

7. Aurélien Portuese (Université Paris II / France)
The Case for a Principled Approach to Law and Economics: Efficiency Analysis and General Principles of EU Law

8. Kristoffel Grechenig (MPI Bonn / Germany)
Wrongful Sanctions

SPECIAL WORKSHOP

SW 47 When is the exercise of an interest a human right? Secular and religious responses to the legitimacy question.	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 1.303
Organizers	Prof. Ph.D. Angus Menuge, Concordia University Wisconsin / USA

About the workshop:

A right is a just entitlement to the exercise of an interest. A human right is a just entitlement one has simply because one is a human being. That is, a human right is not conditional on being a citizen, on having a particular cultural or religious identity, or on whether special agreements or contracts have been entered into. As the human rights movement has progressed, however, the scope of alleged human rights has greatly increased. This raises the concern that some widely supported claims of human rights may be unjustified.
Underlying this concern is the fundamental question of legitimacy: "What makes the exercise of certain interests a fundamental human right?" Initially, thinking about human rights was strongly influenced by religious sources (e.g. inalienable rights were derived from the Judeo-Christian teaching of the imago dei). However, the Enlightenment

proclaimed that the content of morality is discernible entirely apart from special revelation. And today, many people believe that human rights can be defended solely by appealing to the natural characteristics of human beings. This raises several important questions:
(1) Are religious rationales for human rights still profitable today, or have they been superseded by superior, secular rationales?
(2) More specifically, have popular Kantian, neo-Kantian, or similar analyses of rational beings made these religious rationales redundant?
(3) Are religious rationales no longer acceptable, because they violate a principle of neutrality governing apt contributions to public discourse?
This workshop will address these and related questions, with the goal of assessing the relative merits of secular and religious responses to the underlying issue of legitimacy.

List of Lectures:

1. John Calvert (JD, Intelligent Design Network; [http://www.intelligentdesignnetwork.org/], former Chairman of Lathrop & Gage Corporate Department)
Does the security of religious rights depend on state use of a functionally inclusive or neutral definition of religion?

2. Dr. Dobrochna Bach-Golecka (University of Warsaw [http://en.wpia.uw.edu.pl/])
Why is man the primary and functional way for the Church? The involvement of Christian teaching in contemporary human rights discourse

3. Dr. Hendrik Kaptein (Leiden University /The Netherlands [http://www.law.leiden.edu/organisation/metajuridica/staff/scientific/kapteinhjr.html])
Retribution as a fundamental human right

4. Dr. Angus Menuge (Professor of Philosophy, Concordia University Wisconsin / USA [http://www.cuw.edu/fs/angusmenuge])
Why Human Rights Cannot be Naturalized: the Contingency Problem

5. The Honourable Dallas Miller (http://www.justice.gc.ca/eng/news-nouv/janj/2006/doc_31982.html)
The New Mandate for Human Rights

6. Dr. John Warwick Montgomery (Professor Emeritus of Law and Humanities, University of Bedfordshire / UK) and Christian Thought (Patrick Henry College, Virginia / U.S.A. [http://www.phc.edu/JWMontgomery.php])
Restrictions on Religious Freedom: When and How Justified?

7. Professor Dr. Friedrich Toepel (http://www.haarmann.com/en/lawyers/associates/12-angestellte/19-ft.html)
Which function does the legitimation of a human right fulfill?

SPECIAL WORKSHOP

SW 48 The Philosophy of Home Schooling and Its Legal Implications Today	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF E.01 / Deutsche Bank
Organizers	Prof. Dr. Dr. Dr. John Warwick Montgomery, Patrick Henry College / USA

About the workshop:

The right to education and parental rights are guaranteed in a number of the international human rights conventions, but their scope is disputed. One of the most controversial areas is that of home schooling: the right of the parent to carry out a child's education under his or her own supervision. This right exists in France, in the United Kingdom, and in every American jurisdiction, but is not recognised (except under very limited circumstances) in Germany and in Sweden. This workshop brings together specialists in American, German, and European human rights law to raise the underlying questions as to the philosophical and legal justification (or non-justification) of home schooling in modern society.

List of Lectures:

1. Michael Donnelly (J.D., Director of International Relations, Home School Legal Defense Association, U.S.A.)
Education As Creature of the State? Home Schooling at the Intersection of Law, Human Rights and Parental Autonomy

2. Prof. Dr. phil. Dr.theol. Thomas Schirrmacher (State University of the West / Romania)
Compulsory Education—in Schools Only? Divergent Developments in Germany

3. Prof. Dr Dr Dr John Warwick Montgomery (Patrick Henry College, Virginia / U.S.A.)
The Justification of Home Schooling vis-à-vis the European Human Rights System

SPECIAL WORKSHOP

SW 49 Producing Justice: social responsibility of the legal profession in the age of globalization	
Date	TUE 16 AUG 2011
Time	14.30 h – 18.30 h
Location	HOF E.21 / Paris
Organizers	Prof. Yasutomo Morigiwa, Nagoya University Graduate School of Law / Japan

About the workshop:

The professional responsibility of jurists (judges, prosecutors, lawyers and academics) should be explained and determined in terms of the political function the judiciary provides in a constitutional democracy. The branch of Staatsgewalt called the "judiciary" should be in charge of providing the public good of justice to society. Justice, in this context, should be defined, following the tradition of Roman Law, as constans et perpetua voluntas jus suum cuique tribunes; in more modern terms, as the constant effort to uphold the rights of each. In the Rechtsstaat, the use of power to administer justice should be both justified and limited by law. In the age of globalization, the jurisdiction of justice can no longer be identical with the national border. How are the core values of the professional ethics of the lawyer and the precepts of judicial comportment affected by such evolution of the liberal state? The validity of the main principles of lawyer's and judge's ethics will be tested using this theoretical framework describing the relationship between justice, power and law. To this end, judges, lawyers and academics from both the common law and civil law jurisdictions will work together in formulating and discussing a hypothetical case. This should also prove be a test of the soundness of the framework itself and the conceptions of law and justice on which the framework is built. Those interested in participating are very welcome and should email the organizer.

List of Lectures:

t.b.a.

SPECIAL WORKSHOP

SW 50 The Fusion of Law and Information Technology	
Date	TUE 16 Aug 2011 + THU 18 Aug 2011
Time	TUE 14.30 h – 18.30 h + THU 14.30 h – 18.30 h
Location	RUW 1.101
Organizers	Prof. Kitahara Munenori, Hiroshima Shudo University / Japan

About the workshop:

I would like to propose the fusion of law and information technology. The fusion can be a way how laws should collaborate with information technologies to recover the legal effectiveness.
The purpose will aim at getting the higher compliance with legal provisions as information. In the information society law, the breach of the laws has been performed with information technologies. Then, we should oppose to the breaches using the same information technologies. The way can be called that like cures like. The way will mean introducing the strictness and certainty of the technology into laws.
Here, I will suggest the examples.
The Electronic Signatures Act introduces a cryptgraphic technology. As a result, anyone can make an easy use of strict certification. The authenticity of any electromagnetic record can be legally verified by public key cryptosystem.
The Minors Protection Act shall oblige ISPs to apply a filtering and blocking technology to the child pornography information on the Internet.
However, the laws shall provide the security and architecture standard of the technologies.
I would like the participants to present the legal examples and exchange opinions of the fusion.

List of lectures:

t.b.a.

SPECIAL WORKSHOP

SW 51 Freedom of Speech and Intellectual Property: Conceptualizing the conflict(s)	
Date	TUE 16 AUG 2011
Time	14.30 – 18.30
Location	HZ 11
Organizers	Prof. Dr. Peter Niesen, TU Darmstadt / Germany Prof. Dr. Alexander Peukert, Goethe-Universität Frankfurt am Main, Germany

About the workshop:

Obgleich kein Konsens darüber besteht, wie geistiges Eigentum philosophisch und rechtstheoretisch verstanden werden soll, so liegt doch sein spannungsreiches Verhältnis zu kommunikativen Freiheitsrechten auf der Hand. Wenn die Verwendung von Immaterialgütern reguliert wird, kann man sich ihrer nicht in allen Kontexten zum Zweck der Äußerung oder Kommunikation bedienen. Ein verbreitetes Verständnis kommunikativer Freiheiten, demzufolge ein subjektiver Anspruch darauf besteht, „Informationen und Ideen mit allen Verständigungsmitteln ohne Rücksicht auf Grenzen zu suchen, zu empfangen und zu verbreiten" (Art. 19 AEMR), scheint mit exklusiven Verfügungsrechten über Informationen und Ideen strikt unverträglich. Dem Spannungsverhältnis soll auf rechtsdogmatischen wie philosophi-

schen und ideengeschichtlichem Gebiet nachgegangen werden.
Die Ko-Veranstalter sind Principal Investigators des Exzellenzclusters Herausbildung normativer Ordnungen. Das Panel knüpft inhaltlich an den Plenarvortrag von Seana Shiffrin an und sollte daher, wenn möglich in unmittelbarem zeitlichen Zusammenhang stehen. Das Panel soll 150 Minuten dauern.

List of Lectures:

t.b.a.

SPECIAL WORKSHOP

SW 52 Roles of Citizen/ Civil Society and Responsibility of State	
Date	TUE 16 AUG 2011
Time	14.30 h – 18.30 h
Location	RUW 1.301
Organizers	Prof. Tatsuji Ohno, Hosei University / Japan

About the workshop:

The aim of this workshop is, to discuss the importance of activities of „Civil Society", not only in their political, social aspects, but also from a legal point of view.
The development of „Civil Societies" in these days has given influences on the relationship between states, state and society or citizen. The end of the cold war was a turning point for also „Civil Society". in Japan „NPO-law" was made 1998. So Civil Society- discussion has already some history. In this sense, now is the time for legal philosophy, the possibility and implication of CS for its general problems. For example, validity of law has two sources: from its contents and from competence of law-maker. Normally, CSs have no formal competence of law-making. But they influence indirectly on it. It can be important, to settle these influences institutionally in law-making-system, in order to make law-contents better. Better means here that law responds adequately to more opinions in society. CSs can function as a bridge between legislator and (silent) citizens. This can apply to policy-making of administrative system (Mori).
On the other hand, institutions for CSs provide preconditions for better CSs.: accountability of CSs to their clients etc. Under the conditions of good CS there are not-legal one. Communications among citizens, families, CSs and state is one thing (Inoue). This is important for collective decision. In addition to this, independency of CS from state or „public sphere" are important to keep diversity of opinions (Nasu). So CS has a role as a mediator in the process of public will making in its widest sense. Philosophical approach to communication in society gives a skill to analyze these aspects of CS (Sugawara).
As a background of this problems one cannot forget the great impact of globalization upon states, societies, and also local communities. Internet communications opened new networks for people. One can say, it makes a new type of CS. But in this „world" there are many problems, which distruct rights, freedom of people. Therefore, legal approach to this is also necessary (Machimura). We need the coercion of the state power to retain such communities. This paradox will be explained through the cases of regulation/deregulation, comparing Japan-U.S. (and Korea) case studies concerning land-use regulation (Taniguchi).
We provide reports about many aspects around CS, especially with examples from Japanese experiences. But we hope to discuss on comparison with experiences in another countries.

List of Lectures:

1. Tatsuji Ohno (Hosei University/ Japan)
Introduction – The general theoretical and practical Situation about Civil Society and State, especially in Japanese Legal Institutions and Movements

2. Toru Mori (Kyoto University/ Japan)
Democratization of the Administration – from the top down and/ or from the bottom up

3. Kosuke Nasu (Setsunan University / Japan)
Civil Society and its Nonpolitical Foundation

4. Koichi Taniguchi (Tokyo Metropolitan University / Japan)
Paradox of Solidarity and Coersion – global Impact on Communities

5. Masako Inoue (Kanagawa University / Japan)
Civil Society and Family – from Feminism Point of View

6. Yasutaka Machimura (Hokkaido University / Japan)
Civil Society in the World of Internet Communications – its Legal Aspects

7. Yasuhiro Sugawara (Hokkaigakuen University / Japan)
Meaning of the Communication in Civil Society and its philosophical Ground

SPECIAL WORKSHOP

SW 53 Rethinking the foundational concepts of constitutional and legal theory from ‚the semi-periphery'	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 3.101
Organizers	Dr. Zoran Oklopcic, Carleton University, Ottawa / Canada

About the workshop:

Glance at the Field

The workshop proposal that follows is predicated upon the claim/intuition/ conclusion that contemporary constitu-

tional and legal theorizing in the English-speaking world can roughly be situated within two camps.
In the first, there is a body of thought that uses the political and legal preoccupations of the leading Western countries as a foil for making claims in the field of constitutional, and legal theory generally. These preoccupations tend to influence the theoretical analysis of foundational political and legal concepts. Thus, debates about foundational concepts like 'popular sovereignty', constituent power, social contract, and the rule of law, are either explicitly, or implicitly situated within the American, British, or European contexts. Even the volumes that seek to provide a comparative perspective on the foundational concepts engage the constitutional experiences of Germany, France, UK, the US, etc. In the second, there is a growing literature that challenges the dominant perspective from the vantage point of aboriginal struggles for recognition and emancipation. The authors in this camp seek either to recast the existing legal and political structures to make them more accommodating of the Aboriginal difference, or to reframe the central constitutional ideas of Western modernity to be reflective of Aboriginal narratives and worldviews.

Thematic Focus

What we feel is missing is the engagement with the foundational concepts of constitutional and legal theory from the vantage point of the semi-periphery, a locus between the two camps described above. We provisionally understand the semi-periphery not as a precise geographical location, but rather as a political condition. That condition can be anything which departs from the normality of a relatively affluent, theoretically influential, contemporary liberal-democratic state. The semi-peripheral locales can be marked by their authoritarian past, semi-authoritarian present, political paralysis, or deep ethno-national cleavages. Crucially, the localities within semi-periphery bear an ambiguous relationship with the constitutional and legal heritage of 'Western' liberal-democratic states, but don't reject it wholesale, nor do they seek to construct a completely different conceptual register in which they would articulate their claims. Generally, semi-peripheral countries embrace the rule of law, popular sovereignty but their application in these contexts either raises problems for theory, or leads to the mutations of these concepts that respond to their particular environment.

Aims of the Project

The central aim of the project is to challenge the one-way broadcast and dissemination of theoretical insights from the politically consolidated legal and constitutional 'centre' and to the semi-periphery. Over the decades and centuries, the conceptual building-blocks mentioned above have captured the imagination of peripheral actors and framing their political and legal imagination, setting the aspirations and tempo, providing resources for naming and shaming. In this regard, our aim is to explore the extent to which these concepts have been crimped, expanded, or otherwise modified in the cut and thrust of political and legal debate in the semi-periphery.
To be clear, our purpose is not necessarily 'counter-hegemonic' or hostile to the heritage of 'Western' legal and constitutional modernity. Rather, the reliance of various actors on these foundational concepts in the semi-periphery evidences the inherent importance and pragmatic utility of these concepts. However, we think that it is both interesting and important to clarify precisely why and how these concepts can continue to do work even within normative contexts that seem to stand in sharp contrast to their characteristic normative habitats in consolidated liberal democratic polities.
The outcome of the proposed workshop could equally be to:
a) Point to the limitations of the inherited vocabularies and their application in the semi-peripheral contexts. For example, the idea of the constituent power of the people may be inappropriate in the context of state-building in Kosovo; or the ideas of social contract can be seen as problematic in that it justifies Malaysian ethnocracy.
b) Suggest refinements in the concepts under scrutiny, given the context in which they are invoked.
c) Articulate a more self-reflective embrace of the examined concepts stemming from an inquiry of the alternatives and tradeoffs that present themselves in the semi-periphery.
d) Point to links between the operation of these concepts in the semi-periphery and how they operate in their core habitats in a way that also problematizes unstated assumptions about their operation in the latter.

List of Lectures:

Lucas Arimada (Buenos Aires Law School / Argentinia)
Democracy as a precondition to constitutionalism

Rueban Balasubramaniam (Carleton University, Ottawa / Canada)
Understanding Malaysia's "Social Contract" Debate

Miodrag A. Jovanovic (University of Belgrade Faculty of Law / Serbia)
Does Jurisprudence Need Anthropology?

Zoran Oklopcic (Carleton University, Ottawa / Canada)
Title t.b.a.

Alexander Schwartz (Queens University, Kingston / Canada)
Nested Nomos: Tensions between Sub-state Constitutionalism and the Integrity of Law

Stephen Tierney (University of Edinburgh / UK)
'Sub-state nations on the semi-periphery: discrete expressions of pouvoir constituant through the referendum'

SPECIAL WORKSHOP

SW 54 The Relevance of African Legal Theory to Contemporary Problems	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 3.45 / Sydney
Organizers	Dr. Oche Onazi, University of Dundee / UK

About the workshop:

The aim of this workshop is to explore the vision of African legal theory and jurisprudence regarding contemporary global challenges, such as the prevalence of war to the misery of poverty to the crises of the environment, amongst many other pressing problems. The justification for this workshop is simple. Discussions concerning the unprecedented challenges of today have too often proceeded without any consideration of the potential contributions from African legal theoretical or philosophical scholarship. There are, of course, different reasons why African legal theory has been marginalised in this respect, one of which is simply that given Africa's colonial history, it is often considered as a recipient and not a bearer of knowledge, especially the type of knowledge that is relevant to issues beyond Africa. Yet African concepts of law, justice, community, reciprocity, solidarity, humanity, equity, property, duty, responsibility, fairness, punishment – or how they impact on received concepts of state, market, civil society, human rights, democracy, development, economy and governance, amongst many others – can expand the reach of arguments that predominate contemporary legal theoretical and jurisprudential literature regarding global problems. In exploring such issues, the workshop cannot avoid considering the nature and content of African legal theory itself, including its similarities, and differences from the more dominant legal theoretical tradition. Issues for consideration also include the extent to which, or the ways in which African legal theory can work with or independent of dominant legal theoretical traditions.

List of Lectures:

1. Dr. M. Chikosa Silungwe (Malawi Law Commission) (Dr. Silungwe is participating in his personal capacity)
On 'African' Legal Theory: A possibility, An impossibility or Mere Conundrum?

2. Dominic J. Buridge (University of Oxford / UK)
Between Marxism and Individualism: Interpersonal solidarity in African jurisprudence.

3. Dr. Sulieman I. Oji (Usmanu Danfodio University / Sokoto-Nigeria)
African concepts of Law, Commnuity and Justice as a Pancea to Contemporary Global Challenges

4. Dr. Ferdinand M. Kasozi (Makerere University / Uganda)
Inferential Grounds of Badanda Court Processes – Logical Guidance for Contemporary Legal System Efficacy

5. Dr. Babafemi Odunsi (Obafemi Awolowo University / Ife-Nigeria)
Pychic Witness as an American Approach to solving Crimes: A case for revisitng Indigenous African Criminology System in Nigeria

6. Elena Sanella
Decolonising Legal Theory: The way ahead for the breakthrough of African Legal Theory

7. Dr. Oche Onazi (University of Dundee / UK)
African Legal Theory and Contemporary Problems

8. Madalitso Phiri (MPhil [UCT], Junior Researcher, Human Sciences Research Council (HSRC), Cape Town)
Mozambique's Post-Conflict Political Economy: Africa's Success Story? – 1992-2009

SPECIAL WORKSHOP

SW 55 Kelsen and Hart: History of Legal Philosophy in the 20th Century	
Date	THU 18 Aug 2011 + FRI 19 Aug 2011
Time	THU 14.30 h – 18.30 h + FRI 15.30 h – 18.00 h
Location	HZ 8
Organizers	Prof. Enrico Pattaro, University of Bologna / Italy

About the workshop:

This special workshop – which we have been entrusted with organizing as part of the celebrations for the centennial of the foundation of the IVR – is aimed at providing a discussion of the history of 20th-century legal philosophy. It is quite natural that such a discussion should take as its starting point the two major figures of 20th-century legal philosophy in the civil-law and the common-law world respectively, namely, Hans Kelsen and H.L.A. Hart. The main problem here is not only to understand how these two major figures and their theories have influenced the rest of legal philosophy in the different language areas of the Western world, but also to assess how their influence has interacted with other, more local strands of legal-philosophical thought – and, if no such influence can be detected, how these strands developed through a path of their own.
This workshop draws from the work done on 20th-century legal philosophy in Vol-

umes 11 and 12 of A Treatise of Legal Philosophy and General Jurisprudence (Springer: Berlin, 2005). Volume 11, titled Legal Philosophy in the Twentieth Century: The Common Law World and written by Gerald Postema, will be officially presented in print during the congress. Volume 12, titled Legal Philosophy in the Twentieth Century: The Civil Law World and edited by Enrico Pattaro and Corrado Roversi, though not yet in print, is at an advanced stage of development, and several of its contributors will present their work during the workshop.

List of Lectures:

Thursday, August 18

1. Agostino Carrino (University of Naples / Italy)
Hans Kelsen between "Purity" and Ideology: For a Political Interpretation of the Pure Theory of Law

2. Gerald Postema (University of North Carolina at Chapel Hill / USA)
Hart and His Legacy

3. Svein Eng (University of Oslo / Norway)
Kelsen and Hart in 20th-century Legal Philosophy in Northern European Countries

4. Bartosz Brozek (Jagiellonian University of Cracow / Poland)
Kelsen and Hart in 20th-century Legal Philosophy in Eastern European Countries

Friday, August 19

1. Manuel Atienza (University of Alicante / Spain)
Kelsen and Hart in 20th-century Legal Philosophy in Spanish-speaking Countries

2. José de Sousa e Brito (New University of Lisbon / Portugal)
Kelsen and Hart in 20th-century Legal Philosophy in Portuguese-speaking Countries

3. Carla Faralli (University of Bologna) and Eric Millard (Paris West University Nanterre La Défense / France)
Kelsen and Hart in 20th-century Legal Philosophy in Italy and France

SPECIAL WORKSHOP

SW 56 Meaning, Truth and the Concept of Law	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF E.22 / Commerzbank
Organizers	Prof. Dennis Patterson, European University Institute / Italy

About the workshop:

This workshop will present 3 or 4 papers on various aspects of the concept of meaning in law.

List of Lectures:

1. Dennis Patterson (European University Institute [EUI] / Italy)
Meaning and Truth in Law

2. David Duarte (University of Lisbon / Portugal)
Norm's Presupposition

3. Ralf Poscher (Albert-Ludwigs-Universität Freiburg / Germany)
An Agonal Account of Legal Disagreement

SPECIAL WORKSHOP

SW 57 (cancelled)

SPECIAL WORKSHOP

SW 58 Biopolitics	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 1.303
Organizers	Prof.Dr. Luis Antonio Cunha Ribeiro, Universidade Federal Fluminense – UFF / Brazil Prof.Dr. Lucas de Alvarenga Gontijo, Pontifícia Universidade Católica de Minas Gerais – PUC-Minas / Brazil

About the workshop:

Michel Foucault summarizes his understanding of the term Biopolitics in the abstract of his 1978-1979 Course at College de France: it is understood as the way it was tried, since the XVIII century, to rationalize the problems faced by governmental practices by means of phenomena concerning a group of living beings taken as a population: health, hygiene, birth rates, races... In his 1975-1976 course he defines it as the movement by which power takes charge of life concerns. Gilles Deleuze spoke of the idea of managing a multiplicity of be-

ings (a given population) over a vast and open space, where probabilistics become increasingly relevant. Giorgio Agamben states that the totalitarianism of our century is founded on the dynamical identity of life and politics.

This special workshop is intended to gather members and scholars who consider the idea of Biopolitics as understood by the authors above mentioned – as well as by other contemporary philosophers – useful for a better comprehension of XX and XXI century national and international politics. There is a special interest in discussions towards the ways Biopolitics can be related to the role of Social Philosophy and Philosophy of Law in the present world.

List of Lectures:

1.João Chaves (Federal Public Defender's Office School / Brazil)
Law inside biopolitics as a conceptual problem: a new approach on Foucault, Agamben and Negri

2. André Dias (Universidade Nova de Lisboa / Portugal)
Dismantling the Arrested Political Axis: On the Intersection of Biopolitics and Involuntarism

3. Ina Dimitrova (Bulgarian Academy of Sciences / Bulgaria)
Emerging Biopolitics: Techniques of the Self and Reproductive Genetics in Bulgaria

4. Verena Erlenbusch (Emory University / United States of America)
Sovereignty or biopolitics? Mapping power with Agamben and Foucault

5. Lucas de Alvarenga Gontijo (Pontifícia Universidade Católica – PUC-Minas / Brazil)
Culture of Urban Violence: theory of recognition and creative expansion of rights versus biopolitical practices of safety devices

6. Quoc Loc Hong, VU University Amsterdam / The Netherlands)
The Role of Courts in the War on Terror

7. Jacopo Martire (King's College London / United Kingdom)
Is There a Biopolitical Approach to Law?

8. Volha Piotukh (University of Leeds / United Kingdom)
Power over Life: the Concept of Biopolitics in Foucault, Agamben, and Esposito

9. Ali M. Rizvi (Universiti Brunei Darussalam / Brunei Darussalam)
Biopower, governmentality, and capitalism through the lenses of freedom: A conceptual enquiry

10. Luís Antônio Cunha Ribeiro (Universidade Federal Fluminense – UFF / Brazil)
The Archaeological Method in Foucault and Agamben

11. Herivelto P. Souza (Universidade de Brasília – UnB / Brazil)
Primacy of anomalousness: life, norms and politics in Canguilhem and Foucault

12. Samuel R .Talcott (University of the Sciences in Philadelphia / United States of America)
Canguilhem, Jacob, and Foucault: the Emergence of Biopower as Concept

13. Ahmet Ulvi Turkbag (University of Galatasaray / Turkey)
The Bare Life and the Modern Law: A Journey to Some Key Concepts or Conceptions of Agamben

SPECIAL WORKSHOP

SW 59 Objectivity in Legal Discourse. The Comparative Perspective	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 1.28 / Shanghai
Organizers	Dr. Lidia Rodak, University of Silesia / Poland

About the workshop:

Objectivity a special role in application of law. It seems a necessary constituent of law application and legal reasoning. Objectivity is about similar treatment of subjects in comparable position, equality before law, justice or impartiality. Additionally, the concept of objectivity seems to form a junction between the formal and substantive elements of legal systems.
We want to analyze how the argument from objectivity is used in judicial decisions in various legal environments.
On one hand we want to track down detailed nuances across the legal orders, on the other one we do not want to impose too strict pre-conceptions. Our task is to describe the family of objectivity meanings. We do not want to delimitate the scope at the start by pointing to a dictionary definition which could make a point of reference. The researchers are to rely on their intuition as native speakers and trace various senses and functions of objectivity based on their linguistic and legal competences, the ability to track down non-standard usages and ascribe functions to the discerned senses. In this way we want to analyze conceptual networks of national languages, or their legal sub-standards for special purposes. We want to map the related elements within the complex language game (in Wittgenstein's sense).
We are only interested in the court's argumentation from objectivity. We want to preserve the bottom-up model, starting at judicial usage, and only then draw generalizations, since we believe that meaning is a contextual phenomenon detectible by analysis of utterances.
The overall aim of the research is to find the answer to the question about the special meaning of legal objectivity, any sense of the term characteristic only of law.

List of Lectures:

I. Moderator: Pietro Denaro

II. Persons presenting the general final research results: Lidia Rodak, Grzegorz Panek, Mateusz Stepień, Michał Kielb

III. Persons presenting the research results from the perspective of their own legal system:

1. Prof. Mark Van Hoecke (University of Ghent / Belgium)
European Court of Human Rights

2. Dr Pietro Denaro (University of Palermo / Italy)
Italian legal system

3. Dr Antal Szerlics (University of Essex / UK)
Hungarian legal system

4. Andrej Kristan (University of Genoa / Italy)
Slovenian legal system

5. Maximiliano Aramburo (University of Alicante / Spain)
Spanish legal system

6. Katelijne Stranz (University of Hamburg / Germany)
German legal system

7. Dr Bogdan Iancu (University of Bucharest / Romania)
Romanian legal system

8. Dr Rūta Kazanavičiūtė (Vilnius University / Lithuania)
Lithuanian legal system

9. Dr Karine Caunes (Sciences-Po and Center of European Studies)
French legal system

10. Dr Agnieszka Bielska-Brodziak (University of Silesia / Poland)
European Court of Justice

11. Dr Vito Breda (Cardiff Law School / UK)
Common legal system (UK)

12. Jaqueline Sena (University of Sao Paulo, Brazil)
Brasilian legal system

SPECIAL WORKSHOP

SW 60 Net Neutrality or Not Neutrality? Law, Politics & Internet.	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 4.201
Organizers	Rafael Rodríguez Prieto, Pablo de Olavide University of Seville / Spain

About the workshop:

Net neutrality or not neutrality? When national governments want to block particular Internet activities or content – or see what users are doing – they typically turn to the private companies that manage pieces of the Internet, including Internet Service Providers, search engines, blogging and news portals, and even hardware providers. It is a sort of "governmental limitation" on internet.
For some types of online material, such as pornography, racist speech, defamation, or unauthorized posting of personal information, governments, NGOs, and others may encourage or even require Internet companies to restrict content. In other cases, however, governments expect Internet companies to similarly restrict content that is protected expression under international standards, such as videos about current events, online fora for religious expression, and blogs criticizing or ridiculing national leaders. As pressures to filter, censor, and monitor this type of protected speech on the Internet have mounted, some Internet and communications technology (ICT) companies, academics, human rights activists, socially responsible investors, and civil society participants have held a series of conversations about how to respond. This event will tap project participants to have as candid a conversation as possible about the process in which they've engaged, and the role that corporations should play in response to government-mandated Internet censorship and surveillance, with particular but not exclusive emphasis on authoritarian regimes.
But there are other "limitations". Neutrality proponents claim that telecom companies seek to impose a tiered service model in order to control the pipeline and thereby remove competition, create artificial scarcity, and oblige subscribers to buy their otherwise uncompetitive services. Many believe net neutrality to be primarily important as a preservation of current freedoms. On December 21, 2010, the FCC's Democrats approved new "network neutrality" rules for the Internet in the USA. The regulation has sparked considerable controversy in USA.
We will deal with internet and private and public limitations. We will study the impact of the regulations on democracy and human rights.

List of Lectures:

1. Rafael Rodríguez Prieto (Pablo de Olavide University of Seville / Spain)

2. Nolan Bowie (Harvard University / USA)

3. Alberto González Pascual (Complutense(University of Madrid / Spain)

4. Gotzone Mora (Universidad del País Vasco / Spain)

5. José María Seco Martíne (Pablo de Olavide University of Seville / Spain)

6. Fernando Martínez Cabezudo (Pablo de Olavide University of Seville / Spain)

7. Jonathan Pass (University of Manchester / UK and Pablo de Olavide University of Seville / Spain)

SPECIAL WORKSHOP

SW 61 Legal Normativity and the Philosophy of Practical Reason	
Date	MON 15 Aug 2011 + TUE 16 Aug 2011 + THU 18 Aug 2011
Time	MON 14.30 h – 18.30 h + TUE 14.30 h – 18.30 h + THU 14.30 h – 18.30 h
Location	HZ 7
Organizers	Prof. Dr. Veronica Rodriguez-Blanco, University of Birmingham / UKProf. Dr. George Pavlakos, University of Antwerp and Glasgow / Belgium and UK

About the workshop:

Arguably law should be understood in continuity with practical reason. However, there has been little effort to this day to clarify the interconnection between the sphere of legal rules and principles, intentional action and practical reason. The workshop aims to provide a platform for the discussion of these relationships, by bringing ideas from key philosophical traditions to bear on central jurisprudential concepts such as 'authority', 'obligation', 'rule-following, 'normativity', 'causation' and 'responsibility'. The subject-matter of the workshop is located at the intersection of ancient and medieval philosophy of action (Aristotle and Aquinas), contemporary philosophy of action, practical reason (Aristotelian and Kantian) and legal philosophy. Distinguished representatives from both the Aristotelian and Kantian traditions together with eminent legal philosophers have been invited to reflect on these issues for three days at the IVR World Congress in the bustling and cultural city of Frankfurt, Germany.
The IVR World Congress in Legal Philosophy is the perfect intellectual environment to foster thought and ideas at the highest level on the overlapping relationships between practical philosophy, the philosophy of action and legal philosophy. The congress has been held every two years for more than 100 years and has been a driving force in the creation of intellectual partnerships and the generation of important ideas in legal philosophy. Some of the most important legal philosophical ideas of the 20th and 21st century were once presented at a IVR Congress, amongst them Hans Kelsen's notion of the basic norm, Joseph Raz's concept of authority, and Robert Alexy's theory of legal argumentation.
The format of the workshop will include short presentations (up to 10 minutes) followed by extensive open discussion (up to 35 minutes) per paper. All papers will be circulated 3 weeks in advance of the event and prior knowledge by all participants will be assumed. A top academic publisher will be sought to publish the papers in an edited collection, should there exist a sufficient number of high-quality papers.

List of Lectures:

1. Matyas Bodig (University of Aberdeen / UK)
The Normativity of Law and the Methodological Implications of Interpretivism

2. Sharon Byrd (University of Jena / Germany) and Joachim Hruschka (Erlangen University / Germany)
Hobbes, Kant and the Original Contract

3. Sylvie Delacroix (University College London / UK)
Normativity, Practical Deliberation and Moral Courage

4. Luis Duarte Almeida (Oxford / UK)
A Proof-Based Account of Legal Exceptions

5. William Edmundson (Georgia State University / USA)
On G.A. Cohen, Political Philosophy and Personal Behaviour

6. Ken Ehrenberg (The State University of New York at Buffalo / USA)
Law's Claim to Authority is not a Claim to Preemption: Choice of Evils and Legal Gaps

7. Kevin Falvey (University of California at Santa Barbara / USA)
The Cause of What It Understands, Practical Knowledge and Intentional Action

8. Matthew Hanser (University of California at Santa Barbara / USA)
Practical Reason and Moral Mereology

9. Antony Hatzistavrou (University of Hull / UK)
Reconsideration and Exclusionary Reasons

10. Ulrike Heuer (University of Leeds / UK)
Acting for the Right Reasons

11. Heidi Hurd (University of Illinois / USA)
Interpreting Without Intentions: How the Limits of Interpretation Define the Limits of Legal Authority

12.Stanley Paulson (University of Washington at Saint Louis / USA and Kiel University / Germany)
A 'Justified Normativity' Thesis versus 'Modal Normativity'". An Enquiry into Normativity in Kelsen's Pure Theory of Law

13. George Pavlakos (University of Antwerp / Belgium and Glasgow / UK)
Title t.b.a.

14.Veronica Rodriguez-Blanco (University of Birmingham / UK)
Legal Authority and the Paradox of Intention in Action

15. Sergio Tenenbaum (University of Toronto / Canada)
The Rationality of Vague and Indeterminate Ends and Legal Discretion

16. Bruno Verbeek (University of Leiden / The Netherlands)
The Authority of Conventions, Social Norms and Law

17.Ken Westphal (University of East Anglia / UK)
Title t.b.a.

18. Ekow Yankah (Yeshiva University, Cardozo Law School / USA)
Civic Vices and the Rule of Law"

SPECIAL WORKSHOP

SW 62 Philosophy of science and legal philosophy – a blending or a clash?	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 1.303
Organizers	Aleksandra Samonek, Jagiellonian Univeristy / Poland

About the workshop:

Philosophy of science has become an extremely influential heir of philosophical tradition of analysis. Due to this fact, we are tempted to employ the achievements of scientific interpretation and methodology of philosophy of science within legal theory. Notions associated (more or less eligibly) with science e. g. clarity of thought, effectiveness of method, expectation of practical outcome for almost every choice made, encourage us into further investigation of medical and psychological experiments that might be of any meaning
to legal doctrine.
Faced with this state of affairs, should we develop legal theory and philosophy further, into the direct reference with quantum mechanics or maybe abandon the tendency and take a step back, accept that neurolaw as such is just an imaginary friend of psychology? Obvious as it seems, not all fields of science are of equal importance to legal reasoning. The point of the workshop is an attempt to select some reasonable prospects for the development of legal theory and to deal with the looming vision of scientific methodology.
Do we need to adjust our reasoning to scientific tendency or just stick to commonsensical base of our unique theory? Is revision of legal philosophy required in any of these cases? Which type of legal philosophy would fit scientific methodology best? Papers dealing with these and connected questions are welcome to start a discussion on the place of modern legal theory among the fast expanding branches of thought.

List of Lectures:

1. Michał Araszkiewicz (Jagiellonian Univeristy / Poland)
Title t.b.a.

2. Mikołaj Barczentewicz (University of Warsaw / Poland)
Against scientific method in legal Theory

3. José Manuel Linhares (Universidade de Coimbra / Portugal)
Is law's practical-cultural project condemned to fail the test of 'contextual congruence'? A dialogue with Hans Albert's social engineering

4. Aleksandra Samonek (Jagiellonian University / Poland)
Criminal law agency and STIT Theory

5. Wojciech Załuski, Jagiellonian University / Poland)
Deontic

SPECIAL WORKSHOP

SW 63 The Scope of Liberalism in Bioethics; The limit of consenting will	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 3.36 / Chicago
Organizers	Prof. Itaru Shimazu, Chiba University / Japan

About the workshop:

Progress in bioscience and biotechnology has been making the impossible possible. And it has been expanding the scope of potential liberty in our lives. Under the liberal framework every medical treatment has to be authorized by consenting will of the patients. But even if some new treatment is technologically possible and those concerned sincerely desire and are eager to consent with its utilization, our society tends to impose various legal and moral limits on the scope of consenting will. And we sometimes find it difficult to articulate the reasons for that. But what if we go on the principle of 'no reason no limit' which sounds quite suitable for liberalism of our legal framework? The hypothesis which is lingering in our minds is that the modern legal principles may connote within them something which may, at least apparently, conflict with individual liberty. We will identify this as "social anxiety about unspecified consequences" and ask if it can ever provide a sufficient normative foundation for regulation of indi-

vidual liberty. This idea derives from the social philosophy of F.A. Hayek, who is regarded as a thorough-going liberal but used to call himself irrationalist and affirms the social necessity of certain taboos.

List of Lectures:

1. Yukiko Saito (Kitasato Univ / Japan)
Who can give consent to use/make one's gametes?

2. Akiko Nozaki (Hiroshima City Univ. / Japan)
The Influence of Relationship on Relational Rights

3. Itaru Shimazu (Chiba Univ. / Japan)
Limitting the Scope of Consent by Unarticulated Reasons

4. Maru Yuichi (Chiba University Hospital / Japan)
Informed consent in clinical research and the respect for autonomy

Comment
Christoph Lütge (Technische Universität München / Germany)
Stathis Banakas (University of East Anglia / UK)

SPECIAL WORKSHOP

SW 64 Analogical and Exemplary Reasoning in Legal Discourse	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	HZ 13
Organizers	Dr. Carel Smith, Leiden Law School / The Netherlands Dr. Hendrik Kaptein, Leiden Law School / The Netherlands Dr. Harm Kloosterhuis, Erasmus School of Law / The Netherlands

About the workshop:

Analogical reasoning is, on the one hand, considered a way of reasoning that has special prominence in legal reasoning, as a way to find new solutions in law and to defend legal claims (recently Sunstein, Brewer). But it has also been attacked, on the other, for analogical reasoning would be, in fact, nothing but deductive and moral reasoning (Schauer, Posner, Alexander).
This Workshop addresses the (alleged) character and import of analogical reasoning in legal reasoning and legal argumentation. Topics to be discussed are, among others, the role of analogy with regard to institutional changes and developments (such as the increasing significance of principals, and the rising phenomenon of multi-layered legal systems as the European Union), the role of exemplary reasoning in science and law, and the justificatory force of analogical reasoning.

List of Lectures:

1. Amalia Amaya (Research Fellow, Institute for Philosophical Research, National Autonomous University of Mexico)
Exemplars, Legal Reasoning, and Legal Ethics

2. Bartosz Brozek (Adjunct Professor Jurisprudence, Jagiellonian University, Kraków / Poland)
Is Analogy a Form of Legal Resoning?

3. Angela Condello (PhD Candidate, Philosophy of Law, University of Rome III / Italy)
Being instead of a Definition

4. Martin P. Golding (Professor of Philosophy and Law. Duke University, Durham, NC / USA)
The Force of Arguments in the Law

5. Hendrik Kaptein (Research Fellow, Department of Jurisprudence, Leiden Law School, Leiden University / The Netherlands)
Analogy, Precedent, Paradigm, Metaphor: So Many Cases of Unintentional Inexistence (and why this des not always really matter)

6. Harm Kloosterhuis (Research fellow, Department of Jurisprudence, Erasmus School of Law, Erasmus University Rotterdam / The Netherlands)
On the Rhetorical Use of Analoy-Argumentation in Legal Decisions

7. Carel Smith (Research Fellow, Department of Jurisprudence, Leiden Law School, Leiden University / The Netherlands)
The Rhetoric of Literallity: Rules and Metaphor in Law

8.Giovanni Tuzet & Damanio Canale (Assistant Professor, Department of Legal Studies, Università di Bocconi, Milano / Italy)
Analogical Reasoning and Extensive Interpretation

SPECIAL WORKSHOP

SW 65 Law, Science, Technology: Phenomenological-hermeneutical approach	
Date	MON 15 Aug 2011 + THU 18 Aug 2011
Time	MON 14.30 h – 18.30 h + THU 14.30 h – 18.30 h
Location	HZ 14
Organizers	Dr. Oleksiy Stovba, Kharkov's National University / Ukraine

About the workshop:

Science and techniques are the different forms of ruling over the world. The same is valid about law, which the means to control society is. But law, technique, science are the forms of "Ge-stell" (M. Heidegger). Thus, we don't produce the power by the means of law, science e.t.c., but enslaved by it. The possibilities of our Being are enslaved. Because the science is one of the mentioned forms of Ge-stell, we need something other in order to repair this situation. What we can? On the way of phenomenological-hermeneutics legal thinking free attitude towards law, techniques and other forms of the "Ge-stell" to produce.
The topic of the workshop is law, science and technique in modern world.
The aim is to produce the free attitude towards law, techniques and other forms of "Ge-stell" on the way of phenomenological-hermeneutics legal thinking.

List of Lectures:

1. O. Stovba (Kharkov's National University / Ukraine)
Law and "Ge-stell"

2. A. Polyakov (St. Petersburg State University / Russia)
Normative fact as the object of phenomenological analysis

3. E. Timoshina (St. Petersburg State University / Russia)
The Tradition of Phenomenological Interpretation of L. Petrazycki's Legal Philosophy

4. O. Meregko (Lublin's Catholics University / Ukraine)
Five worlds of Law

5. S. Maksimov (National University, Law Academy of Ukraine / Ukraine)
The issue of recognition in phenomenological and hermeneutical perspective

6. Juho Joensoo (Helsinki University / Finland)
Law and Calculative Thinking

7. (Vitaliy Voitsishen / Ukraine)
Phenomenology of Judgement

8. Vyacheslav Bigun (Law research Koretskiy Institute / Ukraine)
Philosophy of Justice

SPECIAL WORKSHOP

SW 66 Dynamics of Law and Society: The Promise of Interactionism and Pragmatism	
Date	TUE 16 Aug 2011
Time	14-30 h – 18.30 h
Location	HOF 2.45 / Boston
Organizers	Prof. Dr. Sanne Taekema, Erasmus University Rotterdam / The Netherlands Prof. Dr. Wibren Van der Burg, Erasmus University Rotterdam / The Netherlands

About the workshop:

In different corners of the field of legal theory, there is a renewed interest in interactional and pragmatic theory, primarily as an alternative to positivism. There is a return to the thought of of theorists such as Lon L. Fuller, John Dewey, Philip Selznick and Karl Llewellyn, as a source of inspiration for coping with the changing relationship between law and society.
The aim of this workshop is to construct a new paradigm of interactionist and pragmatist theory by bringing together scholars who develop interactionism and pragmatism theoretically with scholars who use these theories to cope with problems of legal practice. The common starting point of interactionist and pragmatist theory is the idea that law should be understood as emerging from the interactions and mutual expectations of the participants in legal practices. In this workshop, attention will be both on the theoretical grounds for such ideas and on the implications for practices in international law, legislation and the rule of law.

List of Lectures:

1. Wouter de Been (Erasmus University Rotterdam / The Netherlands)
American Legal Realism: Sound and Fury Signifying Nothing?

2. Jutta Brunnee (University of Toronto / Canada) [to be confirmed]
Interactional International Law

3. Rachel Herdy (Federal University of Rio de Janeiro / Brazil)
Peirce's Contribution to Legal Philosophy: A Threefold Distinction

4. Martin Krygier (University of New South Wales / UK)
Philip Selznick's Pragmatism

5. Lonneke Poort (VU University Amsterdam / The Netherlands)
An Ethos of Controversies operating in a Two-Track Approach. Analysis of an Interactive Model of Legislation.

6. Kristen Rundle (London School of Economics / UK) [to be confirmed]
Before the debate: reading Fuller through eunomics

7. Sanne Taekema (Erasmus University Rotterdam / The Netherlands)
A Pragmatist Account of Legal Dynamics

8. Wibren van der Burg (Erasmus University Rotterdam / The Netherlands)
What is Legal Interactionism?

9. Henrik Palmer Olsen (University of Copenhagen / Denmark) [to be confirmed]
Title t.b.a.

SPECIAL WORKSHOP

SW 67 The Fact/Value Separation and its Relevance for Interdisciplinary Research	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 1.101
Organizers	Prof. Dr. Sanne Taekema, Erasmus University Rotterdam / The Netherlands Prof. Dr. Bart Van Klink, VU University Amsterdam / The Netherlands

About the workshop:

In his Pure Theory of Law, Kelsen tries to a construe a solid scientific foundation for the science of law. For that purpose, the question has to be answered what is typical or unique about the way the science of law understands its object. Kelsen argues that the phenomenon of law can be studied from two different perspectives: either how it should be (Sollen) or how it is (Sein). These two perspectives correspond with two different disciplines from which law can be studied: respectively, a normative science of law that determines deductively which rules are valid, and an explanatory sociology of law that establish inductively a certain regularity for which it tries to find a causal explanation. It is equally possible and legitimate to study law from both perspectives, but not at the same time.
If Kelsen would be right, the possibilities for interdisciplinary research into law would be very limited. However, a strict fact-value separation is rejected by scholars adhering to other, non-positivist scientific approaches, in particular hermeneutics and pragmatism. A forceful pragmatist defense of the inseparability of facts and values is provided by Hilary Putnam. According to him, knowledge of facts presumes knowledge of values and, vice versa, knowledge of values presumes knowledge of facts. Although we can in principle distinguish factual judgments from evaluative judgments, many of those judgments are mixed and there is not a clear separating line between the two categories.
In our workshop we intend to organize a discussion about the tenability of the fact/value distinction and its relevance for interdisciplinary research. Proponents of different (positivist, pragmatic and hermeneutic) positions are invited to give their view on the matter.

List of Lectures:

1. Amalia Amaya (Institute of Philosophical Research, National Autonomous University of Mexico)
Legal Reasoning as Re-description: Murdoch, Facts, and Values

2. Maksymilian Del Mar (Department of Law, Queen Mary, University of London / UK)
Impure Theory: Pragmatic Reactions to the Fact / Value Distinction

3. Anne-Ruth Mackor (Department Theory of Law, Faculty of Law, University of Groningen / The Netherlands)
Norm-descriptions, norm-contentions and norm-recommendations

4. Marcin Pieniążek (Faculty of Law and Administration, Andrzej Frycz Modrzewski Krakow University / Poland)
Paul Ricoeur's dialogue of "Sein und Sollen" and its possible contribution to the philosophy of law

5. Carel Smith (Leiden Law School, Leiden University / The Netherlands)
Understanding Value-conflicts in Law: Towards a Cultural Vocabulary of Law

6. Sanne Taekema (Erasmus School of Law, Erasmus University Rotterdam / The Netherlands)
The Neglect of Facts

7. Bart van Klink (Faculty of Law, VU University Amsterdam / The Netherlands) and Oliver Lembcke (Friedrich Schiller University Jena / Germany)
"The Normative Force of the Factual". Georg Jellinek, Hans Kelsen and Carl Schmitt on the Is-Ought Distinction

SPECIAL WORKSHOP

SW 68 Political Obligation	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 2.45 / Boston
Organizers	Prof. Hirohide Takikawa, Osaka City University / Japan

About the workshop:

Since Socrates, political obligation has been one of the central issues in legal philosophy. A fundamental question is whether or not there is a moral duty to obey the law, and if so, why. A classical answer to this question is the social contract theory expounded by T. Hobbes and J. Locke, but it has been severely criticized since D. Hume. Many other theories have been advanced to explain and justify political obligation by appealing to a natural duty of justice (J. Rawls, J. Waldron), the principle of fair play (H. L. A. Hart, G. Klosko), associative obligation (R. Dworkin), or samaritanism (C. Wellman), while some of them show a hybrid argument of these theories. Furthermore, others just deny the existence of a moral duty to obey the law (A. J. Simmons, J. Raz).

The purpose of this workshop is to carefully examine these classical and modern theories.
Papers are invited to address such topics as:
What exactly is the problem of political obligation? Are there any differences among political obligation, civic obligation and legal duty?
Why do we need to explore the problem of political obligation? Is it worth the effort to be addressed? How should we situate it in the realm of legal philosophy?
Do we have a moral duty to obey a bad law? If we do, why? If we do not, then does it mean that we have a moral duty to morality, not law?
Which approach is most successful to justify political obligation: consent, fairness, natural duty, association, gratitude, or else? What is the criterion of the success of a theory?

List of Lectures:

1. Win-chiat Lee, Department of Philosophy, Wake Forest University, USA
Political Obligations as Associative Obligation

2. Hirohide Takikawa, Graduate School of Law, Osaka City University, Japan
Free Riders Play Fair

3. Massimo Renzo, York Law School, The University of York, UK
Fairness, Self-deception and Political Obligation

4. Tatsuya Yokohama, Shizuoka University, Japan
Intrinsic Value of Law and Good Governance: A Reorganization of Legal Obligation and Political Obligation

5. Tatsuo Inoue, Graduate School of Law and Politics, The University of Tokyo, Japan
Legitimacy, Critical Democracy and Political Transformation of Japan

SPECIAL WORKSHOP

SW 69 Genetically Modified Foods and the Turkish Legislation	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 1.27 / Dubai
Organizers	Ass.-Prof. Dr. Zeynep Özlem Üskül Engin, Galatasaray Üniversity Law Faculty / Turkey

About the workshop:

The main purpose of the workshop is to discuss what GMOs are, the controversies about this specific issue and the related regulations that are put forward by the authorities. GMOs are genetically altered organisms which have been widely produced and breeded in certain parts of the world. According to some experts, this special practice of agriculture emerged in order to put en and to famine and prevent food scarcity. As growing GMOs seems to be more convenient than the traditional farming, it is more eligible to produce food in large scale which will be a fine solution for food scarcity. However, there are some opposition to the GMOs. It is strongly believed that the real causes of famine are not related to production, it is a problem of distribution of food. Moreover, patenting the seeds leads to an unstoppable control and dominance over food by the private enterprises. Therefore, the opponents state that the aims of these companies are solely financial gain and monopolization in food production. Patenting the seeds is another arguable issue. It poses a great threat for the organic farmers since GMO seeds can contaminate the others through natural ways. This is not the only danger that organic farmers face with; they also can be sued by the GMO producers for unintended exposure to GMO seeds. Not only the diminishing of the variety of species but also the possible adverse effects of GMOs on human health create a debate between the two groups. These are the only topics that are open to discussion. In addition to these, labeling the products creates a huge problem among the poorly educated consumers as they have not been clearly regulated in some countries. Hence, this subject having such a close connection to human health cannot be ignored by the law. In fact, a number of countries have enacted legislation in order to regulate this sensitive field. All these contemporary issues for Turkey and other European countries will be highlighted in the work shop.

List of Lectures:

1. Dr. Dobrochna Bach-Golecka, University of Warsaw, Poland
"Is the use of Genetically Modified Organisms Immoral? The Debate on the European Legislation (Directive 2001/18/EC) in Poland".

2. Dr. Bige Açımuz, University Özyeğin
„Turkish GMO legislation. Risk **Management without Precationary Principle".**

SPECIAL WORKSHOP

SW 70 Legal Discourse and Human Rights	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 4.202
Organizers	Ass.-Prof. Gülriz Uygur, Ankara / Turkey

About the workshop:

Discourse theories generally give place to procedural rules, but not to human rights. If we claim that legal discourse should include human rights, the problem arises regarding how we can justify this claim within the framework of the requirements of the discourse. One of the difficulties is that while discourse theory is procedural, human rights are substantive in their nature. If we claim the discourse theory should include human rights, this means discourse theory

should include also a substantive dimension. On the other hand, it is possible to claim that human rights can be included among the requirements of the discourse and consequently claim that discourse theory has procedural and substantive dimensions.
The need for a substantive dimension for discourse theory may be justified on the basis of different reasons. For example one may argue that, if discourse theory yield the right answer as the result of a procedure, it should have a substantive dimension, or, one may discuss that in the context of moral pluralism, discourse needs a common ground. Regarding this, the problem arises how can we reconcile the procedural and substantive dimensions of discourse.
Actually, human rights are considered for some as a discourse theory, and hence this workshop will also explore this relationship.
These are just some of the questions that fall under the scope of the workshop on Legal Discourse and Human Rights.

List of Lectures:

t.b.a.

SPECIAL WORKSHOP

SW 71 Involving the Experts – A Critical Analysis of the Role of Expert Committees in Legal Decision Making con-cerning Complex Technological Issues with a Strong Moral Impact –	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 4.101
Organizers	Dr. B.C. Britta van Beers, VU University Amsterdam / The Netherlands Ph.D. Lonneke Port, VU University Amsterdam / The Netherlands

About the workshop:

Within the regulation of bioethical issues experts' opinions have become of increasing importance. In light of the widely diverging moral viewpoints on current technological developments, the semi-neutrality of expert committees seems very appealing. Moreover, experts can contribute in making these technically complex issues accessible for laypersons. Lastly, it is said that consulting and involving experts will improve the adaption of legal norms to practice. In this workshop, however, we wish to challenge the view that involving experts will lead to more adequate regulation.
The thesis that expert committees should no longer play a decisive role in decision making will be a focus-point of the workshop. To start, their democratic legitimacy can be doubted, especially given the fact that within this field matters of life and death are often at stake. Furthermore, it can be questioned whether their mostly technical or scientific expertise can also justify their authority in legal and political decision making. Moreover, if experts have to operate within a legal framework, can they still function as experts from their own field? After all, their reasoning is, then, limited by legal boundaries given by the context of decision making.
Purpose of the workshop is to re-evaluate the role of expert committees in bioethical decision making. Which aspects of decision making can be delegated to the experts, and which should be left to the political domain? Is the use of expert committees inevitable within a liberal-proceduralist democracy? Finally, are there any alternative ways to bridge the gap between the legal context of decision making and the complex practice of bioethical issues?

List of Lectures:

1. Prof. M. Hildebrandt (VU Brussels / Belgium)
Experts, Experience, Representation, and pTA

2. Prof. M. Adams(Tilburg University / The Netherlands)
The Role of Dutch Medical Ethical Committees in Bio-medical Issues such as Euthanasia

3. Drs. F. Fleurke (TILT, Tilburg University / The Netherlands)
The EFSA. Risk-Assessment on GMOs

4. Dr.mr. L.M. Poort (VU Amsterdam / The Netherlands)
The Role of Expert-committees in Controversial Decision making

5. Dr. mr. B. van Beers (VU Amsterdam / The Netherlands)
Role of Experts in Decision Making on Artificial Pro-creation

SPECIAL WORKSHOP

SW 72 Legal Theory and Education: The Way Ahead	
Date	THU 18 Aug 2011
Time	14.30h – 18.30h
Location	HZ 13
Organizers	Prof. Mark van Hoecke, European Academy of Legal Theory / Belgium Dr. jur. Christoph Good, University of Vienna / Austria Mag. LL.M. D.E.A. Jürgen Busch, University of Lucerne / Switzerland

About the workshop:

The internationalization of law & legal education points to the need for a debate of a (re-) enforcement of the foundations of law (legal theory/legal philosophy, le-

gal sociology, legal history) within legal education in order to provide students with the necessary contexts and tool-set for a proper understanding of complex legal problems. The organizing EALT has long lasting experience in developing and realizing various educational programmes in legal theory as well as providing a platform for a mutual exchange of ideas and experience in legal theory education among different institutions all over Europe and on a global scale.
The workshop intends to share experience among national and transnational experts in organizing such educational programmes and/or in the teaching of legal theory as well as related (i.a. empirical) research. Best practice examples among current programmes and/or projects and future trends and needs for new and innovative responses from stakeholders in the field of legal theory education shall be identified.
Papers proposed will address one of the following topics:
a) general aims of educating legal theory – a transnational view
b) current challenges of legal theory education
c) solutions to current and future challenges – a needs analysis
d) best practice examples of innovative legal theory education
The workshop will focus on a thorough discussion of the draft papers (10 min of presentations, 20 min of discussion for each paper).

List of Lectures:

1. Mark van Hoecke (Univ. Ghent / Belgium), Christoph Good (Univ. Lucerne / Switzerland) and Jürgen Busch (Univ. Vienna / Austria)
Introduction ("European Co-operation and Best Practice in Legal Theory Education: Past, Present, Future")

2. Walter Van Gerven (University of Leuven / Belgium)
Politics, Ethics & The Law – Legal Practice & Scholarship

3. Otto Pfersmann (Université Paris 1/ France)
Title t.b.a.

4. Benoit Frydman / David Restrepo Amariles (Université Libre de Bruxelles/Belgium)
Teaching Global Law

5. Nicoletta Bersier-Ladavac (THEMIS Geneva / Switzerland)
Law taught for purely practical ends or also as a science?

6. Ekaterina Samokhina, National Research University, Higher School of Economics, Faculty of Law, Saint-Petersburg / Russia)
The problem of a romanticized vision of law in legal education

7. Balazs Ratai (University of Pécs/Hungary)
Title t.b.a.

SPECIAL WORKSHOP

SW 73 Law and Memory. Transitional justice in Legal Philosophical Perspective	
Date	TUE 16 Aug 2011
Time	14-30 h – 18.30 h
Location	IG 254
Organizers	Prof. Dr. Wouter Veraart, Vrije Universiteit Amsterdam / The Netherlands Dr. Derk Venema, Radboud University Nijmegen / The Netherlands

About the workshop:

Transitional justice is a hot multi-disciplinary research field. Yet, some fundamental issues have not received the necessary legal philosophical attention. In this special workshop we present a few key issues. Common thread throughout the papers is the close but difficult connection between the technicalities of the legal system and processes of remembering and peace building. On the one hand the presenters appear to be optimistic about the role the law can play in response to extreme injustice. On the other hand, they interrogate the inherent limits of the legal system in its response to an unjust past.

List of Lectures:

1. Luigi Corrias (VU University Amsterdam / The Netherlands)
A Silence That Remains: Notes on Transitional Justice

2. Ernesto Fabián Mieles González (Freie Universität Berlin / Germany)
Strategic Litigation, Social Mobilization, and Memory Building in Colombia

3. Victoria Roca (Alicante University / Spain)
The Role of Legality in the Struggle for Democracy

4. Derk Venema (Radboud University Nijmegen / The Netherlands)
Transitional Justice Mechanisms as Rites of Passage

5. Wouter Veraart (VU University Amsterdam / The Netherlands)
You Asked for Justice, But What You Received was Legal Peace. The Structure of Disappointment in Some Cases of Transitional Justice

SPECIAL WORKSHOP

SW 74 Private Law Theory (PLT) – Politics of Private Law in a Technological Age	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 1.28 / Shanghai
Organizers	Prof. Dr. Dan Wielsch, University of Cologne / Germany Bertram Keller, University of Cologne / Germany

About the workshop:

Our societies are more and more governed by private interactions and private law regulation. In the technological age private governance grows global. Big industrial projects as well as science in general transcend boundaries. The problems remain.
The politics of private law is not purely a state policy any more. The policies spring of spontaneous privates orders themselves. Thus, the different politics of private regulation or law depend on underlying implicit theories.
This PLT workshop aims to clarify what unifies, distinguishes, and relates different theoretical approaches to private law. It does not want to develop shared definitions or concepts among scholars, but to establish a forum that reflects the diversity of approaches. It might disclose the continuous process redefining the institutional boundaries and the foundations of private law. The workshop aims to open the floor for an active dialogue among private law theories.

List of Lectures:

1. Marco Haase (China University of Political Science and Law, Peking / China)
Civil Law as a Legal System

2. Yuki Asano (Gakushuin University / Japan)
Private Law and Legal Pluralism

3. Souichirou Kozuka (Gakushuin University / Japan)
Soft Law, Private Authority and Social Norms: When and how non-state law replaces the private law of the State?

4. Bertram Keller (University of Cologne / Germany)
Private Law as Political Deliberation

5. Dai Yokomizo (Nagoya University / Japan)
Technological Evolution and the Method of Conflict of Laws

6. Lorenz Kähler (University of Göttingen / Germany)
Contractual Consent under the Condition of Information Overload

7. Dan Wielsch (University of Cologne / Germany)
Public Dimension of Licencing

SPECIAL WORKSHOP

SW 75 Legisprudence – Rethinking Legislation and Regulation in the Light of Legal Theory	
Date	MON 15 Aug 2011
Time	14.30h – 18.30h
Location	RUW 3.102
Organizers	Prof. Dr. Luc J. Wintgens, University of Brussels/ Belgium Dr. A. Daniel Oliver-Lalana, University of La Rioja/ Spain

About the workshop:

The overall purpose of the workshop is to reflect on legislation from the viewpoint of legal philosophy and to discuss the role of rational lawmaking and legislation theory within modern constitutional states. In this line, the workshop addresses two major, interwoven topics: on the one hand, it focuses on recent advances in the field of Legisprudence, with a special empahis on evaluation, drafting, and policy aspects of legislation; on the other, it connects Legisprudence with the study of legislative argumentation, particularly as for the implications of reasonableness and proportionality requirements on the justification of legislative measures.

List of Lectures:

1. Andrej Kristan (Slovenia)
Legislative Choice and Its Justifiability

2. Luc J. Wintgens (University of Brussels HUB-KUB / Belgium)
Rationality of Legislation and Legislative Evaluation

3. Woomin Sim (Institute of Legal Studies, Yonsei Law School / South Korea)
Disagreement and Proceduralism in the Perspective of Legisprudence

4. Cheoljoon Chang (Visiting Professor, Handong Global University / South Korea)
Legisprudence in the Asian Context

5. Gema Marcilla(University of Castilla-La Mancha / Spain)
The Areas of Legislative Argument

6. A.Daniel Oliver-Lalana (University of La Rioja / Spain)
Argumentation in Lawmaking Debates

7. Jan-R. Sieckmann (University of Erlangen-Nürnberg / Germany and University of Buenos Aires / Argentina)
Legislation as Implementation of Constitutional Law

8. Laura Clérico (University of Buenos Aires / Argentina)
Proportionality as a criterion of rationality in the legislative discourse:

exploring the constructive side of proportionality

9. Imer B. Flores (UNAM / México)
Legislatures Not-Judging in their Own Cause. On the principle nemo iudex in sua causa applied to Legislation

SPECIAL WORKSHOP

SW 76 Legal recognition of minority groups in light of social sciences	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 1.102
Organizers	Prof. Dr. Marek Zirk-Sadowski, University of Łódź / Poland Prof. Dr. Bartosz Wojciechowski, University of Łódź / Poland Dr. Karolina Cern, Adam Mickiewicz University in Poznań / Poland

About the workshop:

The primary objective which – by virtue of its importance – determines the scope of the workshop in question will be both critical analysis of social- and philosophical-legal importance of the principle of recognition and institutional morality as well as demonstrating the role which they have in the modern world. What we aim at in the consideration of the principle of recognition and institutional morality is highlighting their important features, especially in the context of the justification of certain human rights and in their distribution – both in legal, political, cultural or just social dimension. We shall be therefore interested in the area that is determined, on the one hand, by the substantiation and justification of legal regulations related to human rights issues. In this context there arises the question of the principle of recognition as a universal normative condition and of the type of the sources for institutional morality (namely individual / collective and normative / factual ones), constituting the so-called background morality of numerous decisions. On the other hand, we shall focus our attention on actual matrix of human interactions which are based on these legal regulations. Some of the most crucial questions which arise in this regard are as follows: Do human rights make it possible to generate a genuine mutual social recognition among the participants of the interaction? Does the action consistent with the legal model automatically imply social recognition, or whether leaving the area of discretionary decision-making and acting on the basis of the latter can generate some conflict situations, both individual and social ones? Modern social sciences, after all, strongly suggest the need for analysis, not only systemic ones, but also – correlated with the latter – everyday interaction analyses, case studies and individual institutional decisions (including institutional – legal ones).

List of Lectures:

t.b.a.

SPECIAL WORKSHOP

SW 77 (cancelled)

SPECIAL WORKSHOP

SW 78 Constitutionalism After Communism: Author meets her critics	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	HZ 13
Organizers	Grażyna Skąpska, Jagiellonian University, Krakow / Poland

About the workshop:

Title of the session: „Author Meets Her Critics: A Critical Debate on Grazyna Skapska's Book „From „Civil Society" to „Europe": A Sociological Study on Constitutionalism after Communism" (Brill, 2011)

This session aims at a critical debate on constitutionalism after the collapse of the communist regimes in East Central Europe on the verge of the 21st century. The debate is provoked by the recent publication of a book " "Between "Civil Society" and "Europe". A Study of Constitutionalism after Communism" (Grażyna Skąpska, Brill, Leyden and Boston, 2011) .In Eastern Europe, the scope and range of the shifts were enormous. After 1989, some seventy five million people in Central and an additional more than two hundred million in Eastern Europe experienced the changes; the geo-political map of the continent was altered dramatically. New countries emerged in its central, eastern, northern and southern regions, and some old ones ceased to exist. We witnessed the collapse of an imperial power, "velvet divorces," as well as re-unifications; the realignments have been not only European but, in fact, global. Territorial changes and shifts in alliances followed closely, one after another in the immediately succeeding years. As a result of the relatively successful consolidation of democracy and reformations of economies, eight Central European countries were accepted as members of the European Union in the year 2005, and a further two in 2007 – events entirely unforeseen only several years ago. At the same time, however, a noticeable and considerable disenchantment with democracy and the market economy were observed – a growing distrust in public institutions, populism, and apathy. These outcomes were unforeseen at the beginning of the transformation. Yet one wonders about the contributions the peaceful post-1989 revolutions have made to the development of liberal constitutionalism, the imprint they have left on constitutional provisions, and their impact on the de-

velopment of ideas regarding justice, civic and human rights, and human dignity – the topical issues of the "peaceful revolutions". This issue is even more important in the new, enlarged European Union. One thing is certain, recent experiences with totalitarianism would not go without leaving a permanent trace on the consciousness and political and legal cultures of the people involved. Thus, twenty years after the initial changes, and only little less after the first democratic constitutions were proclaimed, it is a time to analyze the formation of constitutionalism after communism. Considering the goals and their results in their current form, one should not forget, too, that postcommunist transformation does not represent an unwavering, linear change from one point of history – communist totalitarianism, or Stalinism – to another, a well-defined and unproblematic liberal democracy. On the contrary, one should remember that it is as much an open process as democracy is an open project. It must also be kept in mind that the new, postcommunist constitutions are proclaimed in a time of accelerated global change entailing growing international cooperation, and the formation of international or transnational legal orders. This means growing complexity, a considerable ambiguity and uncertainty with regard to the trajectories of the liberal democracy, and new self-definitions of political societies emerging out of communism.

List of Lectures:

Chair: Marek Zirk-Sadowski (University of Lodz / Poland)

Participants:

1. Martin Krygier (University of New South Wales / Australia)
Constitutionalism afer Communism: Fears, Hopes, Achievements, and Disappointments

2. Marek Zirk-Sadowski (University of Lodz / Poland)
Modern State Model and Postmodern Consciousenss of Lawyers

3. Grażyna Skąpska (Jagiellonian University, Krakow / Poland)
Postcommunist Constitutionalism Twenty Years After. A Critical Reflection on My Book

SPECIAL WORKSHOP

SW 79 Neo-Communitarian approach on the human rights in the East Asia	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	HOF 3.45 / Sydney
Organizers	Prof. Akihiko Morita, Shokei Gakuin University / Japan

About the workshop:

In this special workshop, following Charles Taylor's dual distinction of the human rights as legal language and its underlying philosophical foundation, I would like to argue that the human rights, as cosmopolitan imperative, needs different cultural reasoning/justification and it can be formulated by deconstructing and reconstructing each local tradition/culture through dynamic intermingling and interaction among communities within state and other societies beyond national borders.
For this exercise, 'a neo-communitarian' approach, which means breaking away from all traditional and authoritarian types of collectivism and simultaneously embracing and defending individuality within a flourishing community, seems useful and viable in the East Asia because what we need in the midst of ongoing individualization without individualism is its own philosophical foundation for the human rights as universal social norm and as Han Sang-Jin indicated, such reasoning must be based on the communitarian tradition available in the region which can be appealing to ordinary citizens.
For further discussion, I would like to present my thought on how we could develop and articulate the neo-communitarian reasoning(s) of human rights in the East Asia, which, I believe, will complement and enrich the promising approach on human rights as cosmopolitan imperative advocated by Ulrich Beck.

List of Lectures:

Rafael Rodríguez Prieto (Universidad Pablo de Olavide de Sevilla / Spain)
Individualization without individualism. A critical analysis of identity in the framework of the Alliance of Civilizations

Overview

Group A: Methodology, Logics, Hermeneutics, Linguistics, Law and Finance	
WG 1	Logics, Epistemology, Philosophy of Science, Legal Informatics
WG 2	Methodology, Interpretation, Language, Hermeneutics
WG 3	Legal Judgement
WG 4	Legal Argumentation
WG 5	Scientific Knowledge and Legal Decision
WG 6	Law and Finance / Economics
WG 7	Liability, Criminal Law
WG 8	Society, Culture, Politics und Law I
WG 9	Society, Culture, Politics und Law II
WG 10	Justice, Distributive Justice, Non-Discrimination
WG 11	Ethics und Law
Group B: Human Rights, Democracy; Internet / intellectual property, Globalization	
WG 12	Globalization
WG 13	Human Rights – general
WG 14	Human Rights – specific questions
WG 15	Democracy in modern society
WG 16	Democratic development in individual countries I
WG 17	Democratic development in individual countries II
WG 18	Democracy and new technologies
WG 19	Internet I
WG 20	Internet II
Group C: Bioethics / Medicine / Technology / Environment	
WG 21	Bioethics, Biopolitics and Law
WG 22	Medicine, Law, Eugenics
WG 23	Environment
WG 24	Technology and Law – general questions
WG 25	Science, Technology and Law
WG 26	Technology and Law – selected problems

Group D: History of Philosophy; Hart, Kelsen, Radbruch, Habermas, Rawls, Luhmann; General Theory of Norms, Positivism	
WG 27	Kelsen and analysis of the „Pure Theory of Law“
WG 28	Habermas, Honneth
WG 29	Dworkin, Hart, Luhmann, Raz, Rawls
WG 30	Philosophy of Law 19th century and before
WG 31	General Theory of Law, General Theory of Norms
WG 32	Positivism, The Normativity of Law

Disclaimer: This abstract book has been produced using texts submitted by authors until June 2011. No responsibility is assumed for the content of abstracts.

Group A: Methodology, Logics, Hermeneutics, Linguistics, Law and Finance

WORKING GROUP

WG 1 Logics, Epistemology, Philosophy of Science, Legal Informatics	
Session 1	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 4.202
Chair	Adachi, Hidehiko (Kanazawa / Japan)
Session 2a	
Date	FRI 19 Aug 2011
Time	15.30 h –18.00 h
Location	RUW 4.202
Chair	Cyras, Vytautas (Vilnius / Lithuania)
Session 2b	
Date	FRI 19 Aug 2011
Time	15.30 h –18.00 h
Location	RUW 4.201
Chair	Shiner, Roger A. (Kelowna / Canada)

Lectures:
Session 1

1.

Hidehiko Adachi (Faculty of Law, Kanazawa University / Japan)

Goal of Legal Philosophy and Subjects of Legal Logic

Abstract:
The aim of this study is to point out some subjects of a formal approach of legal philosophy. If the “law” is a class of legal norms, then an important goal of legal philosophy is to reveal their condition of truth (or validity). To reach this goal, two theories are required: material and formal. Material theories of legal philosophy, which many theories of justice or social philosophies also include, are not my present concern. I limit the discussion to a formal theory, especially legal logic as applied deontic logic. It’s my view that legal logic must be concerned with at least the following two subjects.
1. Semantic of norms: According to the possible worlds semantic, the truth values of deontic propositions depend on such properties as seriality and transitivity for the accessibility relations between possible worlds. The DT system assumes only serial relations. The D4 system assumes not only serial but also transitive relations. It is an interesting subject to consider whether the DT or D4 system of standard deontic logic is appropriate for legal logic.
2. Norms of competence: According to Hans Kelsen, a legal norm is valid within a hierarchical regal system if it is issued in a manner determined by a higher “norm of competence” that rules who and how the norm can be issued. But this theory fails to explain how a lower norm is logically inferred from a higher norm. I’ll solve this problem with second-order predicate logic.

2.

Vladislav Arkhipov (Faculty of Law, Saint-Petersburg State University / Russia)

Virtual Worlds in Legal Studies

Abstract:
This paper deals with virtual worlds and the opportunities they give for research. As online communities nested in a computer-based simulated environment, virtual worlds are on the rise as a medium not only for entertainment, but for social communication as well. Virtual worlds can be considered as one of the most topical fields for social (including legal) studies taking into an account social impact they have and research capabilities they provide. The most obvious reason for this may be that most virtual worlds reproduce the social reality in whole of in part as we know it, doing this „from a scratch", so that highly insitutionalised and habitualised social practices are reconstructed in a way which allows to track the process of their evolution. Since virtual worlds are inherently models of what may be called the „real life" (however this naming may be questioned by modern philosophy), studying them may give much insight on real institutions and practices, including without limitation law. The paper provides an updated definition and classification of virtual worlds along with the outline of recent developments in this field of research as a methodological prerequisite, and debates two main questions: „What virtual worlds can give to law?" and „What law can give to virtual worlds?" The debate is concentrated over the concept of virtual law, conflict between modern intellectual property concepts and the notion of virtual property, and the suggestion of using the virtual worlds as a platform for ethically correct social experiment in legal field which is still an undervalued approach.

3.

Vladislav Arkhipov (Faculty of Law, Saint-Petersburg State University / Russia)

Speaking About Law: General Fiction of Legal Theory

Abstract:
This paper presents an attempt to re-consider a "popular" methodological attitude in jurisprudence, that is to formulate concepts and conclusions as if (or „als ob" in German) law is some kind of tangible object independent of what the researchers themselves. Such an attitude may be shortcutted to a fiction of „speaking about law". The first issue challenged in the paper is general „fictionalism" of human thought as it was debated by German philosopher Hans Vaihinger and translated into jurisprudence by American theorist Lon L. Fuller. The second one is the impact which the outcomes of the legal philosophy discourse do have on the effective legal systems. The paper refers to the notion of "social construction of reality" elaborated in sociology of knowledge by Peter L. Berger and Thomas Luckmann. The paper also draws in close, but not directly associated approaches practiced in "general semantics" of A. Korzybski and the ideas of language-games developed by Ludwig Wittgenstein. Basing on the discussion of the two aforesaid issues a suggestion is made to deem the "speaking about law" as a general fiction of legal theory which obscures the fact that legal theorists rather "speak law", since any consistent and accepted theoretical approach is inherent to the respective legal system and it shapes legal system as an instrument of "social construction of reality". As such it is not much less important than, for instance, a legal enactment, being engaged in practical legal argumentation and a factor which evolves professional mindset (for instance, throughout legal education). Therefore, it implies positive re-consideration of the social responsibility of jurisprudence by revealing its fundamental and constructive role in legal system.

4.

Ion Craiovan (George Baritu University / Romania)

On Integrative Juridical Knowledge

Abstract:
My paper is trying to point out several matters affecting the vizibility peaks integrative juridical concept of knowledge in legal doctrine stating his notes defining and effectiveness.
In thus,we proposed the following steps:
1. Law as normatif and complex knowledge object is placed in relation to the thesis that any way to understand a complex phenomena is insufficient. (Longino, 2002).
2. We are approach some perspectives that inherent juridical knowledge and having multiple paradigms-normative, conceptual, behavioral, moral, cultural, hermeneutics, postmodern, etc. – as the knowledge of the law:
3. About tensions and conflicts in knowledge of configuring borders. On the concepts of disciplinary, multi-disciplinary, inter-disciplinary, trans-disciplinary, cross-disciplinary, focusing o epistemological issues that dogmatism, exclusivity,mutual ignorance, boycot, lockout or refuzal collaboration between areas of knowledge.
4. Horizon integrative science and legal knowledge into arguments and contra-arguments. Some several coordinates:
Fostering knowledge as border closures that open connections; to cognitive skills and experience issues from several perspectives and contexts; acceptance of epistemological pluralism contrasting paradigms; the initiation of restructuring and mergers setting up a certain understand for solving complex legal problems. Some considerations on a generic integrative application in the academic discipline General jurisprudence.

5.

Luis Duarte D'Almeida (University College, Oxford / UK and LanCog Group and Law Faculty, University of Lisbon / Portugal)

Answerability

Abstract:
In this paper I discuss some problematic aspects of the received view of defeasibility in the domain of criminal trials. If we model valid criminal accusations and convictions as correctly made utterances of sentences of the form 'X φ ed', the received view maintains that the circum-

stances sufficient for a token of 'X φ ed' to be correctly uttered in the context of a criminal accusation are not sufficient for 'X φ ed' to be uttered in the context of a conviction. More precisely, presence of the elements of the 'offence' (or the 'Tatbestand') is deemed both necessary and sufficient in the former context, and therefore sufficient for X to be held answerable for φ ing; but for the unqualified 'X φ ed' to be properly uttered in the context of a conviction it must moreover be the case that further 'elements' obtain. According to this view, the procedural emergence of a valid defence, in the form of a justification or an excuse successfully offered by the defendant, is taken to establish the absence of some of those elements. Yet justifications and excuses, thus believed to render improper (to 'defeat') an unqualified final decision that 'X did φ', seem to be deemed irrelevant for the appropriateness of an utterance of 'X did φ' in the context of an accusation. This account I find very puzzling. It seems descriptively false, in civil law as well as common law systems. Taken as a normative account of criminal answerability, as it sometimes is, it is implausible. I shall develop these claims, suggesting that the received view rests upon an unwarranted conflation of two different and fully independent notions of defeasibility.

6.

Dragan Mitrovic (Belgrade / Serbia) + Gordana Vukadinovic (Novi Sad / Serbia)

The new path of law – From Theory of Chaos to Theory of Law

Abstract:
From chaos to the theory of chaos, from the primordial perception of the world as disorderedness to the scientific research of disorder a long distance has been covered. That path implies openness of mind and scientific boldness which connect mythological perceptions of the world with philosophical and scientific interpretations of phenomena throughout the world in a quite distinctive way resting on the creation of a model and application of computing Kelsen's model of the concept of law, custom model and legal system model. Owing to that, for the first time instead of asking "What awaits us in the future?", we can ask "What can be done in future?" and get a reliable scientific answer to that question. Let us, therefore, measure all that is measurable and let us make measurable all that is not measurable at the moment, because the world is a self-regulating phenomenon driven by perpetual instability while law pulsates in the universal rhythm of order and disorder.

7.

Michael Heather & Nick Rossiter (Northumbria University, Newcastle / UK)

Law as Exact Science

Abstract:
While physics is the exact science of the natural sciences Law is the exact science of the social sciences and needs the same formal rigour if it is to give exact answers in the way the social world is to be configured. Legal normative order is no more arbitrary than the laws of nature. Indeed legal norms are inherently bound up with the facts of this world and have therefore to obey those self same laws of physics. This gives rise to an international common law whose effect is of little consequences locally as in domestic legislation but comes powerfully into force like a tsunami sweeping along on the tide of globalisation. The positivism of the last two centuries has proved inadequate in the face that tide. International law both civil and criminal is more than a scaling up of parochial jurisdictions which have weak foundations. International institutions and movements are proving to be built on sand. Thus for instance the law of the environment does not recognise local boundaries whether geographical or legal It comes down to us from a higher metaphysical order. It is the obvious and extreme example where the laws of science and of the law cannot be prised apart. International commerce needs a logically consistent theory for the creation and operation of corporate law. Economics has not proved of sufficient scientific exactness to guide the development of financial services. International organisations like the UN, European, Arab, African and other like Unions are not proving to have constitutions that are sufficiently sound scientifically to cope with conflicts in places like Iraq, Afghanistan and Libya or transactions of the Euro. Even the human rights movement has proving to have feet of clay. The unresolved dichotomy of human rights and freedom of speech is currently bringing the English courts the police and the whole rule of law in the UK into disrepute.

Few realise the critical role of legal theory in shaping the world's destiny. The science of Law is a missing component in the development of global government of economies, industry and commerce on the planet. The people may not appreciate that they are calling for a much more scientific approach to Law to provide exact results. This paper surveys in formal terms the metaphysical significance for jurisprudence of how the Law forms part of the fabric of our scientific universe.

Session 2a

8.

Vytautas Cyras (Vilnius University / Lithuania) + Friedrich Lachmayer (Innsbruck University / Austria)

Legal machines and legal act production within multisensory operational implementations

Abstract:
This paper addresses machines in the role of legal actors. Examples are traffic lights, vending machines, form proceedings workflows, such as FinanzOnline in Austria, and machines which replace human beings in the role of officials. Their acts have legal importance and draw legal consequences. Thus the concept of iustitia distributiva and societal distribution is enhanced. This research can be viewed from several perspectives: legal informatics, multisensory jurisprudence (or multisensory law; cf. Colette R. Brunschwig) and operationalisations. The latter are explored by computer scientists in electronic agents and norma-

tive multiagent systems, where various normative frameworks and security platforms are being built. Software engineers do not know the concepts of Ought and Is worlds (cf. Hans Kelsen, Enrico Pattaro, etc.) though implicitly make use of them. We reflect from legal informatics perspective as advocated by Friedrich Lachmayer. The concept of e-Person is tackled; cf. Erich Schweighofer. A range of computers can regulate through code; cf. Lawrence Lessig's "code is law". Simple machines such as traffic lights imply simple descriptions of normative positions. Complex ones such as electronic institutions involve complicated security patterns, such as role-based access control expressed in SecureUML. Their lifecycles lead from legal requirements through implementation to norm enforcement. This paper aims to identify law production and communication patterns.

9.

Daniel Karonovic (Goethe University, Frankfurt / Germany)

Moral Laws, Duties and Certainty in Moral Reasoning

Abstract:
The concept of a moral law is the basic concept for most theories of moral reasoning as well as the concept of duty. In the presentation of my paper I start with the discussion of certainty in moral judgments. It is often assumed that moral laws are universal laws, which are unconditionally valid, and that absolute certainty about their validity is possible and necessary to gain the same certainty in our moral judgments. Against generalism, I want to defend a particularistic account of moral laws, which allows exceptions, and I will outline a model of reasoning which is able to deal with such laws, which dismisses absolute certainty from reasoning – without introducing relativism.
Giving up the assumption that absolute certainty is possible in moral reasoning has also repercussions on other basic moral concepts like that of moral duty. It follows directly that we can't be absolute certain about what our duties are and I propose that we have to elucidate this concept with David Ross' concept of prima facie duty.
Finally, both concepts – that of a law, which allow exceptions and prima facie duty – are parts of what we may call a pragmatist account of moral reasoning. I propose that we should change our views about morality to a model that is based on the same dynamics like that of a scientific theory, ruled by the laws of non-monotonic logic as supposed by modern pragmatists in the philosophy of science. Adopting such a model will allow us to understand what it means for the moral agent to do moral judgments from the first-person perspective.

10.

Jan C. Schuhr (Friedrich-Alexander-University, Erlangen-Nürnberg / Germany)

Rechtswissenschaft mit axiomatischer Methode?

Abstract:
Der moderne, Hilbert-Ackermannsche Axiomenbegriff war ab der Wende zum 20. Jh. in einigen Wissenschaften ungeheuer erfolgreich, in zahlreichen Gebieten zumindest ein fruchtbarer Anstoß (so z.B. architektonisch im Bauhaus) und teilweise sogar Grundlage neuer Technik. Anders als bei Aristoteles, dessen Axiome wahr, eines Beweises aber weder fähig noch bedürftig sind, liegen moderne Axiome einem deduktiven System ohne intrinsischen Wahrheitsgehalt und evtl. gar ohne eigene Bedeutung zugrunde.
Axiomatisierung ist an sich nur eine Form der Darstellung vorhandenen Wissens bzw. bekannter logischer Abhängigkeiten. Oft führt sie aber indirekt zu neuen Erkenntnissen, insbesondere weil sie zur Auflösung begrifflicher Mehrdeutigkeiten und zur Aufdeckung von Widersprüchen zwingt.
Naturrecht „more geometrico", Begriffsjurisprudenz, Rechtsquellen-Positivismus, der Stufenbau der Rechtsordnung und die Arbeit an juristischen Expertensystemen haben jeweils eigenartige gedankliche Ähnlichkeiten zur axiomatischen Methode. An ihr besteht bei Rechtswissenschaftlern gleichwohl wenig Interesse. Das beruht teilweise auf Fehlvorstellungen und Missverständnissen, und der Text würde gern einige davon aufklären. Die Rechtswissenschaft hat aber auch Eigenheiten, die einer umfassenden Axiomatisierung entgegenstehen und die es herauszuarbeiten gilt. Das Ziel begrifflicher Klarheit und des Offenlegens von Prämissen und Ableitungszusammenhängen muss indes auch die Rechtswissenschaft verfolgen.

Session 2b

11.

Roger A. Shiner (University of British Columbia Okanagan / Canada)

Law's Naive Realism

Abstract:
I want to explore the idea that naive realism is central to the nature of law – that modes of apprehension essentially similar to that to which G.E. Moore appealed in his celebrated Proof of the External World play a crucial role in the methodology of the law. At its cutting edge – at the point where its deliverances impact on the lives of citizens – the law is not a technical or a scientific discipline, but a naively realistic discipline. I will explore this theme by considering two specific cases – the alleged exposure of the law, especially the criminal law, to the findings of neuroscience, and the idea that the law's interest in causation is an interest in a scientifically technical notion of cause.

12.

Gonzalo Villa Rosas (Universidad Externado de Colombia / Colombia)

Über Tatsachen und Handlungen

Abstract:
Es gab eine Zeit, in der die analytische Philosophie die logischen Wahrheiten von den empirischen deutlich trennte. Ihrer Ansicht nach konnte diese Unterscheidung auf alle bedeutsamen Urteile der gesamten Kenntnisbereiche angewendet werden (s. z. B. Schlick; Ayer; Carnap). Diese Dichotomie (Putnam, 2002) basierte auf der Differenzierung

zwischen analytischen und synthetischen Urteilen, die eine wesentliche Rolle nicht nur im modernen Empirismus, sondern auch in der Philosophie Kants gespielt hatte. Trotz des Vertrauens der Philosophen des Positivismus in diese summa divisio der philosophischen Probleme, sind ihre Grundlagen seit den fünfziger Jahren des letzten Jahrhunderts in Zweifel gezogen worden. Verschiedene Denker haben das Unterscheiden zwischen analytischen und synthetischen Urteilen entweder abgestritten (Quine, 1951) oder revidiert (s. z. B. Putnam 1962, 1975; Kripke, 1972; Burge 1979, 1986).

Basierend auf den Beiträgen Kants hat die Pandektenwissenschaft im 19. Jahrhundert die Differenzierung zwischen juristischen Tatsachen und Handlungen eingeführt (Savigny, 1840). In den letzten Jahren wurde auch ein ähnliches umstrittenes Unterscheiden von verschiedenen Rechtsphilosophen anerkannt (s. z. B. Bulygin, 1991; Alexy, 2008), das sich auf der Theorie Searles' von regulativen und konstitutiven Normen errichtet (Searle, 1969). Seine Theorie, wie diejenige der Pandektenwissenschaft, bringt die Spuren der modernen Differenzierung zwischen analytischen und synthetischen Urteilen wieder in Erinnerung.

Auf der Basis des holistischen Vorschlages Quines' ist die Schrift bestrebt, die Forschung von einigen Kritiken und Konsequenzen, die in der Rechtstheorie aufgrund von Verweigerung oder Abschwächung des Bereiches dieser Differenzierung in dem philosophischen Denken des letzten Jahrhunderts formuliert werden konnten, voranzutreiben. Diese kritische Position bietet eine Aufwertung der Rolle der Kompetenz im Rechtssystem sowie ein schärferes Verständnis der Beziehung zwischen diesem und seiner Umgebung an.

13.

Markku Kiikeri (University of Lapland / Finland)

Science and law as collective intentionality

Abstract:
Science and law are both collective enterprises. The basic uncertainty is experienced as collective, cooperative, and social or institutional. In sciences reasons and causes of the unexpected is studied scientifically. In law, on the other hand, the reason is found in human intentionality, which cannot be generalized. In sciences it is enough to explain the reason and remove the cause of the uncertainty. In law, the cause of the uncertainty within the social acting is explained by particular human intentions. The uncertainty is abolished by trying to change intentions in a legal discussion. One tries to remove the results of these intentional human actions. The basic difference is then the human intentionality. In law there is a constant tension between the individual and collective intentionality, which cannot be resolved. The conflict between law and science is actualized in the way they remove the cause of the uncertainty. The sociological, statistic and psychological explanations see humans as causes of uncertainty on the basis of their physical characteristics and acting. The results are valued functionally. The functional evaluation takes place in finding the cause as well as in executing policies based on scientific discoveries. The scientific activity or political interest formation cannot be in itself the starting point for collective activity of the society. Namely, scientific explaining has a tendency to see collective intentionality as a matter of social scientific issue. The scientific "law" functions as a law. The claim is that the modern ideology of science is fundamentally incompatible with the legal ideology because of the different conception of the collective intentionality.

14.

Lennart Åqvist (Uppsala University / Sweden)

On the Distinction Norms vs. Norm-Propositions and its Logic

Abstract:
In this paper we intend to summarize some main results obtained in an earlier contribution of mine, viz. Åqvist [2008] – see the References at the end of the paper. In turn, Åqvist [2008] dealt with problem of axiomatizing three formal systems of Deontic Logic/Normative Logic in a sense derived from Alchourrón & Bulygin [1973] and Alchourrón [1969]. First of all, we considered a version DL of their Deontic Logic (= Logic of Norms) which, in point of expressive power, was seen to be slightly richer than the version originally due to our authors. Secondly, in that earlier paper, we considered a version NL of their Normative Logic (=Logic of Norm-Propositions), to which they added a number of definitions generating certain normative operators "proper" by means of a new operator N (or indexed family {Nx} with x denoting some appropriate agent) that they take to represent the dyadic relation of promulgation. Thirdly, in Åqvist [2008] we dealt with a third formal system NOBL constructed with a view to isolating the normative fragment of NL that arises as a result of adding those definitions to NL. The main outcome of this previous paper was then a representability result to the effect that the set of sentences provable in NOBL turns out to be exactly the set of the sentences which are provable in NL on the basis of those definitions.

In the coming sections we plan (i) to explain the basic Alchourrón-Bulygin distinction norms vs. norm-propositions in general terms, (ii) to report on earlier work by some well-known Scandinavian philosophers that led up to essentially the very same distinction, (iii) to consider three important consequential distinctions that ensue from the basic one, and (iv) to summarize and to comment somewhat more in detail on the three formal systems (DL, NL, NOBL) of Deontic Logic / Normative Logic mentioned above. We then close the paper by giving (v) a brief scrutiny of the so-called Frändberg Adequacy Condition on Explications of the distinction at issue.

WORKING GROUP

WG 2 Methodology, Interpretation, Language, Hermeneutics	
Session 1	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 0.254
Chair	Pontes, José Antonio S. (São Paulo / Brazil)
Session 2a	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	IG 251
Chair	Hwang, Shu-Perng (Institutum Iurisprudentiae, Academia Sinica / Taiwan)
Session 2b	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	IG 0.254
Chair	Zhang, Qingbo (Macau / China)

Lectures: Session 1

1.

Tomasz Stawecki + Wieslaw Staskiewicz (University of Warsaw / Poland)

Impact of new forms of collecting legal information to the process of legal interpretation

Abstract:

In Central Europe during last twenty years we face significant changes in the process of interpretation and application of law. Some of them are consequences of new technologies. We can observe that:

(1) judges and lawyers gradually eliminate paper collections of legal texts and replace them with electronic data basis on CDs;

(2) E-data basis include texts of laws as well as huge number of judicial decisions of various court. Decisions are, however, organized as references to particular laws.

All that causes important evolution of legal interpretation, decision making and argumentation.

(1) we face "new textualism": easy access to legal texts pushes other contexts (ideological, functional etc.) out of consideration. Constant changes of law make judges to follow texts of laws as a defense of legal certainty;

(2) judges are not encouraged to take a "systemic" approach in the interpretation, i.e. looking at EU law, judgments of ECHR etc.;

(3) it's a standard to cite several court decisions in even short legal documents. Some call this a de facto case law in civil law countries. Citing previous decision is, however, schematic and not based on deeper analysis of facts;

(4) technology has also negative impact on a quality of court decisions: a practice of "copy and paste" becomes popular among judges. We can find identical paragraphs in several decisions taken in completely different cases.

Unfortunately legal theory does not react quickly enough to new practices.

2.

José Antonio S. Pontes (Faculdades de Campinas / Brazil)

Some advances in practical reason: for a progressist dialogue with contemporary hermeneutics

Abstract:

This paper intends to identify some points of the contemporary thesis concerning constitutional hermeneutics and methodology of law. Once identified some authors and the lines of argumentation affiliated grosso modo to the linguistic turn and rhetoric, as well as the core of the transcendental powers of communication (v.g. R. Alexy, N. McCormick, K.Gunther etc.), the objective is to identify some dialogue with economics, enlightened by recent researches about Hegel-Marx interpretations of social life. Of course the discussion inevitably passes through methodological questions, opposing analytics vs. dialectics, idealistic v.s realists standpoints. In a effort to foment the inclusive dialogue between points of view concerning the concept of law that may create (not necessarily) radical opponents, the lines of conclusion intents to revisit some foundations of hegelian "method" (so to speak) and intends to give a modest contribution to a more profound analysis of the relations between sein and sollen categories, in order to enrich the discussions about technology and social life, specially the life of the law nowadays.

3.

Péter Cserne (Tilburg University / Netherlands)

Legal theory, legal policy, and the law's assumptions about human behavior

Abstract:

This paper analyses the theoretical status of the law's assumptions about human behavior. Legal epistemology is concerned with "how the law thinks" (cf. Teubner 1989). Legal rules and doctrines, e.g. on causation, legal capacity or the voluntariness of contracts make implicit assumptions about human behavior and the role of law in society. While these constructs are often well-articulated and have a clear technical meaning, they half-knowingly reflect philosophical ideas of earlier ages or express common sense psychological notions which are empirically unfounded. Whether one wants to criticize law's implicit presuppositions or not, they should be made explicit. This rational reconstruction points at theoretical concerns about the relations between legal epistemology, common sense psychology and scientific knowledge. How seriously should these doctrinal theories be taken? If they are not factual, can they still be 'objective'? The argument that this legal worldview should be challenged in light of empirical data is often based on the view that law is a means to policy ends or a specific social technology. Under this instrumental view, the reason why legal policy should be informed by empirical research on human behaviour is straightforward: rational legal policy requires reliable predictions about the incentive effects of legal rules. Still, even if

we assume an instrumental perspective, it does not follow that legal scholarship unavoidably becomes a simple instrument of translating scientific insights into legal rules and doctrines. In other words, even within an instrumental view of law, there are various considerations that require that the law should not adopt a „psychologically adequate" view of man – or so shall I argue.

4.

Danillo Almeida + Cecilia Lois (Federal University of Santa Catarina / Brazil)

Legal Theory and Epistemic Values: against authoritary interpretativism

Abstract:
In his new book, R. Dworkin advocates the unity of values thesis. He wants to circumscribe morality as a proper epistemological domain which is methodologically different from scientific inquiry. The epistemological independence of morality is supposed to be a consequence of the irreducible fact/value dichotomy. This paper sustains that unity of values thesis is methodologically correct; all moral reasoning must be a constructive interpretation of its meaning. However, that author fails to recognize that not every axiological interpretation implies moral consequences. From H. Putnam's indispensability argument, this paper intends to demonstrate that much of scientific inquiry relies on values interpretation, and that this kind of reasoning is morally neutral. Finally, it should be clear that epistemological choices in legal positivism – e.g. the decision on which aspects of social interaction are theoretically relevant – should not disturb the soundness of its argument nor should it be read as if it had moral implications. This paper concludes that positivist theories cannot be ruled out. Since the choice between descriptive and interpretative models requires a circular

5.

Mathieu Carpentier (Université Paris-1 Panthéon Sorbonne / France)

Intention in Interpretation. Why it Should Matter and How It Does Not

Abstract:
Intention in legal interpretation can be understood in two different ways. In the first sense, intention can be conceived as a particular interpretive technique which allows the judge to reach the meaning of a legal text when it is not clear how it should be applied (and whether it should be applied at all); in this sense intention should be explained by contraposition with plain meaning. In the second sense, intention is understood as a general constraint on judicial interpretation (whether the case is «hard» or not), which distinguishes legal interpretation from other kinds of interpretation. The many controversies concerning intentional interpretation (Radin v. Landis, Fish v. Posner, Dworkin v. the Originalists, Moore v. Raz, Marmor v. Waldron, Alexander's counterfactual realism, etc.) have most often failed to distinguish between these two accounts of an intentional interpretation. My claim is that the first account cannot be seriously upheld, and my argument to this point shall be a classic hartian one. But this does not mean that a case for a moderate intentionalism is not justified, as long as it is not a normative thesis. But this of course requires to define more precisely what one understands by 'intention'.

6.

Oles Andriychuk (Centre for Competition Policy, University of East Anglia / UK)

The Dialectics of Law

Abstract:
The purpose of this paper is to explore the essence of law from the perspective of dialectics. It internalises the principles of dialectical analysis proposing a method by which most of the jurisprudential dilemmas can be explored and addressing some of them. The paper begins with clarification of the very notion of dialectics; it poses a thesis that the concept of the ideal law should be perceived as an indispensible part of any law – as well as any social norm in general – negating the view that the ideal elements are related to legal axiology (what the law should be), and transposing the notion of the ideal law to legal epistemology (what the law is). It reverts then to the problem of legal indeterminacy, seeking to reveal its cognitive potential, perceived as a dynamic tension between different legal interpretations. In the last part Dworkin's thesis of legal morality is explored with a proposal to amend his metaphorical omnipotent judge Hercules with his alter ego Sisyphus, which constantly strives to find the right answers between the equally plausible but competing readings of the law.

Session 2a

7.

Geraldina Gonzalez De La Vega (Heinrich Heine University Düsseldorf / Germany)

Verfassungswandel als dynamische Verfassungsinterpretation

Abstract:
Man kann nicht feststellen, ob es eine Lehre vom Verfassungswandel tatsächlich gibt oder geben kann. Obwohl alle Autoren das Konzept als ein Phänomen der Anwendung von Verfassungsnormen behandeln, findet man keine Übereinstimmung der Thesen hinsichtlich ihrer Definition oder ihrer Grenzen. Ungeachtet dessen, dass alle Autoren das Konzept als einen Wandel des Sinnes von Normen erläutern, ist diese Antwort nicht zufriedenstellend. Es sieht so aus, als ob das Konzept der Verfassungswandlung bzw. des Verfassungswandels eine Chiffre für ganz verschiedene Möglichkeiten der Fortentwicklung von Normen einer offenen Verfassung ist. Keiner der Autoren vermag eine durchgängige Definition des Verfassungswandels zu geben. Sie akzeptieren, dass die bloße Interpretation offener Normen und Prinzipien (noch) kein Verfassungswandel ist. Sie räumen ein, dass es Normen gibt, die entwickelt werden müssen und dass sich der Lauf der Zeit sowie der Wandel der sozialen Wirklichkeit in der Konkretisierung von Normen widerspiegeln kann. Wenn dem so ist, dann stellt sich die Frage, was Verfassungswandel eigentlich ist und wann er vorliegt. Das Verhältnis zwischen Interpret und Norm hängt von dem jewei-

ligen Verfassungsverständnis ab und beinhaltet entweder eine Annäherung an eine Verfassungsänderung oder an eine Verfassungsauslegung. Die Trennung dazwischen liegt in der Unterscheidung zwischen einer dynamischen und verfassungsmäßigen Interpretation auf der einen Seite bzw. einer verfassungswidrige Anwendung auf der anderen Seite. Der zeitgenössische Verfassungsstaat vermag ein Gleichgewicht zwischen der Demokratie und der Verfassung herzustellen. Derjenige, der die Balance zur Demokratie schafft, bevorzugt die politischen Entscheidungen, d.h. die Entscheidungen der Mehrheit und wird in diesem Sinne die Fortentwicklung der Verfassungsnormen vom Bundesverfassungsgericht ablehnen. Im Gegensatz dazu schafft derjenige die Balance zur Verfassung, der die Bewahrung der Normativität der Verfassung und die Minderheitsrechten durch das Bundesverfassungsgericht gegenüber der durch die politischen Mehrheiten im Parlament bevorzugt.Das Konzept der Verfassungswandlung bzw. des Verfassungswandels versteht die Norm als Dogma, als etwas das fixiert und unveränderlich ist. Heutzutage ist unter Berücksichtigung der Idee der normativen Verfassung das Konzept der Verfassungswandlung mit dem demokratischen Ideal inkompatible und irrelevant für die normative Theorie der demokratischen Verfassung. Eine pluralistische und wandlungsfähige Verfassung, die nach Offenheit für die politische Debatte in Zeit und Raum strebt, sollte konsequenterweise ihre Konkretisierung anhand der Realität und dem demokratischen Willen zulassen. Das Verfassungsgericht wandelt den Sinn der Norm nicht; die Norm ist und bleibt dieselbe: Ontologisch ist sie dasselbe Objekt, da die Norm, wenn man sie interpretiert, ihre essentiellen Eigenschaften nicht verliert. Da es nur darum geht, Änderungen – oder wenn man so will: den Wandel – festzustellen, dann ist das Konzept des Verfassungswandels allein für historische Recherchen oder eine soziologische Perspektive relevant. Zur Rechtsdogmatik und Normensetzung trägt das Konzept des Verfassungswandels nichts bei und führt eigentlich zu einer unnötigen Diskussion.

Es wird hier behauptet, dass das Konzept des Verfassungswandels mit einem demokratischen Konstitutionalismus nicht kompatibel ist, da die Verfassungsdogmatik des Grundgesetzes der Bundesrepublik Deutschland sowohl als organisatorische Norm als auch als Werteordnung einer pluralistischen Gesellschaft verstanden wird. Wer behauptet, dass man, um die Verfassung zu interpretieren, als einzige Methode die Subsumtion benutzen sollte, wird ganz sicher die Hermeneutik als ein Mittel, um die Inhalte der Normen zu wandeln, ablehnen.

8.

Shu-Perng Hwang (Institutum Iurisprudentiae, Academia Sinica / Taiwan)

Zur Inhaltsbestimmung des Gesetzes unter Ungewißheitsbedingungen

Abstract:
In herkömmlicher Hinsicht richtet sich der Inhalt des Gesetzes vornehmlich auf dessen rechtsstaatliche Aufgabe der Freiheitsgewährleistung. Besonders im Rahmen eines materiellen Rechtsstaates wird die materiell-inhaltliche Ausrichtung der Gesetzgebung an einer höheren Normenordnung mit Nachdruck hervorgehoben. Im Zeitalter der Ungewißheit aber fragt es sich, ob die Freiheitssicherung immer noch im Rahmen der klassischen, die materiell-inhaltliche Vorbestimmtheit des Gesetzes voraussetzenden Rechtssicherheit zu verwirklichen ist. Mit Blick auf die erhebliche Dynamik sowie hohe Komplexität der technischen und wissenschaftlichen Entwicklungen erwächst zuallererst der Zweifel, ob und inwiefern der Gesetzgeber noch mit hinreichenden Sacherkenntnissen materiell-inhaltlich bestimmte und vollständige Vorgaben aufstellen kann. Daher überrascht es nicht, daß besonders im Rahmen des Umwelt-, Technik- und des Telekommunikationsrechts die behördliche Ausgestaltungsfunktion überwiegend im Vordergrund steht. Beim Schwerpunktwechsel von der Inhaltsbestimmung des Gesetzes zur Inhaltsergänzung durch die Verwaltung kommt allerdings das Problem kaum in Betracht, ob diese Entwicklungstendenz zugunsten der Exekutive nicht zur Freiheitsbeeinträchtigung führen würde. Ausgehend von dieser Problemstellung versucht dieser Beitrag zu zeigen, weshalb und wie im Streben nach der materiell-inhaltlichen Vorbestimmtheit des Rechts unter Ungewißheitsbedingungen die freiheitssichernde Funktion des Gesetzes in Kauf genommen wurde. Dadurch soll verdeutlicht werden, was das Gesetz beinhalten soll, um seine rechtsstaatliche Aufgabe der Freiheitsgewährleistung auch unter Ungewißheit zu erfüllen.

9.

Andreas Krell (Federal University of Alagoas / Brazil)

Diskussionswandel über juristische Hermeneutik: Voraussetzung der Ziele des Sozialen Umweltstaates in Brasilien

Abstract:
Die Garantien des demokratischen Rechtsstaates durch die Verfassung Brasiliens von 1988 sind eine wichtige Voraussetzung zur Entwicklung der Strukturen des Staates, der auch zukünftig eine aktiv-proeminente Rolle übernehmen muss, um die von der Globalisierung verstärkten sozialen ökologischen Probleme zu vermindern. Die Kombination konstitutioneller Detailregelungen und weitreichender Klagerechte ermöglicht die gerichtliche Überprüfung fast aller politisch relevanten Entscheidungen. Gerade in den Bereichen Umweltschutz und Sozialleistungen, wo die individuellen und kollektiven Rechte ausgiebig positiviert wurden, erscheint eine verstärkte Judizialisierung weniger als Irrweg in Richtung Jurisdiktionsstaat als eine Etappe zur politischen Bewusstseinsbildung der Gesellschaft. Der Umfang dieser komplexen sozialen Herausforderung steht jedoch (noch) in einem Missverhältnis zum Fachwissen der Richter und der von ihnen gewöhnlich angewendeten Methoden zur Auslegung der einschlägigen Rechtsnormen. Die akademische Diskussion über die Interpretation des Rechts beschränkt sich größtenteils auf Dispute bzgl. philoso-

phischer Hermeneutik, Sprachtheorie, Argumentation, Systemtheorie usw., die allesamt die angebliche Nutzlosigkeit der traditionellen juristischen Methoden verkünden. Dabei wäre gerade eine Vertiefung diverser Fragen im Bezug auf eine Umformung und Anreicherung der klassischen Auslegungslehre vonnöten (Kaufmann, Esser, Kriele, Hassemer, Ricoeur), um der rechtsanwendenden Praxis brauchbare Lösungsansätze zu liefern.

10.

Hattori Hiroshi (Research Fellow of Japan Society for the Promotion of Science / Japan)

1953 – ein Markstein der juristischen Methodenlehre in Japan und Deutschland

Abstract:

Vergleicht man die Entwicklungen der juristischen Methodenlehre in Japan und Deutschland, so kann man neben vielen Unterschieden eine interessante Gemeinsamkeit feststellen. In beiden Staaten fanden 1953 unabhängig voneinander zwei Ereignisse statt, die zu Marksteinen in der Methodenlehre beider Staaten werden sollten. In Japan hielt der Zivilrechtler, Saburo KURUSU anlässlich der Tagung der Japan Association of Private Law ein Referat, welches den sog. Rechtsauslegungsstreit auslöste. In Deutschland hielt Harry Westermann an der Universität Münster seine Rektoratsrede, die seinen Ruf als Pionier der Wertungsjurisprudenz begründen sollte. Zwischen beiden Ereignissen bestehen zunächst äußerliche Parallelen, denen es sich nachzugehen lohnt, z.B. die Generation der Beteiligten oder das Bewusstsein, eine frühere Methodenlehre zu bewältigen. Interessant ist auch die Frage, warum diese Ereignisse gerade 1953 stattfanden. Um sie zu beantworten, sollen ihre Hintergründe und Umstände untersucht werden, die bislang nur wenig beleuchtet worden sind. Kurusus Referat ist vor dem Hintergrund der Unrechtsdebatte zu sehen, die m. E. in Zusammenhang mit der „infiniten Auslegungslehre“ steht. In Bezug auf Westermann ist u.a. die Bedeutung von Wilhelm Sauer hervorzuheben, der vielleicht als erster die Methodenlehre Westermanns als „Wertungsjurisprudenz“ bezeichnet hat.

In meinem Referat versuche ich, unter Berücksichtigung dieser Hintergründe den bislang ungelösten Fragen der damaligen Methodenlehre nachzugehen und neue Erklärungsansätze zu präsentieren.

Session 2b

11.

Qingbo Zhang (Faculty of Law, Macau University of Science and Technology, Macau / China)

Judicial Control, Good Unconstitutionality or Unwritten Constitution. How to deal with the antipode between the Text of Chinese Constitution and the Reality?

Abstract:

The Chinese Scholars are always confronted with the question, whether the Chinese Constitution is effective. Some of them pledge to set up the judicial control system, which can prevent the unconstitutional events from happening. The others think that due to the imperfection of the text of Chinese Constitution there should be some good unconstitutionality according some standards from or above the Constitution. Recently, a new approach tries to define some kinds of the praxis in contrast to the Constitution as unwritten Constitution. The article wants to find a solution towards the issue and explain how to deal with the antipode between the text of Chinese Constitution and the reality concerning the Chinese Constitution.

12.

Rares-Sebastian Puiu-Nan (“George Baritiu” University / Romania)

On Suprainterpretation Concept And Lawyer’s Work

Abstract:

My paper work proposes some reflections on the hermeneutical approach and on Umberto Eco’s suprainterpretation concept in particular.

It covers the connection of this concept with real legal facts and lawyer’s everyday work experience. Thus we proposed following the next few steps:

The Hermeneutics – Theory of understanding

According to Umberto Eco, the suprainterpretation of a text means to explore the fact that, undoubtedly, a certain point of view has a relation of analogy, continuity and similarity with any other (point of view). That implies meeting certain criterias of suprainterpretation. In this framework, the states have tried to defend the citadel of reasonable text against the aggressive incursions resulted from various unforeseen contexts.

The prospect of the legal interpretation speech contains some criterias different from all the legal systems. In this context, Eco’s concept can provide a system of selectivity and reasonableness.

13.

Oskar Pogorzelski (Jagiellonian University / Poland)

Modelling of concepts in criminal law using cognitive linguistic.

Abstract:

This paper presents certain concepts of actions forbidden by criminal law as cognitive radial categories which are based on the concept of prototype. Categories having such structure occur not only in every day life but also in law. It is well known that classical categories, based on necessary and sufficient features which can be assigned to all elements belonging to such category, are dominating in our every day perception of the external world.

However, as the law refers to many different phenomena, it is hard to be framed into stiff classical categories. It poses a problem for criminal law and in particular for the fundamental principle of nullum crimen sine lege, which requires a precise description of any action forbidden by the law. Anyhow, as it appears the actions forbidden by criminal law are frequently referred to in the criminal code by use of certain descrip-

tions which rather refer to a prototype of a radial category, than to a classical category.
Actual actions frequently depart in certain respect from such prototype, but nevertheless are assigned to the radial category defined by such prototype. By analysis of several examples, the paper shows the mechanism of such assignment.

WORKING GROUP

WG 3 Legal Judgement	
Session 1	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 0.454
Chair	Travessoni, Alexandre (Belo Horizonte / Brazil)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	IG 0.454
Chair	Yang, Bei (Beijing / China)

Lectures:
Session 1

1.

Maria Clara Calheiros De Carvalho (University of Minho Law School / Portugal)
Justice online: a new kind of justice?
Abstract:
It is a fact that mediation and other alternative dispute resoltion means are becoming increasingly popular. Actually, governments are encouraging people to use them instead of going to Court, as they are quicker, cheaper and more informal than trials, and can be implemented using internet. The author focus on the analysis of the structure and purposes of mediation, in particular. The paper aims to discuss and understand what kind of justice, if any, is offered by alternative dispute resolution.

2.

Torquarto Castro Jr. (Federal University of Pernambuco / Brazil)
"Exception" or "Equity"? The power of "miracle" in legal decision
Abstract:
Carl Schmitt asserted that all significant concepts of the theory of State are secularized theological concepts. One concept, however, which does not belong to Legal or State theory, but only to the realm of Theology, is that of "miracle". To Schmitt, however, this would also find a correlate in the idea of the decision on a "case of exception". In such context, he who bears sovereignty could miraculously decide both beyond and through the rule, as if it empowered him to do so, when, by definition, it could never. This insightful argument circularly reinforces Schmitt's perspective that Law is essentially Politics (and this, persuasive gathering of friends against foes). In spite of the richness of the idea for the sociology of Legal concepts, it seems correct to criticize it. It seems possible to show that Schmitt's image tries to explain something from the point where it really ceases to be what it is, thus failing. If metaphorically the Law was to be compared to the King's garments (the Law would dress Politics, but not change it), than Schmitt would be trying to understand the King's clothes from his very nudity. Schmitt's expedient makes sense in a measure, but only for the very rudiments of an understanding of what "dressing" here means. It is far from capable to explain what power it might have. On the other hand, if something was to be rendered miraculous, to the point that it could explain the persuasive power of such rhetoric, this would be the concept of equity, in the sense of the Aristotelian concept of epieikeia: a decision, which is literally against a statute, succeeds to be deemed lawful and is so generally accepted. That this discursive rupture of ostensive language is not seen as such is something of a wonder and shows what all such "dressing" is about.

3.

Alexandre Travessoni (Federal University of Minas Gerais [UFMG] + Pontifical Catholic University of Minas Gerais [PUC-MG] / Brazil)
Discretion and the claim of correctness: effects of the relation between law and morality in legal adjudication
Abstract:
The essay investigates the problem of legal discretion and its relations to descriptive and normative legal theories. It starts by investigating Hart's and Kelsen's legal theories and asserts that positivist models such as Hart's and Kelsen's were not only models of and for rules (as Dworkin believed, especially regarding Hart's theory), and that even if they were, that would not be discretion's main cause, for rules provide a smaller playroom than principles. It reaches then the partial conclusion that discretion's main cause in Hart's and Kelsen's theories was not the absence of principles, but rather the absence of an interpretation theory. After that it investigates the relation between discretion, legal interpretation theories and the descriptive-normative character of legal theories. It does that by using Alexy's concept of law, in which law has a dual nature, namely a factual and an ideal. It tries to show why descriptive theories can only diagnose discretion, but have no proposal to minimize it. Then it tries to show why solving or at least minimizing discretion is necessary, and that only a normative theory can be a good candidate to this task. But it recognizes that being normative is not enough to fulfill it; in other words, it asserts that being normative is a necessary condition to minimize discretion, but not a sufficient one. Finally it tries to show how the ideal dimension of law, which raises a claim of correctness, is connected to normative theories.

4.

Danielle Anne Pamplona + Amelia Sampaio Rossi (Pontifical Catholic University of Paraná / Brazil)
The knowledge of judges of disciplines outside the law and their responsibility for the image of the Judiciary Branch

Abstract:
There is some research showing that there is a significant increase in the number of lawsuits brought to the Judiciary in Western countries. This observation is accompanied by the realization that there is a deterioration of the image of this Branch, which leads to questioning about the causes of such a negative image of the Judiciary. Research has pointed to citizens' discredit in relation to the Judiciary and their frustration on the lawsuits resolution by the courts. There are many angles under which we can evaluate the problem of the image of this Branch. The most common way faces technological improvements and the numerous innovations that allow a larger organization, optimization of time and routine procedures, with the negative image of this Power. However, there is still room to follow a different path and inquire about the activity of the judge and how it contributes to the strengthening or deterioration of the image of the Judiciary. The present work searches adequate judges' profiles to the expectations of societies, even though the need for them – especially in Western countries – to conform to government programs that seek legal security and uniformity of judicial decisions at any price. The search focuses on the training of magistrates with a focus on non-legal issues which can assist in the understanding of society, philosophy, economics, politics, among others, improving the quality of their results and therefore, improving the image of the Judiciary Branch.

5.

Oscar Perez De La Fuente (Carlos III of Madrid University / Spain)

What kind of theoretical agreements are needed in resolving judicial cases

Abstract:
"Should judges be philosophers? Can judges be philosophers?" The answers that are given to these questions define two distinctive positions. First, the Law as integrity approach. In Dworkin's view, judges, to resolve judicial cases, must undertake an interpretative exercise in terms of value. Values and principles, and conflicts between them, are the vocation of moral and political philosophers. The moral reading of the Constitution is a task of judges and philosophers that share topics and interests for concepts and values. Dworkin views favourably the scope and potentiality of the field of Philosophy of Law. In this, he thinks that the Law Faculty is a better place for studying political and moral philosophy than others. Second, the Legal pragmatism approach. In the **Posner's** view, the Moral Theory, the intellectual product of an academic morality, is a useless tool for a judge. The pragmatic outlook of Law is characterised for being practical, instrumental, forward-looking, activist, empirical, sceptical, antidogmatic and experimental. The judges, then, should have an instrumental view that their main aim in a case is appropriately answering the question, What works? From this view, It's interesting the Sunstein's Incomplete Theorized Agreements approach.
In this article, I wish to analyse the appropriate role of Theory for resolving judicial cases.
Examined is the need for some kind of theoretical basis, in both the Law as integrity approach and the Legal pragmatism approach, in two specific cases: a) The decision of the European Court of Human Rights on a gipsy widow's right to a state pension; b) The controversy surrounding the rights of irregular immigrants to public services and state benefits.

6.

Hans-Rudolf Horn (Instituto de Investigaciones Jurídicas der Universität Mexiko Stadt / Germany)

Judicial Review in Democratic Systems

Abstract:
When judges are authorised to invalidate legal acts for being unconstitutional, the competence of the legislator is directly concerned. The question raises, if thus judges do not usurp legislative power. In the traditional doctrine of the separation of powers the parliament is the first power, based on its direct democratic legitimacy. Yet cancelling legal acts completely or partially does evoke more irritations in the public that could be expected. The people seem to have more confidence to the assumed impartiality of the judges than to the results of the parliamentary work which seems to be dominated by the struggles of the parties. The necessity of judicial review mainly is based on the consideration that individual rights even in an authentic democratic system may be violated by a legal act of the parliament. In this case constitutional courts have the very task to defend individual rights, principles of liberty and authentic equality. Therefore it is justified to speak of the "jurisdiction of liberty", as the Italian constitutional expert Cappelletti has said. But also without such legitimacy in many countries the Courts intervene in the field of the legislator. The courts themselves discuss the limits of judicial interventions, emphasising themselves, that they have to respect the legislative decisions principally, but do not abide always by their own proclaimed principles. In Spanish recent publications it is spoken of the principle "in dubio pro legislatore", (in case of doubt in favour the legislator), reminding of "in dubio pro reo", in order to treat the legislature power not worse than the defendant in a criminal process.

Session 2

7.

Bei Yang (Law Faculty, University of International Business and Economics / China)

The Role of Reasonableness in Law

Abstract:
Reasonableness plays a big role in law. On the one hand, it serves as an important legal principle in a lot of legal fields. On the other hand, the reasonableness could be taken as the fundamental value that makes legal decisions acceptable in the perspective of legal argumentation.
This paper aims to describe the role of reasonableness in law and find the real reason of it. By examining the "duty of

reasonable care" in tort law and criminal law, the "reasonable usage" in intellectual property law, we might achieve the meaning and position of reasonableness in law. By going through the making process of legal decisions, the role of reasonableness as the fundamental value will be proved.
The reason of these will be analyzed in historical and philosophical way. The history of justice will show that reasonableness has been a major criterion used by judges of all times. Moreover, reasonableness has a close relationship with legality and legitimacy. Reasonableness is not the opposite of legality or legitimacy. To some degree, they are compatible. It is the coexistence of reasonableness and legality and legitimacy makes legal decisions acceptable, moreover, makes law reliable.

8.

Anthony J. Connolly (Law School Australian National University / Australia)

Judicial Understanding and the Limits of Conceptual Difference

Abstract:
Occasionally, in pursuing their adjudicative duties over the course of a legal hearing, judges are called upon to acquire new concepts – that is, concepts which they did not possess at the commencement of the hearing. In performing their judicial role they are required to learn new things and, as a result, conceptualise the world in a way which differs from the way they conceived of things before the hearing commenced. Some theorists have argued that either as a general matter or as a matter specific to judicial practice and the legal context, judges are, with some degree of necessity, incapacitated from acquiring certain kinds of concepts. Such concepts include those possessed by the members of culturally different minority groups.
Drawing on contemporary trends in analytic and naturalistic philosophy of mind, this paper explores the extent to which a judge might be incapacitated from acquiring new concepts over the course of a legal hearing. In so doing, the paper provides a theoretical account of the cognitive and practical process by which new concepts are acquired by judges in that context, identifying those factors which condition the success or failure of that process and elaborating a theoretical framework for identifying, critically reflecting upon and reforming those aspects of the normative regime presently regulating legal hearings which facilitate or obstruct that process.

9.

Anna Kalisz + Adam Szot (University of Sosnowiec / Poland + University in Lublin / Poland)

Mental models theory and a paradigm of law application process

Abstract:
Aapplicatio est vita regulae
The paper is a modest attempt of introducing some elements of analytic philosophy to jurisprudence (legal theory and logics). Mental model – generally speaking – is a representation of objects and its connections which are viewed as a sample of given phenomena (classes). Thus, creation of mental models turns into generalization of individual subject and phenomena. This model is a representation involving the presentation of a finite number of objects and their relations. These items are presented in concreto, but treated as a sample of the objects of a certain type
The aforementioned introduction of an idea of mental models to the theory and practice of decisional process results with numerous detailed considerations that concern: objective truth versus judicial truth, legal presumption and definitions as well as a question of decisional discretion while applying general clauses. The common grounds for such diverse matters is a reduction phase of decisional process.
The goal of the paper is to answer the question, whether the Philip Johnson-Laird's mental models theory is applicable to a paradigm of a decisional process and to what extend it is able to illustrate of legal reasoning in its narrow sense – as psychological processes undergone in reaching the legal decision.

10.

Antoinette Muntjewerff (University of Amsterdam / The Netherlands)

An explicit model for learning to structure and analyze decisions by judges

Abstract:
The law that applies in a legal system such as the Dutch legal system consists of general rules that are determined or acknowledged by authoritative bodies. The two most important authoritative bodies within the Dutch legal system are the legislator and the judge. While it is obvious the legislator determines rules that apply in general, this is more complicated with judges. A judge has to decide in individual cases, she has to construct a legal solution based on the facts of the case and the applicable legal rules. In the majority of cases that come before the court, a judge formulates a decision that applies only to the case at hand. These decisions do not add to the body of applicable rules in the legal system. However, in cases where a judge first has to construct an applicable rule, before being able to decide the case on the basis of this rule, we have a different type of decision. The rule constructed by the judge to decide the case, may add to the body of applicable rules in the legal system. Legal practitioners and legal scientists need to have knowledge of the general rules that apply in the legal system. This involves both knowledge of the legislation and knowledge of the decisions by judges that function as general rules of law. Law students preparing themselves for the legal profession of course also need these kinds of knowledge. They have to acquire knowledge about the role of decisions by judges in the legal system, and they need to understand the two categories of decisions by judges. A student has to have knowledge about where to look for decisions of the second category, understand the structure of decisions and learn to determine what makes a decision relevant to the body of applicable rules in the legal system. Therefore it is necessary that students practice reading and analyzing de-

cisions by judges. However, this is not a trivial activity. Learning to read and understand a legal decision is difficult. The complex structure and the incomplete content make it difficult to reconstruct the line of argumentation. The question is how we can support law students with reconstructing the argumentation in the decision. The answer has been sought in a rational reconstruction of the legal knowledge and legal reasoning involved in a decision. This reconstruction is then used as a model to instruct a law student how to structure and analyze a decision. This attempt resulted in the instructional environment CASE. However, the problem with reconstructing the legal knowledge and legal reasoning necessary for the construction of a model is that often within the text of the decision the line of argumentation remains implicit and incomplete. This makes it difficult and sometimes even impossible to fully reconstruct the reasoning process. In this paper we describe our attempt to find a solution to this problem.

WORKING GROUP

WG 4 Legal Argumentation	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 0.454
Chair	Oh, Byung-Sun (Seoul / South Korea)

Lectures:

1.

Felix Gantner (Austria)

Die Interpretation von Rechtstexten und der Stufenbau der Formatierungen

Abstract:

Der Einsatz von Textverarbeitungsprogrammen hat die Ansprüche an Texte verändert. Sie werden nicht mehr nur geschrieben, sondern „gestaltet“. Dies hat auch Auswirkungen auf die Gestaltung von Rechtstexten.

In Österreich unterschied der Gesetzgeber 2003 in der Novellierung des Bundes-Verfassunggesetzes (B-VG) und des VfGHG zwischen fett gesetzten Textteilen im Verfassungsrang und einfach gesetzlichen Texten, die ebenfalls fett gesetzt wurden. Die Folge waren Formatierungsanweisungen („fett, normale Laufweite“) als Teil der österreichischen Verfassung.

Der Gesetzgeber ordnet der Formatierung eine besondere juristische Qualität zu. Diese ist daher als Erweiterung des Stufenbaus der Rechtsordnung anzusehen. Der Stufenbau der Formatierungen ist im Rahmen der Auslegung von Rechtsvorschriften zu beachten.

An Hand von Beispielen aus Gesetzestexten, die Formatierungen des Textes enthalten, werden Konsequenzen für die juristische Argumentation dargestellt.

2.

William Idowu (Obafemi Awolowo University / Nigeria)

For Each a Crumb of Right, For Neither the Whole Loaf': African Legal Thought and the Jurinomics of Reconciliation

Abstract:

Before now, modern jurisprudence seems to be obsessed entirely with a purely speculative concern over what the nature and subject matter of law is and how it can be distinguished from other cultural and normative institutions, such as morality, religion, in human societies. The central controversy centers on the so-called objectivity of law. Such analyses led to the belief, on one hand, by legal naturalists, that law is a purely normative and idealistic enterprise without due application to world of empirical reality and, on the other hand, the belief, by legal positivists, for instance, that law is a purely descriptive, scientific and empirical enterprise without any attachment to abstraction and transcendental reality.

However, in recent times, contemporary jurisprudence seems to have introduced a shift away from this speculative concern to a properly scientific and empirical angle to the understanding of law. One of the very important approaches is what is termed “an economic” analysis, interpretation, and application of legal concepts into mainstream jurisprudence. Richard Posner (1973), Lewis Kornhauser (2005), Kaplow and Shavell (2002), Coleman (1988), and Jones (1983), to mention a few, are some of the excellent and painstaking analysis demonstrating the economic side to legal concepts and ideas. This possibility and practice is what I have personally termed jurinomics.

Given this background, this paper is interested in exploring the jurinomics of African legal thought. The paper discovers that reconciliation, consensus and restoration are pertinent jurinomic concepts in African legal thought. The paper argues that this possibility is so because, apart from being revered legal concepts, they also carry and embody the economic backside to African legal thought especially in matters of adjudication. The paper further argues that the jurinomics of African legal thought is, in many cases, proverbial and contained in the terse but profound expression that ‘for each a crumb of right, for neither the whole loaf’. Apart from providing a new orientation in jurisprudential studies, the nuances provided by this economic orientation in jurisprudence also helps in transcending the myopic and unenlightened remarks about African legal thought.

The paper concludes that African usage of the concepts of crumb, the loaf and the whole and, such other words, have very interesting economic implications in the understanding of law given the African milieu. In doing this, it is my view that apart from stressing the importance of economic jurisprudence as an innovative approach in the study of law, it equally foregrounds the importance of exploring cultural jurisprudence as an emerging front in jurisprudential studies.

3.

Nathália Lipovetsky e Silva (Federal University of Minas Gerais – UFMG / Brazil)

The place of philosophy of law between justice and efficiency

Abstract:

The discussion around the complex relation between the concepts of efficiency and justice goes a long way and brings several arguments. One of them, and it must be rejected in advance, is that public law should be concerned about justice while private law should be concerned about efficiency. The legal system is one and it is unacceptable that the balance between conflicting laws is found with such a division. Legislators and judges are responsible for finding the balance and no theory can just postulate that the balance will always be found with a simple cut between public and private law to distinguish when the criteria should be justice and when it should be efficiency. Besides, it is unbelievably reductionist to confine the discussion to single goals as efficiency and justice, when there is so much more to look upon like certainty, human dignity and human rights. Moreover, even if the discussion is kept between justice and efficiency only, it is the easiest thing to demonstrate that they are not mutually exclusive. The economic analysis of law, Posner said it himself, has limits and philosophy of law plays an extremely important role in this discourse (that must be interdisciplinary) to clarify that there can not be a goal other than the realization of human rights and that there can not be justice if it is not shared for all mankind.

4.

Jorge Mena (National Autonomous University of Mexico / Mexico)

The use of politic science methods in jurisprudence

Abstract:

The aim of this paper is evalute the posibility of measuring principles in law. For the political science the concepts can be "operationalized", the definitions were repleced by measuring.

In legal theory, one of the most important isssues is the posibility of the enfoncerment of principles, but the major critique is the subjetivity of that pretension. Some of the proposals, like Alexy's formula, have similitudes and differences with political science measuring.

5.

Matti Ilmari Niemi (School of Business, Lappeenranta University of Technology / Finland)

Objective Legal Reasoning – Is It Possible?

Abstract:

Discussing the objectivity of legal knowledge is a way to outline the relation between the sentences of legal dogmatics and reality and the nature of legal reasoning.

The fundamental question is: Is it possible to combine the perspective of a particular person in the world with an objective view of the same world (Nagel).

There are different ways to understand objectivity: three conceptions introduced by Marmor and a fourth by Rawls. The first and strongest conception can be called the metaphysical one: objectivity means correspondence between a statement and its object in the discernible world. This conception is uniform with philosophical naturalism. It is not acceptable in the frames of legal dogmatics.

The second and weaker conception can be called the semantic conception of objectivity. A statement is objective if it is a statement about an object, and it is subjective if it is about the subject making the statement. This conception is not helpful, either.

The third conception can be called the logical conception of objectivity. A statement is objective if it has a determinate truth value. An objective legal statement provides information about the legal order of a society as a fact-based institution. Notwithstanding its attractiveness, I abandon it. All the three conceptions provided by Marmor are too strong. The fourth and weakest conception introduced my Rawls can be called the constructive conception of objectivity. It focuses our attention on the criteria of reasoning instead of presumed entities, objects or truth conditions. This conception is consistent with the nature of legal reasoning: an objective statement is at the general level and free from particular interests. It is possible to see objective legal reasoning in this sense.

6.

Byung-Sun Oh (Sogang University Law School / South Korea)

Relevance of Moral Sense to Legal Reasoning: A Critical Appraisal of Korean Debate

Abstract:

Recently a leading Korean Constitutional Court justice expressed an opinion that the meaning of language of "judge's conscience" denotes a judge's professional conscience, not a judge's individual conscience formulated on the basis of personal worldview and value structure. When the meaning of the Article 103 of the Korean Constitution "Judges shall rule according to their conscience and in conformity with the Constitution and the statutes" is at stake, some of progressive young judges try to interpret the judge's conscience as a personal conscience. Progressive judges explicitly imbue their decision with value judgements derived from personal conscience in hard cases where the conflicting value judgement is involved and the languages in the statute are not clearly indicative.

Because of these apparently prejudicial judgement derived from either judge's hunch or ideological bent, there arise criticisms against the way of understanding the meaning of judge's conscience as a judge's personal one. But the alternative way of understanding the meaning of the judge's conscience as a judge's professional conscience is not also clear.

With regard to this role of conscience in judge's adjudication in hard cases, a lesson may be drawn from a traditional ethical debate on the relevance of moral sense to judgement, which had been much explored in Korean Confucian moral discourse. On the role of moral sense in establishing judgement, debates centered on the operation of four different kind of moral sense, such as commis-

eration, shame, modesty, and discernment. These four kind of moral sense has been known respectively as the beginning the four virtuous judgement, such as humanity, righteousness, propriety, and wisdom. I shall investigate whether, if any, there is any relevance of these four kind of moral sense to contemporary context of understanding the meaning and application of judge's conscience.

7.

Julio Oliveira (Pontifical Catholic University of Minas Gerais; Federal University of Ouro Preto / Brazil) + Rodolpho Sampaio Jr. (Pontifical Catholic University of Minas Gerais / Brazil)

Good fences make good neighbors: an investigation on the place of law and its limits in the context of the Brazilian private law movement Escola do Direito Civil-Constitucional (Private-Constitutional Law School)

Abstract:

As Martha Nussbaum observes (in Poetic Justice: the literary imagination and public life), the literary imagination is a part of public rationality. It is not the whole of public rationality. But as a part, it plays a fundamental role. It is an ingredient of an ethical ground that sustains the universe of rules and formal decision procedures (the universe of the law). The impoverishment of this ground necessarily implies in a correlate impoverishment on the field of law. Law cannot be separated from ethics. Notwithstanding, today, there is a movement on Brazilian private law towards a mischaracterization of some important institutes of private law in the name of some not well understood constitutional ethical principles. This movement is known as Escola do Direito Civil-Constitucional (Private-Constitutional Law School). It is as if the law should carry the responsibility of being the source of every ethical (and theological) virtue. It is, of course, a movement in which both ethics and law are misunderstood. One thing is to know that law cannot be separated from ethics. This is right. A different thing is to think that law must command every ethical or theological virtue. This is a mistake. And even worse, it is a mistake that signifies a threat both to ethics and law. In this paper, we will use an analysis of Robert Frost's poem Mending Wall as a key to investigate and criticize two examples of the oblivion of the right distinction and the right relationship between ethics and law proposed by this new Brazilian private law movement.

Mending Wall is a long one-stanza poem published in 1914. It is written in blank verse and contains a narrative-like style. It opens with an intriguing verse: "Something there is that doesn't love a wall" (this same verse will appear once more in line 35). At this point, by the reading of the next nine verses, it seems to be that it is nature that doesn't love a wall. The narrator observes that there are gaps made by hunters and his dogs. But he also observes that there are gaps in the wall that were not made by men. Those gaps seems have been made by nature. That same verse appears again in line 35. But at that point, considering the previous verses, in which the narrator expresses his doubts about the reasons for the very existence of walls and relates his dialogue with his neighbor, it seems now that it is the narrator himself who doesn't love a wall. It seems that the narrator does not love the wall and wants it down, although his neighbor insists that "good fences make good neighbors". The statement "good fences make good neighbors" appears two times as well. In both occasions, it is the neighbor's statement. In fact, it is all the neighbor says. It appears for the first time in line 27, and a second time in the last line of the poem. Its first appearance is just an expression of an old proverb. That casualness fades away when it appears in the closing of the poem. At that point, the narrator is already conscious about the power of violence that is, at the same time, encapsulated and frozen in the fence. So, although it seems that the theme of the poem is a simple criticism of the existence of walls, a deeper interpretation may show that it is not. What does not love a wall is love. Love does not accept fences. As Diotima once taught to Socrates, love wants union. The lover wants to be one with her/his beloved. But if it is true that love does not love a wall, it is also true that the destruction of a wall does not create love. Put in a different way: bad fences (or no fences at all) do not make good lovers, but certainly bad fences (or no fences at all) make bad neighbors.

So, in the world of human affairs, it must be a place for law (represented by walls) as a condition for the virtue of justice, and it must be a place for love, as a complete different virtue. Although today, in Brazil, the Escola do Direito Civil-Constitucional (Private-Constitutional School of Law) concentrates its efforts in trying to make us believe that the law must be a condition not for the virtue of justice, but for the virtue of love. It is as if love could be commanded by law. If the narrator of Frost's poem, in a narrow view, may be pictured trying to put the wall down in order to create a kind of a new society in which love would be the only virtue and the only law, the Escola do Direito Civil-Constitucional (Private-Constitutional School of Law), in a more audacious project, goes a different way: it wants to create a love society by law. This paper will present two examples of this project.

The first example will be called "the right to be loved". This expression here is not a metaphorical expression. The Escola do Direito Civil-Constitucional (Private-Constitutional School of Law) thinks that a person has a right of being loved and, as a logical consequence, thinks that some other person has a correspondent duty of loving. If the person who has the duty of loving fails in performing his/her legal obligation, he/she can be condemned to pay a monetary compensation to the one who was left without his/her due love. This absolute nonsense is what has been contemporarily defended in various fields on the Family Law by the Escola do Direito Civil-Constitucional (Private-Constitutional School of Law). Its roots are easy to trace. Once love (taking in modernity not as a virtue but as a person sentiment

of affection) is established as the sole basis for the family institution, since it is possible to detect this feeling, it is possible to detect the constitution of a family. Institutes like marriage, for instance, are in a process of loosing its formal elements (the effects of this loss of formal elements is paradoxical: today, in Brazil, getting a divorce is quite an easier task for formally married couples than for those who have chosen not to marry formally). So, if it is possible to state that love bonds are important in the institution of family, it is not correct to conclude that there should be a legal duty to love. But this is just the conclusion put forth by the Escola do Direito Civil-Constitucional (Private-Constitutional School of Law). In the relationship between parents and children, the duty of loving was added to the traditional duties of respect and mutual assistance. Parents must, then, provide not only for material and traditional moral needs of education for their offspring, they are also obliged to provide love. The Escola do Direito Civil-Constitucional (Private-Constitutional School of Law) talks about "affection/love desertion", which is thought as a cause for a monetary compensation. It is not said how a monetary compensation (and how much) can be a proper compensation for the alleged lack of parental love. But it seems not to be a problem. For the Escola do Direito Civil-Constitucional (Private-Constitutional School of Law) what matters is the institutionalization of love by law.

The second example will be called "going to a private school without paying for it". One of the main theses proposed by Escola do Direito Civil-Constitucional (Private-Constitutional School of Law) is that the contract, instead of a manifestation of the person's autonomy, must be understood as an instrument to achieve solidarity (another kind of love) in society. So, a contract that is not a manifestation of solidarity has its obligatory power threatened. This way of reasoning has achieved the status of a federal statute in Brazilian law. The practical effects can be seen in various places. It can be seen in the contracts between private educational institutions and its students. A student who stops paying his monthly fees has the right of going on assisting classes and performing all educational activities until the end of the class period. The argument behind this right is that such a thing as education cannot be subordinated to such a thing as honoring contracts. As it is understood by the Escola do Direito Civil-Constitucional (Private-Constitutional School of Law), the individualistic economics interests of the private schools must not be allowed to overcome the right of a person to be educated in a private school without paying for it. The quite paradoxical outcome of this statute is that, as recent researches shows, for a default percentage of 30.3, there is an increase of 15% on the value of the school monthly fees. As it is easily observed, the project of transforming contracts in an instrument for solidarity has achieved the goal of transforming good payers in compulsory helpers for bad payers. At the end, it is not solidarity. Its proper name is exploitation.

As Frost's Mending Wall helps us to see, if it is true that there is something that doesn't love a wall, it is also true that good fences make good neighbors. And still, it is important to understand that it is simply impossible expecting that law could be responsible for the implementation of the realm of love in this world. The purpose of law is quite more modest: its purpose is to make possible the existence of good neighbors.

WORKING GROUP

WG 5 Scientific Knowledge and Legal Decision	
Session 1	
Date	MON 15 AUG 2011
Time	14.30 h – 18.30 h
Location	IG 454
Chair	Leczykiewicz, Dorota (Oxford / UK)
Session 2	
Date	MON 15 AUG 2011
Time	14.30 h – 18.30 h
Location	IG 457
Chair	Rodriguez, José Rodrigo (São Paulo/ Brazil)

Lectures:
Session 1

1.

Gunoo Kim (College of Law, Seoul National University / South Korea)

What Jurisprudence Must Learn from History and Philosophy of Science

Abstract:
This paper argues that the so-called "replacement thesis", as proposed by the contemporary naturalized jurisprudents such as Brian Leiter, should be significantly modified. The replacement thesis requires that the necessary or essential features of the law provided by analytical jurisprudence be replaced by the contingent findings due to the corresponding naturalized jurisprudence. To support my argument above, I maintain that the methodologies of philosophy and science are continuous with each other. In doing so, I pay special attention to "thought experiments" as found in the history and philosophy of science (hereafter 'HPS'), and their common role in both sciences and philosophy in general. In my view, thought experiments typically employ a reductio ad absurdum to derive a certain conclusion at least about the way of our talking or thinking, or even the way the world is. So construed, the conclusion of the thought experiment is a priori in that it never derives from empirical data, while it is contingent in that it is not a logical truth that is totally immune to the demands of empirical science. As a consequence, the methodology of thought experiments plays a role in bridging the apparent gap between sciences and philosophy.
This line of argument exactly applies to the context of jurisprudence. Analytical jurisprudence and naturalized jurisprudence are continuous, so that naturalized jurisprudence cannot be done solely

by empirical investigations but requires conceptual or a priori business. In conclusion, for a jurisprudent, there is much to be learned from HPS, for it is replete with a variety of thought experiments, and one can find analogous cases of thought experiment and their role in jurisprudence.

2.

Dorota Leczykiewicz (University of Oxford / United Kingdom)

Law and Science in the Proof of Causation: Redefining the Boundaries between Law and Fact

Abstract:
The paper discusses the relationship between law and science in the context of establishing causation between a relevant factor (a breach of standard) and the harm suffered by the claimant. It analyses the use of scientific data in the proof of facts on which the action rests and considers problems which emerge in this context. They include conceptual difficulties about the subject-matter of proof, as well as the question of the evidential potency of scientific findings which offer only some, but not absolute, level of certainty. The response of the law to these problems may be twofold: the jurisprudential principles can remain unchanged and accept scientific facts as given, regardless of how much uncertainty is hidden behind particular scientific conclusions; or they can accept that scientific data can be tainted with some level of uncertainty and adapt the legal tests accordingly. The former approach masks the presence of uncertainty by expanding the province of fact, and portrays judicial decision-making as based on exceedingly idealised 'scientific truth'. As a result of this approach, judges do not have to explain how they deal with the limits of scientific knowledge. The latter approach, which admits the existence of uncertainty behind scientific conclusions, entails the creation of legal rules governing the proof of causation in order both to factor in the uncertainty and to allow exceptions to general principles in situations where fairness requires that it is the defendant who should bear the consequences of limits in scientific knowledge. The paper will assess which of these two approaches offers a better response to the use of scientific data in litigation.

3.

Yi Liu (Law School of BIT [Beijing Institute of Technology] / China)

Science as „Ideology" and Modern Chinese Law

Abstract:
In early stage of mordern China, „Sicence" was regarded as the most important value and idea of the West, it was called „Mr. Sai", which is the partial tone of science. Another important value is democracy, which was called „Mr. De". From then on, science was endowned with an ideological role. In another word, science means right and modern, and even just and holy.
Just because science is an ideological concept, „science" and „scientific" became universal and pragmatic. For exemple, „scientific outlook on development" is now the central political idea of the Party, but the „scientific" here just means right, has nothing to do with science itself. In a similar way, we can find this distance in law, such as „scientific legislation", that means making law correctly.
Another consequence of ideologicl science is that law was regarded from instrumental perspective. As same as science can be used to make aircraft and nulear weapon, law also was counted as the instumental of governing the society and people. For a long time, Chinese government uphold an idea of rule of law, but an idea of instrumentalism in law.

4.

Mariana Pacheco (Federal University of Pernambuco / Brazil)

On the excessive role of technocracy (from a gadamerian perspective)

Abstract:
The role of experts grows in the present time and that is, in part, justifiable: as complexity rises, the ones who deliberate feel the need of the help of those who have know-how in specific fields. The question that must be asked revolves around the type of expectations developed in modern societies in regards to what experts can do. Though specialization is not a peculiarity of our time (the process can be observed since human beings became sedentary); it has presently gained specific characteristics. Two aspects of modern life are particularly significant for the matter: (i.) the fact that the economic system is based on excitation of new needs (and no longer on the demand for satisfaction of needs); (ii.) the growing pursuit for total administration of conflicts. These factors are constitutive of what Gadamer sees as a great threat to our civilization: the excessive emphasis given in our times to the human capacity to adapt. What is demanded of individuals is the specific ability to make an apparatus function properly. Less resistance and more adaptability is requested, and because of that, autonomous thought – that is, free from functional determinations – is devalued. The threat we currently face is that the abilities of a good technocrat become the only qualities requested of those who are responsible for practical decisions (especially in politics and law). Technical reason (which requires know-how in a specific area and consists of choosing means to reach a previously established goal) cannot substitute practical reason, as the former requires adaptability to experience (not to an anticipated plan) and is grounded on solidarity.

5.

Karen Petroski (Saint Louis University School of Law / USA)

Making Public Meaning: The Legal Use of Technical and Textual Expertise

Abstract:
Legal systems' use of non-legal expertise, especially scientific expertise, continues to generate controversy despite reforms responding to concerns about expert bias and influence. This paper argues for a reconsideration of the ways non-legal expertise contributes to legal systems.

According to prevailing theories, the non-legal expert serves an epistemological role, helping legal actors reach true or justified conclusions. It is possible, however, to understand the legal use of non-legal expertise differently, as a technique for giving legal dispositions a form of legitimacy. Legal systems enlist experts to help shape legal products in a way that will make a variety of social actors willing and able to put those products to use. Through examples, I show how this process might be best understood not in terms of truth-seeking but as a matter of the extent to which legal systems' products can be integrated into existing systems of meaningfulness. The analysis suggests that the vocabularies most suited to clarifying the legal use of non-legal experts may be those of the philosophy and science of meaning, not epistemology. Indeed, expertise in the theories and technologies of meaning creation could turn out to be key to procedural reform as well as theoretical clarification. To explain how, the paper describes some of the kinds of technical, and even scientific, expertise in practices of text use and information management that are likely to become legally significant.

Session 2

6.

José Rodrigo Rodriguez (Fundação Getulio Vargas's Law School, São Paulo/ Brazil) + Samuel Rodrigues Barbosa (University of São Paulo / Brazil)

The ambivalent relation between science and law in narratives of justification of the Brazilian Law

Abstract:
Legal discourse and scientific-technological discourse have a complex relationship in a democratic state. On the one hand, the scientific discourse justifies technical rules autonomously according to the criteria applicable for the research community that is a social voice that must be taken into account in a democratic legislative process and in a democratic administration of justice. On the other hand, these technical rules combined with power and interests can form zones of autarchy that cannot be reached by the debate on the public sphere.
The article will present this ambivalent relationship between science and law in two narratives of justification of Brazilian law: (1) legal opinions of judges of the Constitutional Court on research with embryonic stem cells and (2) the debate on traditional knowledge and intellectual property.
The contrast between these two cases will demonstrate that the incorporation of scientific arguments to legal discourse varies according to its acceptance by society.
Taking this analysis into account, this article makes an attempt to distinguish between technical rules and legal rules taking into account their relation to the public sphere.

7.

Andrés Santacolma (Catholic University of Colombia / Colombia)

"I Don't Suppose You Can Bluff a Bacterium": How the Law has to Deal with Science, Junk Science, and Scientism to Pursue the Truth

Abstract:
Today, some take a very uncritical attitude to the natural sciences (and sometimes to the social sciences), perhaps, as one of the consequences of all the developments and advances that this human activity –a valuable endeavor– has given us. This attitude, manifested in many situations and places, is traceable in Courts and Legal decisions, at least, in two different ways:
(1) As a very deferential attitude to Sciences; this can mislead legal decisions by allowing anything, so long as it is called "science," to be considered as such in legal cases. (English speakers might call this a kind of "scientism").
(2) As a very suspicious attitude to the Sciences; this mislead legal decisions by making legal decision makers believe that any kind of science must be in part (or be entirely) junk science.
If (1), they let in too much just because it's called science; if (2) instead of (1), they keep out too much because they are suspicious of science. There is no doubt that Science, with all the developments and progresses achieved by human kind, has a role to play in Courts and some legal cases. But if it is so, courts have to do not (1), not (2), but:
(3) Have a critical attitude allowing science to be part of the cases in the proper way.
I will take rulings from the U.S. Courts, the Spanish Courts, and the Colombian Courts, to show how courts do (1) and (2), but also how, in some cases, they have done (3) and by doing so, they have reached the Truth.

8.

Filip Przybylski-Lewandowski (University of Gdansk / Poland)

Application of game theory in predicting court decisions

Abstract:
The subject of this elaboration is an attempt to answer the question whether it is possible to apply game theory in the analysis of decisions made by courts, based on the example of Newcomb's paradox. The reasoning presented in the paper approaches the matter from the perspective of a party in the proceedings, not the court. This change of the usual perspective, dominating in theoretical-legal reflection on applying law in courts, reverses the way of explaining decision-making mechanisms in law application. What is more, the proposed type of game, which assumes that one of the players (in our case – the court) has already made their decision and the sole objective of law application process is to guess what this decision is, makes it possible to perform the reasoning simultaneously at the level of ontological and epistemological reflection; an enquiry about sources of law once again becomes the fundamental issue.

9.

Rui Sorares Pereira (Faculty of Law, University of Lisbon / Portugal)

Challenging The "Cause-In-Fact"/ "Cause-In-Law" Dichotomy

Abstract:
In law, causality is particularly relevant in the field of civil liability and criminal liability. Some authors believe that everything that relates to a logic of responsibility will have to refer to causality, assuming this as crucial to law. In this sense the so called causal nexus is seen as a necessary a priori, particularly in civil liability, for allowing a connection between the damaging event or breach and the damage to be repaired. However, some authors, considering that, in order to affirm responsibility, it is necessary to start from a legally relevant notion of cause and to distinguish between fact or naturalistic causality (stricto sensu causality) and legal causality (imputation), argue that causality in law is nowadays mainly an imputation problem, since the pure and simple causality of a harmful event represents a mere starting point for the attributive judgment of responsibility, which in some cases does not necessarily have to be based on fact or naturalistic causality. Moreover, there are those who state that questions regarding responsibility can be addressed directly without the need to ask whether there is a causal relation between agency and harm, since only fact or naturalistic causality would be genuinely causal. This article seeks, on one hand, to discuss the relevance of the fact/law distinction to the causal inquiry and, on the other hand, to discuss how can be sustained the fact causality/legal causality distinction and if it is necessary to give greater importance to one or another of these elements.

WORKING GROUP

WG 6 Law and Finance / Economics	
Date	FRI 19 Aug 2011
Time	15.30 h –18.00 h
Location	RUW 1.101
Chair	Bisogni, Giovanni (Salerno / Italy)

Lectures:
Session 1

1.
Siarhei Artsemyeu + Xiaonan Hong + Yigong Liu (Dalian University of Technology, School of Humanities and Social Sciences, China)

Influence of sources of Constitutional Law on the national economic Policy (Chinese and Belorussian experience)

Abstract:
Because of the special nature of constitutional law (it is the most fundamental and the most political branch of law as well as it regulates the foundation of economic system) the issue of its sources is important for proper functioning of national economy. It is worthy to state that norms, concepts and principles of other branches of law which directly influence any national economy (civil law, economic law, commercial law, labor law) should not be understood without taking into consideration of content of constitutional law.
Legal systems of China and Belarus share many similar features. Constitutional law of both countries was influenced by civil law concepts, ideas of Soviet legal tradition as well as by Anglo-Saxon legal thought. In spite of many similarities, the two countries have accumulated their own unique experience of constitutional development which is also worthy to be examined to understand how genetically similar legal ideas in societies with different traditional cultures can diverge, and how unlike legal concepts influenced by similar factors can typologically converge.
The purpose of the present research is:
to examine peculiarities of the influence of the most important elements of the system of sources of modern constitutional law of People's Republic of China and the Republic of Belarus on the economic situation;
to investigate the correlation between constitutional law and economy;
to analyze the possible ways of improving the regulative effect of norms of constitutional law on the economic system;
to explore opportunities to reduce conflicts between different sources of constitutional law to improve functioning of national economies.

2.
Giovanni Bisogni (Università di Salerno / Italy)

Legal Theory and the Global Financial Crisis

Abstract:
What can legal theory say on the current financial crisis?
Apparently, very little. In scientific literature as in the press the'lion's share'was held by economists, partly ratione materiae, partly because of the charge of not having foreseen the crisis at all.
Yet, there is much talk of'rules': rules that are missing, rules that did not work, rules that were not voluntarily complied with, rules that were not enforced by those who had to do it ... In short, we have a remarkable use of a very common concept in legal theory –'rule'– and my aim is to demonstrate that this perspective (especially of a normativist nature) can help not only to understand the reasons for this crisis – in particular, the illusion of the 'business community'to live as a'simple society', in which duty-imposing-rules are backed by a social pressare not institutionalized –, but also to show what chance have the present attempts to overcome it at international level through a rule of recognition for the business community (e.g., international treaties or agreements or existing supranational agencies).

3.
Adrualdo Catão (Federal University of Alagoas / Brazil)

Law and Economics, consequentialism and Legal Realism: the influence of Oliver Holmes Jr.

Abstract:
This paper aims to present the similarities and differences between Posner's defense of Law and Economics(LAE) and Holmes' Legal Realism. The investigation is centered in the arguments of economic consequences of judicial decisions. Law and Economics tends to emphasize these arguments as a determi-

nant characterization of Legal Realism. These arguments involve some dilemmas: Is it possible to eliminate a rule, or reinterpret it according to the effect of its application in practical life? May these economic consequences serve as argument for a replacement of traditional interpretation? To what extent can we rule out the law with arguments of consequence? Despite the influence, LAE has some important differences with respect Holmes' Legal Realism. Posner's LAE involves the economic principle of wealth maximization and its relations with utilitarianism and economic liberalism. Consequentialism in Holmes, by contrast, is based on a teleological interpretation of existing rules. It is important the judge does not decide based on a specific economic theory. Also, Legal Realism do not advocate abandoning the tenets of positivism that form the basis for the rule of law. Holmes defends a judicial restraint. Accordingly, the argument of consequence must have previous limits in precedents and statutes. However, both Legal Realism and LAE are connected by the idea that the adaptation of the law to a reasonable end can not be absent from the canons of interpretation and adjudication.

4.

Péter Cserne (Tilburg University / Netherlands)

Consequence-based arguments in legal reasoning: a jurisprudential preface to law and economics

Abstract:
In philosophical and methodological debates about the economic analysis of law, one of the persistent problems is the role of economic arguments in legal reasoning. The problem has been extensively discussed in the legal literature but has not been ultimately solved. This paper is a contribution to this discussion. The argument goes as follows. First, I argue that insights from law and economics, to the extent that they claim to be directly relevant for legal reasoning, should carry a jurisprudential preface that states that this very relevance is limited by and conditional upon a canon of acceptable arguments. Second, I argue that the typical normative claims of law and economics based on economic efficiency can be interpreted as consequence-based arguments of a special kind. Third, in the analytical core of the paper, the conceivability, feasibility and desirability of the judicial appreciation of general social consequences of legal decisions is considered. Referring to the philosophical, jurisprudential and institutional dimensions of the issue I argue that in a modern constitutional democracy the scope of consequence-based judicial reasoning is limited mainly by the expertise of courts. A more general implication of this analysis is that the impact of law and economics scholarship on law can only be understood through a close look at legal reasoning in general and consequence-based arguments in particular.

WORKING GROUP

WG 7 Liability, Criminal Law	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 2.101
Chair	Sangero, Boaz (Jerusalem / Israel)

Lectures:

1.

Pawel Banas (Jagiellonian University / Poland)

Akrasia – status of weak willed actions in philosophy of law

Abstract:
Akrasia, or weak-will, is a term describing a phenomenon when one acts freely and intentionally contrary to his or her better judgment. Discussion on the possibility of akrasia originates in the Plato's Protagoras where he states that "No one who either knows or believes that there is another possible course of action, better than the one he is following, will ever continue on his present course". However, in his influential article from 1970, Donald Davidson argued that akrasia is theoretically possible yet irrational. Some other critics of Plato's stance point out that phenomenon of akrasia is common in our everyday experience, therefore it must be possible.
These two arguments in favour of akrasia existance – theoretical and empirical – will be discussed from both – philosophical and psychological points of view. Especially, George Ainslie's argument that akrasia results from hyperbolic discounting will be taken into consideration to show how it affects traditional thinking about weak-willed actions.
Finally, the paper will discuss how may the contemporary notion of akrasia affect the idea of responsibility and free will. Implications for the philosophy of law will be shown, i.a. to which measure it is possible to claim that a given example of a weak-willed action was indeed free and intentional and one should be hold responsible for its results.

2.

Henrique Carvalho (King's College London / United Kingdom)

Terrorism, Punishment and Recognition

Abstract:
The proposed paper will be an article based on contemporary discussions on punishment and responsibility, directly related to the possibility of punishing terrorists within a system of criminal law. The principal research question can be articulated as: 'can recognition provide a better understanding of the challenges that terrorism pose to a normative theory of punishment?' The basic argument follows a discussion by Anthony Duff of the problems that terrorism pose to a normative theory of punishment, which ought to presuppose communication (and, it will be argued, recognition) as its basis.
It will be argued that while Duff is probably right to presuppose some notion of communication are a presupposition to a fair normative theory of punishment

(or should we say, in a more general tone, justice), the account that he makes of liberal law, even normatively more than descriptively, still fails to provide the necessary basis for individual agency and communication. Rather, a dialectical notion of recognition must be developed and schematised in order to establish what is really implied in the idea of a communicative normative theory, and only after such a theory is establish could a proper theory of punishment be established (or, better again, examined or criticised).

Rather than terrorism challenging a theory of punishment, a 'recognitive' theory of justice would necessarily challenge terrorism as the concept is currently understood by orthodox legal and social theory.

3.

Miyuki Hasegawa (Chiba University / Japan)

Can expressive social disapproval generate the wider sense of responsibility over apathetic people?

Abstract:

I have long been discussing that the notion of individual responsibility, which is the principle of the modern law, should be expanded beyond the narrow boundary of individuality. An individual is responsible for her own acts, not for others' acts. This is the principle of the modern law which is based on the rational self. I have argued that such an individual is the ideal and the ideological human model of the modern law, and in order not to be irresponsible and apathetic towards others and society, we need to expand the notion of individual responsibility.

In relating to the responsibility expansion, this paper targets shame punishment such as requiring defendants to wear signs in public or advertise their convictions in newspaper. It seems to be the common arguments among criminologists that these practices are the results of penal populism and these expressive punishments are simply bad policies because they are costly, not effective deterrent, and moreover they are against human dignity. Obviously those scholars are against representations of public opinions. However, people's sentiments do not necessarily go to harsh punishments, instead they may move to lenient treatments if they are given the opportunity to know the offenders.

This paper will focus on:

1) Can a symbolic social disapproval, such as shame punishments or naming & shaming, change people's moral attitudes?

2) If so, can such moral attitudes become a norm for those people?

3) Can such a social expressive disapproval give an opportunity to understand the offender and the cause of the crime, and provoke people's concerted participation in dealing with the cause of crimes, and hence generate the wider sense of responsibility beyond the narrow boundary of individuality?

4.

Boaz Sangero (Academic Center of Law & Business / Israel)

Towards Safety in the Criminal Justice System

Abstract:

In light of the proven phenomenon of false convictions and the severe harm caused to society and to the convicted, this article focuses on the necessary preliminary stages toward the development of a safety theory in the criminal justice system, as it is entirely absent today. The criminal justice system is a "safety critical system": it deals with actual matters of life and death, and an error in the system is liable to cause grave damage. We consider a false conviction as an accident, just like a fighter jet crash. This comparison is not only metaphorical, but rather – when the damage is assessed financially – quite realistic. The difference in awareness of safety between the fields of engineering and of medical devices and the criminal justice system is linked to what we define as "the hidden accident principal of criminal law". False convictions are typically hidden. We will provide an assessment of the risks of false convictions, and show that the risks are great. We will propose a few specific solutions of the safety problems that this article raises, and explain why these specific solutions are insufficient, and why a complete safety theory must be developed for the field of criminal law.

5.

Diego Victoria + Fernando Ochoa (Libre University / Colombia)

Communicative rationality in the standardization of legal relevant criminal conduct

Abstract:

A felony is the rupture of communicative rationality that exists between the factuality of an action and the concrete validity of the rule. The penalty, in turn, is the counterfactual reaffirmation of the normative validity through the denial of the denying factor of the felony. In this regard, it is necessary to make two (2) warnings in a way of contextual clarification: a) the word action is raised and exposed throughout this thesis in its broader Kant's connotation, as a possibility of public use, at all times and places, of one's reason rather than in its narrower naturalistic sense, as an external to do that implies the correlative acceptation of the not to do (omission). The public use of reason is a subjective right, understood as the faculty of demanding from another person the intervention, which is incumbent by competence, to a given normative pretension. It is about a right to intersubjective recognition of the existence of the individual freedom as an event consistent with the freedom of all and b) the communicative rationality is based on the assumptions of language, universality, clearness, veracity and finality, included in the world of life thanks to the social pact subscripted by the individuals when they migrated from the state of nature to the rule of law. The interpretative vision of the right of control in a risk society is not new, it goes back in its broader perspectives to the German philosophical stream of idealism that characterized the epistemological development of XVIIIth century. In the complexity of postmodern socie-

ties of nowadays, on which virtuality is merely one feature, the hermeneutic function of role and social system accomplishes a teleological and communicative function.

6.

Ana Luisa Zago De Moraes (Federal Public Defenders Office School / Brazil)

The state of exception and the penal system in contemporary brazil

Abstract:
The state of exception, in the sense proposed by Carl Schmitt, is the suspension of a law state due to a decision taken by a sovereign power during a certain period of time; in the opposite direction of Walter Benjamin´s theory, which presents the state of exception as the indistinction between the law itself and the normality, picturing the indistinguishable space of anomic violence. Giorgio Agamben defines the state of exception as the very limit of the system, which means, an area of topological indistinction between law and reality, where the law itself can rule the exception when disregarding the individual as one provided by constitutionally assured fundamental rights. Bringing these theories to the reality, more specifically to Contemporary Brazil, this work examines the existence of typical criminal actions emerging from a state of exception in the fight against crime. For that, it analyzes Carandiru, Candelaria and Vigario Geral massacres, episodes tied to the concrete actions of agents who compose the criminal justice system in the country. After these events, systematic violations to human dignity done by the police, judicial institutions and prison actors has persisted, which has not simply occurred against the law, but law itself rules the exception when disregarding the individual as one provided with fundamental rights. These rules are motivated, among other factors, by political and media speeches of "fight against the crime". So, the state of exception is expressed in the spheres of facts, laws and speeches, highlighting the presence of Agamben´s state of exception in contemporary Brazil.

7.

Yu-An Hsu (Taipei / Taiwan)

Die subjektive Zurechnungslehre von Aristoteles und Strafrecht (Aris-totle's Theory of Subjective Imputation and Criminal Law)

Abstract:
As is well known, the Greek philosopher Aristotle (384 BC – 322 BC) has developed the theoretical foundation for so many fields of science that, during the mid-century, his name has been recognized as the synonym for "philosopher". As the father of modern science, Aristotle is devoted to constructing a deontological approach to ethics, according to which the supreme good is happiness. In pursuing the supreme good, therefore, humans base their decisions on thoughtful considerations and choices and thereby are evaluated on the basis of these considerations and choices. Accordingly, Aristotle developed a theory of voluntary action which maintained that only voluntary behaviors can be morally judged and evaluated. From then on, the theoretical framework of voluntary action has always been one of the most discussed issues in the western ethics.
Because Aristotle's theory of voluntary action is closely related to the issue of whether a certain human should be blamed, it has influenced the legal determination of subjective imputation ever since the Roman law. Moreover, the influence of this theory has extended to discussions and developments on many important subjects such as Handlungslehre, Irrtum, action libra in causa, Affekt, Unkenntnis des Gesetzes. From this perspective, it is worth exploring the spirit of Aristotle's voluntary action not only because it helps clarify the nature and developments of numerous criminal law issues, but because its sharp contrast with the modern theory of subjective imputation under the influence of psychology provides an opportunity to criticize the modern theory. Against such a background, this essay purports to analyze the characteristics of the theory of voluntary action in order to reexamine the modern system of criminal law.

8.

Miroslav Imbrisevic (Heythrop College [University of London] / UK)

Hart and Nino on Punishment

Abstract:
It has been suggested (by Nicola Lacey) that Carlos Nino's theory of punishment is 'a consent-based version of Hart's limiting distributive principle.' In this paper I will try to answer two questions: In how far is Nino a Hartian? As well as: What are the merits of Nino's theory in comparison with Hart? Both thinkers justify the institution of punishment on consequentialist grounds: it brings about a reduction of future harm to society. And both agree that the institution of punishment is subject to the constraints of Kant's humanity formula of the Categorical Imperative. Hart's retribution-in-Distribution principle is, despite its name, only retributive in a minimal sense. It should more accurately be described as a principle of justice, because it stipulates that only those who broke the law may be punished. Nino's answer to the question 'To whom may punishment be applied?' is: only those who consented to assume a liability to punishment. Hart's focus is on the voluntary action: If you commit a crime it would be permissible for society to override the principle which forbids the use of one human being for the benefit of others. Nino's structure is similar, but he spells out that the voluntary actions of the criminal constitute consent to assume liability to punishment. I will argue that Nino's justification of punishment is more powerful because Nino's justification rests, to a much greater degree than Hart's, on principles which we encounter outside of the institution of punishment and which we accept as fair.

WORKING GROUP

WG 8 Society, Culture, Politics und Law I	
Session 1	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 251
Chair	Bindreiter, Uta (Lund / Sweden)
Session 2	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 254
Chair	Lopes, Mônica Sette (Minas Gerais / Brazil)

Lectures:
Session 1

1.

Graziela Bacchi Hora (Faculdade Damas da Instrução Cristã / Brazil)

The use of art's specialized language in the Brazilian Supreme Court's decisions and the demand for creativity in Law

Abstract:
This communication aims to analyze the relations between Law and Art, considering the presence of Art's specialized language in Legal decisions. The functional differentiation of Law's subsystem and of Art's subsystem, in the terms of Niklas Luhmann's social systems theory, will allow the identification of limits between the two spheres. In the definition of the intersection points between them, the concepts of structural coupling, system irritation and code corruption are tested as possibilities to understanding the processes of approximation between Law and Art. The phenomenon of intertextuality in decisions of Brazilian's Supreme Court, the country's Constitutional Court, which refer to recognized Literature works, citing them expressly and bringing about the memory of Art's social subsystem, comes as invitation to reflection about the possible urge for creativity in Law's subsystem. On the other hand, it questions the legitimacy of such influence, which would have straight repercussion on the concept of legitimacy understood as functional differentiation. The meaning of the overlaying of languages in the phenomenal level of legal decision and its supposed incompatibility with the requirements of autonomy and binary code based reproduction of Law's subsystem expose the central issues guiding the discussion.

2.

Felipe Bambirra + Gabriel Barroso (Law School of Federal University of Minas Gerais / Brazil)

Crisis and Philosophy: Aeschylus and Euripides on Orestes' crime

Abstract:
Since the XIX century, a pleiad of philosophers and historians support the idea that Greek's philosophy, usually reported to have started with the presocratics, lays its basis in a previous moment: the Greek myths – systematized by Homer and Hesiod – and the Greek arts, in particular the lyric and tragedy literature. According to this, it is important to retrieve philosophical elements even before the presocratics to understand the genesis of specific concepts in Philosophy of Law. Besides, assuming that the Western's core values are inherited from Ancient Greece, it is essential to recuperate the basis of our own justice idea, through the Greek myths and tragedy literature.
As a case study, this paper aims on the comparison of two key-works, each one representing a phase of the Greek tragedy: The Orestea, by Aeschylus, and Orestes, by Euripides. Both contain the same story, telling how the Greeks understood the necessity of solving their conflicts not by blood revenge, but through a political way. Although, in Aeschylus's one, men are still leashed by their fate, while the gods play a major role, in order to punish human pride (hybris). In a different way, on Euripides's work men face their own loneliness, in a world fulfilled with gods, each one demanding divergent actions. That represents a necessary moment to the flourishing freedom and human subjectivity, and, once the exterior divinity is unable to resolve human problems, men will need to discover their interior divinity: that is how the Philosophy emerges.

3.

Uta Bindreiter (Faculty of Law, University of Lund / Sweden)

The Steward: Legal Institution and Ethical Metaphor
An inquiry into the potential of "thick" moral concepts

Abstract:
Stewardship, the ultimate expression of the principle of care, is a "thick" moral concept, comprising - to use the proper Roman Law terms – cura, fiducia and integritas. Stewardship is about the responsibility to take care of something owned by somebody else; in
organizational contexts, it concerns the responsibilities of the managing director and board. Curiously, more is expected from a company's steward than from an "ordinary" managing director.
In my view, the entire potential of stewardship is expressed by the word "steward": it renders the meaning of the biblical metaphor. The biblical steward is characterized by two mutually
informing conceptions - accountability and responsibility. There is a dialectic here: the steward is accountable (in the last analysis to God), but he is also responsible, acting with wisdom and foresight. His chief loyalty belongs to his Master, but he is also mindful of the interests of third parties. Stewardship is a vocation, not a commission.
In strictly legal contexts, the steward's status is frequently unclear. In Sweden, for instance, the term steward does not figure in the main body of certain major statutes, whereas
their traveaux préparatoires, or motives, mention stewardly accountability vis-à-vis shareholders and third parties.
This is where my paper comes in. Isn't it odd that a timeworn institution without any current legal function, is deemed sufficiently important to be adduced in the motives?

Against the framework of A. Peczenik's theory of cultural heritage and drawing on R. Poscher's findings as to the specificity of legal conceptions, I argue that "thick" moral concepts can be so deeply anchored in the culture of a society that their intension outweighs the specificity of their legal conceptions.

4.

Ricardo Resende Campos (Goethe University / Germany)

Can Law cope with Uncertainty? A methodological approach from Law to modern Society

Abstract:
The crunch question on the current development of legal theory about the relation between law, science and technology is certainly how the methodology of law deals with uncertainty. Taken into account the continuously advanced scientific and technological achievements in the modern society and its soaring necessity for innovation, must those be understood as a central knowledge problem. However those non-territorial, decentralized anonymous communication processes seem frequently to be inefficiently treated from the main conceptual archetypes of the national based law systems. Focused on the legal theory mainstreams related to the coordination of law and social changes – technology, science, economy etc advancements – can be stated that the long attested limit from the legal Positivism of the nineteenth century is not deep-seated in the "subsumption-machine" grounded in the rule-application-model, but in a specific uptake model of knowledge in the positivism system itself. In this sense, it is affirmed in the present essay that the so called "legal post-positivism" faces false fronts on the crucial question on the relationship between law and modern society, once its main argument is focused on the legal reasoning process as a substantial correctness function of law discourse in attempt to describe the insufficiency of the model of term stable rules of the legislature from the legal positivism. Rather, to deal with crescent uncertainty in the modern society, a suitable concept of law must bind uncertainty in law system itself and take the cognitive aspects of law into account to face, in the concept of norm, the necessity to develop connectionist model of knowledge creation and, over and above that, make legal theory productive for the new non-continuous society.

5.

Ronaldo Macedo Jr. (Direito GV,USP Law School / Brazil)

Overcoming orientalizing views of Latin American Law. New approaches to new legal experiences in Brazilian Law

Abstract:
Latin American legal studies is a subfield of area studies led by legal comparativists and economic development scholars. The work-product of these fields is highly relevant and influential for they serve as the background for decisions by states and international institutions on development aid and play a big influence in legal education.
In the past, the area was an example of the cultural domination imposed by the North to the South. As acknowledged by some recent criticisms (Jorge Esquirol), the main literature in the field of Latin American legal studies has taken one of two dominant forms: "either (1) it dismisses official law all together as irrelevant in the face of outside social forces and systems which are said to more aptly explain societal phenomena; or (2) official law is examined and analyzed through an ideological lens searching for dysfunction". The underlying assumption of these analyses was that Latin American law was structurally condemned in producing economic underdevelopment and democratic deficits. Two examples of this view can be found in the "law and society" or the "law and development" classic literature. In spite of the usefulness and richness of the legal theory produced by this scholarship it could only offer a partial and pessimistic view of law American law. This limited picture of real law produced a kind of "Orientalizing" structure that results in negative diagnoses of the problem of "law" in Latin America from a neocolonial perspective. This view dismisses the politics of law underlying law-making and legal interpretation in the various Latin American countries. This paper aims to offer a counter example of such analyses and highlight the role and nature of the intervention of the Office of the Attorney General in Brazilian law, as well as its place in the Brazilian Judicial System. It also shows the basic pitfalls for an appropriate structural arrangement of this Brazilian institution and the originality of its institutional building.

6.

Anthony Amatrudo (University of Sunderland / UK)

Nazi Law: the censuring of modernist culture and the elimination of memory formation

Abstract:
This paper will trace the development of Nazi cultural and legal policy towards the arts. It will examine the role of censure in the development in this process. The paper will draw on previously published work on the subject by the author and set out a clear methodology in Nazi cultural and legal policy towards the arts: a process of censure, exclusion and annihilation. The purpose of Nazi policies towards the arts being no less than the elimination of all modernist (Jewish and 'degenerate') culture and the impossibility of a memory of it. The paper will argue that the destruction and elimination of modernist (notably Jewish) culture was in a real sense the destruction of all Jewish history.

Session 2

7.

Ilton Norberto Robl Filho + Pablo Malheiros Da Cunha Frota (University of Paraná's / Brazil)

Post Legal Positivism: New Paradigm of Legal Science (Jurisprudence) and Practice in Brazil

Abstract:
The relation between law, moral, society

and science is shifting in Brazil as it is changing in democratic contemporary societies. This paper proposes to reflect about this change in the Brazilian legal and social context. Jurisprudence and legal practice have been transformed intensively after the Brazilian redemocratization that began in 1985 and Federal Constitution of 1988. In the field of Jurisprudence (Legal Theory), a new legal theory called post positivism progressively has been overcoming legal critical studies and legal positivism. In recent years, ideas as any moral values can be improved by law (positivism) or law is one of many oppressive institutions in capitalist society (legal critical studies – Marxism) have been losing place in legal theory.Nowadays that constitutional Brazilian law implements just society and legal system different of the authoritarian military regime (1964 – 1985), it is difficult to work with a complete relativist idea of law (positivism) or difficult to accept that law is necessarily oppressive in capitalistic societies. Otherwise the idea of science in law at post positivistic point of view try to overcome in a dialectic way a pure science methodology (normativistic positivism) and the complete political and economic studies of law (critical legal studies – Marxism). After that, the text will show that Brazilian legal practice have changed intensively after post positivistic methodology of law and will reflect about same dilemmas of post positivism in Brazil in the legal theory and practice.

8.

Mônica Sette Lopes (Minas Gerais Federal University / Brazil)

Jurists and Journalists: impressions e judgements

Abstract:
The process of finding evidence of what truthfully happened in a conflitive situation interests journalists and jurists (considered here as law graduates, in general, judges, lawyers, prosecutors, solicitors, professors, researches, legal scholars etc.). But they do it different ways, what can be clearly seen when journalists and jugdes are concerned. Both cathegories must tell a story about a conflict, must listen to all envolved, must inform what happen to the general public. Although both cathegories must use the freedom of speech to expose their point of view about something, their timing is different as well as the process and the effect of fulfiling their task.
The question that should be made is what happens to law when it becames the subject matter of the news in the world of full information? In what mesurement journalists also pass judgements and how does this affects the formal processes of law?
The effort to answer to those questions and the ones relatated to them is important to understand some of problems that must be approached by those who want to understand the ways of law in the mass media technological society.

9.

Gustavo Siqueira (Federal University of Minas Gerais / Brazil)

Experience, Culture and Legal History

Abstract:
In this article, the author tries to demonstrate how a concept of legal experience, little used, studied and criticized in philosophy of law and jurisprudence, can be an essential concept for understanding the historical and cultural legal.
Usually the legal history is reduced to a history of legal thought or a history of positive law. Superseded the traditional concepts of legal experience, the purpose is to see how this concept can best demonstrate the relationship between legal culture and history, providing a better understanding of the legal phenomenon in a given period, making visible the contradictions between the law and its application and more noticeable the questionable or present ruptures and continuities in the legal and political history.

10.

Sapan Baruah Bhikkhu (Mahamakut Buddhist University / Thailand)

Humanism And Religion

Abstract:
When human beings first considered their existence,there was no religion at that time. Through experience, they realized the danger of cruelty, anger,jealousy and so on. Although these are natural characteristics On the other hand, they realized the importance of compassion, sympathy, generosity, harmony, patience, and tolerance. These characteristics were not given by god or devil,but were natural products of the interaction of our five senses. When they interact,the sixth sense,mind,arises. Then through experience,our ancestors understood the danger of negative behaviour.They developed humanism instead of religion to live in harmony with their fellow beings with understanding cooperation, practicing tolerance and abstaining from evil immoral and wicked thing. That is humanism that is how they have illustrated the concept of heaven and hell extending their present experience of peace pleasure and these endless suffering. When they developed these good qualities according to their knowledge at that time they also realized that there is a universal energy which goes through every kind of existence.

Briefly Buddhism philosophy
The word philosophy comes from two words philo, which means love, and sophia,which means wisdom. So philosophy is the love of wisdom or love and wisdom both meanings describe Buddhism perfectly. Buddhism teaches that we should try to develop our intellectual ability to the fullest so that we can understand clearly. It also teaches us to develop love and kindness so that we can be like a true friend to all beings. So therefore we can called Buddhism also philosophy.

11.

Hadayat Rashidi (Islamic Azad University / Iran)

Blood money in the yesterday and today Islam

Abstract:
The exertion of scholars must not be taken as the meaning last countries Scholars exertion must mean effort in stating new command for a social or Update scientific problem not stating imitated command from the previous Jurists. Perhaps prophet's opinion of exertion has been the above mentioned Meaning. As he stated when a judge efforts for understanding of correct Command and then perceives the correct commands. He will be rewarded with one spiritual reward. So just as we saw, in this reverse, the prophet (p.b.u.h) has referred to some commands to which there isn't any command and so the legist has to obsess their mind with the use of correct criterion which are derived from religion. Definitely legists who have judged to up to date dower must also judge to cases like blood money, women blood money, women retaliation, blood money and retaliation of non Muslims up to date and must be imitate the previous jurists.
Keywords: blood money, Islam, exertion, tradition, Women, Non Muslims

WORKING GROUP

WG 9 Society, Culture, Politics und Law II	
Session 1	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 254
Chair	Qi, Chunyi (Frankfurt am Main / Germany)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	IG 254
Chair	t.b.a.

Lectures:
Session 1

1.
Miaofen Chen (College of Law National Taiwan University / Taiwan)

"Internalization" of norms and formation of "self": a modified ethical naturalism

Abstract:
If social existence is not pretend as mere recoil of words, does it really have a spatio-temporal domain for "being there"? This is the question of the very essence of laws at issue, which conceal the ineffable sphere of being as "norm" and "norm-user". While Karl Marx gave an account of "surplus value" and "class subordination" as key concepts of explaining subjectivity and subjection of proletariat, he hardly explained how the subject is assumedly "subject" to subordination and to what extent his/her awareness of subjection affects the concrete being of life.
To deal with problems of the psyche, structure of power relation and the affected bodily presence is one of the most challenging tasks of late-modern (or postmodern) social and legal philosophy. Taking "virtual reality" as a sensible conceptual invention to understand the changing living world today, it seems to many necessary to conjure a "pre-ontological" domain from which the knowing, perceiving, demanding, persecuting or suffering subject is emerging, embodied with social classifications. This domain is determined in psycho-phenomenological terms as the "primary" and "seconcary" scene of being, that is, as the "signification" of self.
This paper will discuss thouroughly the views of self-signification in the writings of Slavoj Žižek and Judith Butler. It tries to reveal the dialectical paradox of Master Signifier and the passionate (dis-)attachment of self to the order on the one hand, and will provide a modified ethical naturalism to clarify modes of subjection and internalization of such norm (dis-)attachment with respect to our developing multi-dimentional societies on the other hand.

2.
Jakub Krajewski (Jagiellonian University / Poland)

Virtue Jurisprudence and the Question of Multiculturalism?

Abstract:
Virtue jurisprudence, as new rising intellectual force in the field of legal theory, has to face the burning issue of multiculturalism. When authors such as L.Solum try to develop a coherent theory of judging, they also have to give an image of the legal system. The revival of Aristotle's ethics can provide an inspiration to point the telos of law and the legal system in particular. Unfortunately, it doesn't directly cope with the pluralism of moral beliefs.
Even the modern virtue ethicists use the term eudaimonia or it's modern version - human flourishing as if there was only one scenario of self - development. If the telos of a legal system is to enable and even encourage human flourishing – as Solum claims – the system has to provide a clear scenario of agent development. Clearly different legal systems give us a different scenario. Also the judicial virtues that enable the fair adjudication process are dependent on the principles that underlie the system.
The answer to this problem and a important voice in the debate is Alasdair MacIntyre's concept of tradition. This modern philosopher of virtue argues that the virtues are the dispositions that help us take part in social practices. Those practices form a coherent system of norms which Solum would call nomoi. If a judge exercises those virtues to perform a special social practice, which is the practice of adjudication, he reaches to formulate the basic principles inherent to this particular legal system. This version of virtue jurisprudence can also justify the difference in the ways human beings can flourish.

3.

Elena Maslovskaya (Nizhnii Novgorod State University / Russia)

Jeffrey Alexander's Theory of the Civil Sphere Between Philosophy and Sociology of Law

Abstract:
Alexander's theory of the civil sphere can be placed in the context of development of sociology of law. However, paradoxically, Alexander draws not so much on sociological theories but rather on the approaches of philosophy of law, particularly the ideas of Fuller, Dworkin and Habermas. The civil sphere is presented by Alexander as the embodiment of Dworkin's principal integrity. Locating law within civil morality Alexander reveals the similarity of his viewpoint to Dworkin's position. Drawing on Fuller's works Alexander singles out the procedural foundations of the democratic order. At the same time for Alexander the source of morality of law is not the legal system itself but a certain level of civil solidarity. Like Habermas, Alexander emphasizes the culturally embedded character of the legal norms. Alexander shares Habermas's understanding of law as a regulative mechanism affecting all spheres of social life. However, Habermas is more sensitive to the danger of colonization of law by the imperatives of the economic and political subsystems. Alexander's approach can be contrasted with Luhmann's sociological theory of law. Alexander concentrates on interrelation and mutual penetration of the civil sphere and law while Luhmann regards law as an autonomous system following its own logic. While Alexander claims that his theory is rooted both in sociology and philosophy of law in fact his approach is closer to normative philosophy.

4.

Javier Ferreira Ospino (Universidad del Atlántico / Colombia)

Analysis of the first sentence of the Justice & Peace law – Mampujan case – and its contribution to the design of a policy of memory as justice for victims in Colombia

Abstract:
20th Century will be remembered by Colombians as one of the bloodiest moments in national history. The degradation of violence and the appliance of increasingly terrifying methods by confronted sides was a constant during this period.
The degradation and intensity of armed conflict in Colombia and the way civil population has been involved in it lead to the institutionalization of the conception of a certain para-institutional impunity that raised mixed emotions that went against the rule of law and legal security.
It is in this context that the law 975 of 2005 appears, the so called "Justice & peace law". Although its domain was limited to demobilized members of the Colombian Autodefensas, it was assumed that it could also encompass other forces. With the identification of the discourse of the theory of justice for victims it is expected to widen the range of interpretation of the language of victims in Colombia, as it has been done by Manuel Reyes Mate in Spain.
The goal is to conceal the discourse of justice for victims from the vindication of memory, and it is right there where the hermeneutical work of Paul Ricoeur becomes important –Especially his pretension of assuming the symbols of language beyond their illusory moral consciousness that casts words away from reality. It is a sense of justice that goes beyond the supposition of the limitations that are given by this regulation.
This is the case of the sentence of the legal process 200680077 (Superior Tribunal of Bogotá), Court of Justice and Peace, also known as the Mampujan case.
This paper aims to answer the question of which is the contribution of the first legal sentence of the Law and Justice Law to the design of a policy for memory as justice for the victims in Colombia.

5.

Chunyi Qi (Goethe University Frankfurt am Main / Germany)

Methodischer Ansatz der Gesetzgebung mit chinesischer Prägung – Erfahrungen und Probleme

Abstract:
Am Beispiel der Entwicklung der Gesetzgebung im Bereich des Zivilrechts, und zwar, hauptsächlich im Bereich der Vertragsrechtsgesetzgebung, möchte ich den einzigartigen methodischen Ansatz der Gesetzgebung in China (als ein unentwickeltes Land) beschreiben. Die Besonderheit des Ansatzes liegt in der „Entwicklung mit der Zeit (advance with the times)", denn bevor sich die Marktwirtschaft in China endgültig eingehend entwickelt hatte, wurden die Gesetze des BGB nicht als Gesamtheit auf einmal, sondern als Einzelgesetze hintereinander erlassen. Diese wurden zugleich durch Verordnungen des Zentralen Amtes und Auslegungen des Volksgerichtshofs ergänzt. Der methodische Ansatz besteht im Wesentlichen darin, dass ein Gesetz genau dann erlassen wird, wenn es notwendig und „reif" ist. Die Vorteile dieser Methode liegen darin, dass die Schwierigkeiten der Inkompatibilität gemildert werden, die bei einer Rechtstransplantation oft entstehen, die die Gesetze auf einmal in ein anderes Sozialsystem integriert, denn nach der Systemtheorie koevolutionieren die Rechtsnormen mit dem Produktionsregime. Dennnoch bringt der methodische Ansatz dieser Art der Gesetzgebung auch Probleme mit sich, nicht nur weil er die Rechtssicherheit und Voraussehbarkeit des Rechts gefährdet, sondern auch weil die Rechtsnormen miteinander in Konflikt stehen und den Rechtsinstitutionen unter Umständen die Möglichkeiten bieten, ungerechte Entscheidungen zu treffen.

6.

Josefa-Dolores Ruiz-Resa (University of Granada / Spain)

Connections between Education for Citizenship and equality between women and men (Analysis of the claims against this subject before the Spanish courts and their rulings)

Abstract:
This paper try to analyse the debate on

equality between women and men found in the claims against the subjects related to Education for Citizenship. These claims were resolved in the Spanish Supreme Court and High Courts of the Autonomous Communities. In this debate, there is a strong rejection of antidiscrimination law assumptions, namely that the different roles and social roles of women and men have a cultural and social base and it is unnatural, as evidenced by the concept of gender. Conversely, many appellants and judgments defend the difference between women and men as if it was informed and legitimated on human nature. Hence gender is considered an ideology, that is, a category of analysis by mean of which you can conceal or distort the reality of true human nature. But if these arguments are taken into account, some important contents of recent legal reforms may be meaningful, as it is questioned their normative value, by prioritizing certain moral principles against these laws. We ara talking about the Law for Effective Equality Between Women and Men (Ley Orgánica 3/2007 para la Igualdad Efectiva de Mujeres y Hombres), the Law on Integrated Protection Measures against Gender Violence (Ley Orgánica 1/2004 de Medidas de Protección Integral contra la Violencia de Género) and the Law on Education (Ley Orgánica 2/2006 sobre Educación).

Session 2

7.

Yulia Ten (Southern Federal University / Russia)

Symbolic representation of the legal concepts in culture: the problem of interpretation

Abstract:
Each culture creates the specific system of symbols embodying the ideas, concepts, values and norms which make up fundamental part for living of the society. A symbolic system of culture includes the social, ethnic, mythological, religious, artistic, scientific, political, legal and national types of symbols. The criterion for classification of such types of symbols is the different forms of human self-realization in the socio-cultural space. The social, ethnic, mythological, religious, artistic, political, legal and national types of symbols are interrelated and interacted.
Symbols perform several functions in culture. They are cognitive function (symbol as the universal method of cognition), adaptive-regulative function (cultural symbols stimulate individual to accept notions, norms and values of the society); identificative-integrative function (through symbols an individual can identify himself with the concrete social groups); informative-communicative one (symbols communicate the information) and the function of socialization of individuals in culture.
The legal symbols play a very important role in the constructing of the symbolic system of the national state. The interpretation of the national symbols is determined by the special legal documents. At the same time the interpretation such symbols becomes complicated if we will interpret these symbols in the mythological, religious, artistic or advertising contexts.
Members of the same culture must share sets of images, ideas, concepts, norms, values and symbols which enable them to think and feel about the world, and thus to interpret the world in similar ways. Nordic societies have been considered as the countries where egalitarian values have had greater success than elsewhere. I'd like to draw attention on the following problem. Several societies may use the same legal symbols, but these symbols may stand for different things. For example, concept "equality" can have different meanings in English and Norwegian. The Norwegian word for equality, "likhet" may stand for both similarity and equality. Here and other example. The cheese slicer is a Norwegian symbol of moderation. It is obvious that this symbol has other meanings in the French and Russian cultures. In this case we come across with the problem of universality of symbolic meaning. I assume that each symbol of any society and state must be investigated in its immediate social, political, religious and historical contexts. I'd like to analyze and interpret the legal symbols of the Germany which can be represented the concepts, norms and values of a model of welfare state. The comparative investigations of the legal symbols in the different national contexts may be very important for modern legal philosophy both for Russia and for Germany.

8.

Mustafa Yaylali (University of Luiss Guido Carli, Rome / Italy)

"Community and Law Approach": Identifying the locus of Law in Community

Abstract:
In Identifying the locus of "law in community" I will employ Tönnies' distinction between Gemeinschaft and Gesellschaft. By juxtaposing the elements trust, values and Alternative Dispute resolution, (typifying Gemeinschaft) against, logic, rules and judicial adjudication, (typifying Gesellschaft) I want to exemplify the difference in approach to law between gemeinschaft and Gesellschaft. Trust relationship constitutes an essential characteristic of a community, because it embraces the proximity of its members, based on a shared common values. Trust makes any external intervention from the state obsolete. I will claim that logical construction of relationships is a substitute for trust relationship.
Secondly, I will argue that value is the glue that directs the society into a certain direction. In contrary to rules, it has an intrinsic effect instead of extrinsic likes. Rules, on the other hand are initially imposed from outside.
Lastly, ADR exemplifies the essence of what law is about in community structure. Namely in upholding and maintaining (trust) relationship between members. I will argue that in contrary to

judicial adjudication in Gesellschaft, the aim of ADR in Gemeinschaft is to solve disputes and make sure that relationships between members are restored.
Conclusively, by juxtaposing those elements with each other, I will be able to exemplify the locus of law within community.

9.

Junghoon Lee (University of Ulsan / South Korea)

Japan's Influence on Korea's Judicial Modernization : Examination of the Reality of Judicial Modernization through the Analysis of Legal Cases in late 19th Century

Abstract:
Korean scholars argue that the nation achieved judicial reform for itself through the Gabo Reform (a political reform for Western-style modernization in 1894). According to them, therefore, the establishment of Japanese Residency-General in Korea (Tonggambu, a colonial governing body Japan set up in Korea) in early 20th century was not for the modernization of Korean legal system but a means for the imperialist's invasion into Korea. In other words, they insist that Korea was able to accomplish modern judicial reform and Western-style judicial modernization, but the Japanese imperialists deprived the nation of such an opportunity. They also portray Ito Hirobumi as the chief instigator of Japan's imperialist invasion and some Japanese scholars agree to them.
However, empirical research based on historical documents shows that the above arguments are not true. The Gabo Reform that the Korean government maintained was a political reform made by the Japanese government's pressure. In addition, new laws enacted in the process of judicial reform were not applied to actual trials. Accordingly, this study intends to analyze major trials and cases at that times, thereby describing the complete failure in the Korean government's modern reforms of legislative and judicial systems. Furthermore, issues like foreigners' right to stand before the court and protection of legal rights such as one's life and property in Korea, and political meanings of Ito Hirobumi's assertion which stressed the need for protecting Koreans' legal rights will be explained.
Currently, Korean and Japanese courts and prosecutions have many common characteristics in their structure, organization, and functions. Japan's influence on Korea's judicial modernization cannot be ignored, and it is necessary to objectively analyze Japan's influence in order to properly understand the current status and problems of the Korean judicial system. This is the main reason why this study pursues objective empirical study, away from a nationalistic perspective. This study is expected to become the cornerstone for research that expounds East Asian countries' acceptance of Western legal system and judicial modernization.

10.

Ivan Padjen (University of Rijeka / Croatia)

Student Rights and Revival of Immaturity: Can Jurisprudence Account for Coercion?

Abstract:
The problem of this paper is prompted by the claim of Zagreb University students residing in government subsidized dormitories that their duty to act for free as dorm night porters amounts to forced labour. After a preliminary note on the nature and types of legal scholarship, the paper restates jurisprudential arguments against student rights and analyses limitations inherent in legal scholarship in action, or jurisprudence, that make it unresponsive to student rights: a limited normative framework and a limited subject-matter, most notably a limited focus of inquiry when it comes to force or coercion. A glimpse at an analysis of force in international law indicates that the naked force typical of elementary criminal law has dissolved long ago into phenomena remotely related to naked force, such as economic pressure and ideological propaganda. Two legal and social contexts of force are of primary interest to understanding student rights. The first is legal recognition of the vulnerability of children to naked force. The second is the blind eye of jurisprudence for the vulnerability of workers to economic need. The belief in economic necessity and subjugation of the state to capital has resulted in a bizarre reversal of the roles of corporations and students. Jurisprudence cannot change the world but can interpret it more sensibly by coming closer to the studies of politics and economics.

WORKING GROUP

WG 10 Justice, Distributive Justice, Non-Discrimination	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	RUW 3.201
Chair	Seoane, José Antonio (A Coruña / Spain)

Lectures:

1.

Laura Carlson (School of Law, Stockholm University / Sweden)

Critical Race Theory in a Swedish Context

Abstract:
This article reviews the Swedish discrimination legislation and case law against the background of Critical Race Theory. Critical Race Theory offers explanations for the some of the paradoxes arising in the Swedish case law between the explicit statutory protections against unlawful discrimination on the basis of ethnic origins and the application and interpretation of the legislation by the courts, here specifically the Swedish Labour Court.
Part One of this article sets out the legal theoretical framework addressing race based on Critical Race Theory and Intersectionality. Part Two explores the treatment of "race" as defined by these theories with respect to religion, immigration and ethnic origins in the Swedish legislation and the case law of the

Swedish Labour Court. The case law of the Swedish Labour Court is chosen for several reasons. First, the initial claims brought to court were under the statutory protections of the 1994 act against discrimination on the basis of race and ethnic origins in the field of employment. Even if an employee not represented by a labour union or the ombudsman can bring such claims to the general trial courts, they are then appealed to the Labour Court, so that the Labour Court is the ultimate arbitrator of such questions in the Swedish legal system. The body of case law is fairly developed before the Labour Court, with twenty-six cases having been brought in the past twenty years. Last, space constraints prevent a similar analysis with respect to the case law in the general courts as to unlawful ethnic discrimination claims in areas other than employment.

2.

Leonel Pessôa (Universidade Nove de Julho / Brazil)

Inequality, Ability to Pay and the theories of equal and proportional sacrifices

Abstract:

Brazil has one of the worst distributions of income in the world. The wealth of the richest 1% of the population is equal to that of the poorest 50%. Brazil has a greater concentration of wealth than ninety-five percent of countries on which data are available. In the legal field, tax justice is based on the constitutional principle of the "ability to pay", according to which taxes should be paid based on the economic capacity of the taxpayer. This principle first appeared in the Brazilian legal order in the 1946 Constitution, was excluded from the texts of 1967/69, and reappeared in paragraph 1 of article 145 of the 1988 Constitution. The aim of this paper is to examine two possible grounds for the principle of ability to pay (equal sacrifices and proportional sacrifices) to show how, in Brazil, the interpretations that seek to assign a positive content to this principle are limited to the horizons of a particular form of State associated with the theory of equal sacrifice. This theory for its turn is consistent with a theory of justice, under which no expense or charge levied by the government can alter the distribution of welfare produced by the market. As the application of the ability to pay principle is done within the limits of that horizon, as a consequence, this principle does not play an important role in the issue of reduction of inequality in Brazil.

3.

Josefa-Dolores Ruiz-Resa (University of Granada / Spain)

Jurisprunce and the society of knowledge (how to adapt a dogmatic knowledge to the demands of the collective intelligence)

Abstract:

The basic motto of the European Higher Education Area (EHEA) is to turn the university into an important agency of the so-called "knowledge society", whose primary task is the research and development of new products that expand the market of the European economy. On the other hand, the reform of the European universities intends to move away from the uncritical transmission of traditional knowledge, based on the authority of teachers, in order to stimulate learners to discover themselves the object of study. It is a purpose that is consistent with the new concepts of social science and philosophy of science, which consider individual an active subject when learning, and equipped with prior knowledge and a community culture in which he lives. At the same time, it is accepted that the knowledge society implies a participatory perception of intelligence, so that knowledge is considered as community knowledge that is transmitted by means of new information and communication technologies (ICT). Nevertheless, Jurisprudence (that is, the science made by lawyers) was not designed to be discovered and interpreted freely by means of certain educational tools, or to be made by any individual, but to be transmitted, guarded and then cultivated for its recipients, in a dogmatic and authoritarian tradition of knowledge.

I intend to analyze how the conception of the knowledge society and the use of ICT could influence Jurisprudence and conclude that the requirements of adaptability and flexibility for legal professions and the new model of learning which are demanded in the EHEA, should be seen as an opportunity for Jurisprudence to redefine its status and become aware of its cultural, social and practical dimension.

4.

Loisima Schiess + Miranda Lossian (Brasilianischer Richterverband / Brazil)

Physikalische und Mathematische Verbindungen von Justiz Division

Abstract:

Es wird eine Verbindung zwischen dem von Antiphon entwickelten infinitesimalen Berechnungsverfahren, der Theorie Verteilungsgerechtigkeit von Aristoteles, des Hebelgesetzes, der eben radialen Figuren und der Verteilung hergestellt.

Die Problemstellung stellt sich wie folgt dar:

dem Kennenlernen der Gründe, die Antiphon mutmaßen ließ, die Exhaustionsmethode als ein Mittel der Bildung des Quadratur des Kreises anzusehen,

Beziehungen von grundsätzlicher und historischer Art zwischen der Verteilungsgerechtigkeit und den Hebelgesetz herzustellen,

ein Model der Verteilungsgerechtigkeit, basierend auf der modernen Mathematik der Verteilung, von multipler Partizipierung zu konstruieren.

Die Zielsetzungen sind:

Die These zu erstellen, dass die Exhaustionsmethode aus der Gerichtspraxis stammt; dass das Hebelgesetz und die Theorie der Proportionen von Eudoxos Modelle der Verteilungsgerechtigkeit von Aristoteles sind;

weiter soll gezeigt werden, dass die ebene Verteilung der materiellen Partikel auch ein Modell der Verteilungsgerechtigkeit ist.

Das Modell der Mehrteiligkeit der Verteilung, das vorgestellt wurde, enthält zwei Arten von Freiheitsgraden, einen

für den Wert der zu verteilenden Güter an jeweils einen der Beteiligten und einen zweiter Freiheitsgrad für die verschieden Ebene zwischen den Beteiligten im Falle der Ungleichheit.

5.

José Antonio Seoane (University of A Coruña / Spain)

Human rights and disability: a question of justice

Abstract:

The manifolds conceptions and treatments of disability can be summarized through the dialectic between the medical model, understanding disability from a biological perspective as an individual problem that might be removed, and the social model, understanding disability as a social construction that must be improved with changes in the social environment. Recently the biopsychosocial model, presented as a synthesis of the previous models, or the diversity model, stressing the value of disability as a difference and the need of recognition as a question of justice, suggest new approaches and conceptions.

Nevertheless, a most comprehensive theoretical and normative proposal for justice and disability comes from the model of rights, whose paramount example is the UN Convention on the rights of persons with disabilities (2006). Describing and assessing the foundations and basic features of the human rights approach, arguing with the other models as well as with another theoretical proposals (capabilities approach, secure functioning approach, theories of recognition), and thinking about the meaning of justice in disability matters is the aim of this paper.

WORKING GROUP

WG 11 Ethics und Law	
Session 1	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 1.302
Chair	Polanowska-Sygulska, Beata Maria (Kraków / Poland)
Session 2	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 1.301
Chair	Swan, Peter (Ontario / Canada)

Lectures:
Session 1

1.

Antonio Cota Marçal + José Emílio Medauar Ommati + Paula Maria Nasser Cury (Pontifícia Universidade Católica de Minas Gerais + Pontifícia Universidade Católica de Minas Gerais / Brazil + Ruprecht-Karls University Heidelberg / Germany)

Ethik und Wissenschaft im brasilianischen Juradiskurs – eine Analyse der Argumente, die das Urteil des obersten Bundesgerichts über die Legalität der Abtreibung von hirnlosen Föten in Brasilien begründet haben

Abstract:

Gemäß dem brasilianischen Strafgesetzbuch ist der Schwangerschaftsabbruch eine Straftat gegen das Leben, die nach den §§ 124/126 mit einer Freiheitsstrafe von eins bis vier Jahren bedroht ist. Ausnahmeerlaubnisse sind der Abbruch mit dem Zweck, ein Todesfallrisiko für das Leben der Schwangeren abzuwenden, und der Abbruch im Fall einer Vergewaltigung.

Heute wird in Brasilien diskutiert, ob das allgemeine gesetzliche Verbot des Schwangerschaftsabbruchs hinsichtlich der Menschenrechte noch legitimiert sein kann. Ein besonderer Teil dieser Diskussion ist das Recht, eine Schwangerschaft abzubrechen, wenn es wissenschaftlich erwiesen wird, dass der Fötus hirnlos ist.

Im Jahre 2004 hat sich das brasilianische oberste Bundesgericht (Supremo Tribunal Federal) mit dieser Frage beschäftigen müssen. Um seine Entscheidung zu begründen, hat dieses Gericht verschiedene Sozialbereiche in eine öffentliche Debatte einbezogen, wie z.B. Wissenschaflter, Ärzte, Mitglieder von Frauen- sowie von Menschenrechtebewegungen und Vertretter von bestimmten Glaubensrichtungen. Dadurch sind wissenschaftlich-technische Argumente neben rein moralisch-religiösem Plädieren vorgetragen.

Obwohl diese Argumente von Bedeutung für die Rechtfertigung der Entscheidungen und für die sogenannte richterliche Fortbildung des Rechts sind, es sieht so aus, als ob die Grundfrage der Diskussion nicht berücksichtigt worden ist, einmal der Anlass des Vorgehens eigentlich um den wissenschaftlichen Charakter des heutigen Rechts geht. Darauf zielt unser Beitrag: um eine intersubjektive Konstruktion und Anwendung des Rechts gewährleisten zu können, müssen Rechtstheoretiker und Rechtsanwender wissenschaftlich vorgehen. In dieser Perspektive wird die Begründung des Urteils von Supremo Tribunal Federal analysiert sein.

2.

Marcin Kilanowski (Nicolas Copernicus University / Poland and Harvard University / USA)

On Pragmatism, Politics and objectivity of Ethics

Abstract:

In my presentation I would like to discuss Hilary's Putnam philosophy, which is very much rooted in pragmatism. As Putnam says, there are ideas in pragmatism that deserve to be part of the future of philosophy and are part of his. There are many things that we can learn from it – as he says. He admits that he does not normally call himself a pragmatist, but he is not unhappy when he is described as one. In saying this, he makes one reservation, that even though he might be described as a pragmatist he does not want his view to be assimilated with the views of his friend and philosophical opponent Richard Rorty. At the beginning I would like to show that Putnam thinks alike about certain issues as Rorty and Habermas when the

issue discussed is politics. Presenting this issues is important to understand Pragmatism as a whole, not only the classical one but contemporary, that it has a very important massage to deliver. And I strongly believe – as Putnam – that it can be „part of the future of philosophy". For that to happen certainly much more must be said and new steps are necessary. I believe another important step must be taken toward broadening our understanding of the role of ethics. And Putnam is making this step. Of course to understand his position about ethics it is important firsthand to present his criticism of certain philosophical points of Rorty and Habermas. In other words first I would like to show common point of his philosophical thinking with Rorty and Habermas, next where they differ and later Putnam's perspective on objectivity of ethics, which is rooted in his criticism of fact/value dichotomy.

3.

Beata Maria Polanowska-Sygulska (Jagiellonian University / Poland)

John Gray and the Implications of Value-Pluralism for Legal Philosophy

Abstract:
John Gray is the thinker who has reconstructed the main tenets of ethical pluralism inherent in the work of its initiator - Isaiah Berlin - and pointed to its consequences for political philosophy. In particular he singled out three levels of conflict in ethics identifiable in Berlin's writings: among the ultimate values belonging to the same morality or code of conduct, among whole ways or styles of life and within goods or values which are themselves internally complex and inherently pluralistic. Isaiah Berlin accepted the reconstruction, though he did not agree with all the consequences derived by Gray. As I was priviledged to discuss this subject-matter in person with both Isaiah Berlin and John Gray, I shall comment on their respective positions.
It is the third, internal kind of conflict that proves to be the richest in implications. Because it undermines a whole constellation of contemporary liberal doctrines informed by the Kantian-Lockean tradition that conform to the legal paradigm. From the pluralist perspective such monumental theories (e.g. those of Rawls or Dworkin) are no longer sustainable due to the recognition that no ultimate value is immune to the phenomenon of incommensurability. Thus, irresolvable conflicts may also break out within the given regulative value.
Confronting ethical pluralism with general reflection on law has mostly negative consequences. Nevertheless, the incommensurability thesis sheds considerable light on certain legal disputes. I shall illustrate this claim by interperting in pluralist terms the controversy over the verdict by the European Tribunal of Human Rights of 3.11.2010 concerning hanging crosses in classrooms.

4.

Karolina Prochownik (Jagiellonian University / Poland)

Law and disgust. Is it reasonable for a lawyer to be disgusted?

Abstract:
Emotions are very relevant in social life, and law as an institution that always corresponds with it to some degree, usually takes some social emotions into consideration. According to an American law and philosophy professor Martha Nussbaum, in certain circumstances emotions may be regarded as rational and applied in law. Cases that she describes include anger, fear, grief, compassion, shame and disgust. She argues that emotions like anger, fear, compassion and grief may play a role – to some extent – in two legal processes: legislation and legal proceedings – because they are in some sense reasonable and justified. She, on the contrary, refers to the liberal standards and criticizes influence of disgust in both processes.
In my paper I would like to briefly present the emotion which Nussbaum finds inadequate and unreasonable in reference to the liberal legal system and answer the question: is the presence of disgust in legal system indeed irrational and inconsequent if we assume some liberal standards? I agree with Nussbaum and my general answer is 'yes'.
But here arises a question: what does it mean to have a rational reason for using an emotion in law?
I would like to discuss the arguments against Nussbaum's theory as well as those for the use of disgust in legal domains.
My main thesis is that standards of rational consideration of emotions in law may change according to the legal system which we regard in such deliberations. For example a conservative legal system may be more tolerant of, susceptible and open to disgust – and we may say that it will be consequent, coherent and, finally, reasonable if it considers this emotion in legislation and legal proceedings. It appears that a liberal system, on the contrary, should be immune to such influence.
I will actually show how rationality standards (and therefore standards of rational use of emotions in law or rating them as 'reasonable') may change when we use different socially constructed hierarchies of values protected by particular legal systems.

5.

Cesar Antonio Serbena (Federal University of Parana / Brazil)

Is Ethics with moral dilemmas possible? A paraconsistent proposal

Abstract:
Since Thomas Aquinas and Kant, ethical systems formulated by the classical philosophers attended to general principles considered rational. There was a connection between logic and metaphysics and ethics. Aquinas deduced syllogistically the civil law from natural and eternal law as well as Kant formulated the principle that "obligatory implies possible". In this philosophical tradition, the ethical problems were conceived to be practical problems in which it was possible to find one solution and a rational response. Consequently, there would be no moral or ethical dilemmas. Nowadays there are still attempts to found the Ethics of Speech and the Theory of Legal Ar-

gumentation on rational principles. Both K. O. Appel and R. Alexy are examples and a part of their theories are based on "Münchhausen Trilemma" (Hans Albert). According to H. Albert and his Trilemma, it is not possible to support a philosophical theory or scientific argument using the circular argument and the regressive one. In the second half of the twentieth century logical systems alternative to systems of classical logic were formulated. One such logic is paraconsistent logic, which admits contradictions. We argue that, from the paraconsistent logic point of view, it is possible to formulate ethical and philosophical theories that accept the moral dilemmas as existing, real. In the same way, the circular argument of Münchhausen Trilemma would be no longer an impediment to support philosophical theories.

6.

Hubert Schnüriger (Universität Basel / Switzerland)

Eine Statustheorie subjektiver Rechte

Abstract:

In der Frage, was ein subjektives Recht ist, stehen sich klassisch zwei Theorielager gegenüber. Willenstheoretiker betonen, dass Rechte einen Handlungsspielraum der Rechtssubjekte schützen. Interessentheoretiker gehen davon aus, dass Rechte Interessen der Rechtssubjekte schützen. In jüngster Zeit weisen verschiedene Autoren im angelsächsischen Raum beide Ansätze zurück und fordern eine ‚dritte Theorie subjektiver Rechte'. Ziel dieses Beitrages ist es denn auch, eine solche dritte Theorie vorzulegen. Ausgangspunkt ist die Vorstellung, dass Rechtszuschreibungen eine bestimmte Art von normativer Beziehung zwischen Individuen implizieren. Das Spezifikum dieser Beziehung kommt darin zum Ausdruck, dass ein Individuum ein Recht besitzt, wenn ein anderes Individuum ihm gegenüber eine korrelative Pflicht hat.

Zunächst wird aufgezeigt, dass die beiden klassischen Theorien subjektiver Rechte auch in ihren überzeugendsten Ausgestaltungen in einigen Hinsichten unbefriedigend voraussetzungsstark sind. In kritischer Anlehnung an einige jüngere Theorien subjektiver Rechte wird im Anschluss eine Statustheorie subjektiver Rechte entwickelt, die diesen Beschränkungen nicht ausgesetzt ist, obwohl sie selbst auf einem anspruchsvollen moraltheoretischen Fundament steht. Die Statustheorie postuliert nämlich, dass Rechte eine bestimmte Begründungsstruktur von Pflichten implizieren. Die Pflichten, die Rechten korrelieren, bestehen um der Rechtssubjekte willen. Die Statustheorie arbeitet die begrifflichen Voraussetzungen dieser Begründungsstruktur heraus.

Session 2

7.

Peter Swan (Carleton University / Canada)

"There'll be the breaking of the ancient western code"?: Explorations of Law at the End of History'

Abstract:

The "negative political theology" of the philosopher, Jacob Taubes represents one of the most interesting theoretical challenges to law in the 20th -century. Using Taubes' s interpretation of the political theology of Saint Paul as a point of departure, this paper will explore two alternative conceptualizations of law at the end of history. Basing his interpretation of law on the work of Schmitt Benjamin, Taubes argues for a messianic break with history in which law is overthrown. However, in an aside, Taubes links his project of "negative political theology" to the French philosopher, Alexander Kojeve. I will show how law becomes a central category of their respective visions of "post history". However, with Kojeve we see law as an institution that remains in tension with social justice and as such can be interpreted as an historical project which may or may not be realized as "just law" at the "end of history" For some this prophetic vision may be more frightening than Taubes' messianic overcoming of law. However, Kojeve's view of law and justice remains too important to be conceded to an interpretive monopoly by the political right for it can illustrate the partial character of instituted justice in a continual interrogation of the political relationship between ruler and ruled. In this paper I will show how Kojeve's vision remains more open to contingency than we have been led to believe by both contemporary conservative and postmodern interpretations.

8.

Antal Visegrády (University of Pécs / Hungary)

Comparative Judicial Ethics

Abstract:

The paper consists of two main parts. The first passage presents the administration of justice in a historical segment, then it examines the relationship between morals and the law. Finally the leagal status of judges and juditial power is shown.

The second part of the paper endeavoures to present the fundamental principles and rules of judicial ethics as „distilled" from the European, Italian, Croatian, Canadian, American, Austrian, and Hungarian ethical-codes.

These are: A Judge Shall Be Independent; A Judge Shall be Impartial; Juditial Conduct of Proceedings Shall Be Charaterised By Fairness, Integrity, Equality, and Diligence; A Judge shall Refrain from Pursuing Any Political Activity; Judges' Activity in Public Life Must Also Be Ethical; A Judge Shall Conduct Himself Ethically Also in His Private Life;

According to the authors opinion the ethical codes protect and guide the judiciary – one of the pillars of the „Rechtsstaat" – at the same time they inform society about the requirements it may expect the juditiary to satisfy.

Finally the paper analises some decisions of the National Judicial Ethics Council of Hungary just as the sanctions for bridge of the ethical rules in Lithuania, Estonia, Moldova, Slovenia, and Czech Republic.

9.

Wojciech Zaluski (Jagiellonian University / Poland)

Evolutionary Theory and Metaethics

Abstract:

The goal of the paper is to reflect on

whether the evolutionary insights into human nature are relevant for the central question of metaethics, i.e., the question about the justification of moral norms. The point of departure of the analysis pursued in the paper is the rather uncontroversial claim that in the light of evolutionary theory human beings are 'moral animals', i.e., they have become endowed by natural selection with dispositions to act morally. To put it more precisely, the claim says that one can provide a plausible evolutionary genealogy of many (but not all) of our moral dispositions. It is clear that this claim has important implications for moral psychology and sociology or morality: many of the crucial questions of these branches of moral sciences (e.g., the question about moral motivation or the evolution of moral systems) cannot be fruitfully tackled without taking into account the results of evolutionary theory. However, it is much less clear whether these results have any implications for the aforementioned metaethical question. Painting with a broad brush, one can distinguish three general views on this matter. The first view asserts that by demonstrating an evolutionary genealogy of a disposition to take a moral act P one thereby strengthens a justification of a moral norm prescribing P. The second view asserts that by demonstrating an evolutionary genealogy of a disposition to take a moral act P one thereby weakens a justification of a moral norm prescribing P, because acting with this norm, besides what it may be beyond that, proves to be a means for achieving an evolutionary success (and thus a moral norm is 'debunked' as subservient to an evolutionary goal of transmitting one's genes to further generations). The third view asserts that demonstrating an evolutionary genealogy of a disposition to take a moral act P has no implications whatsoever for a justification of a moral norm prescribing P: by itself neither does it strengthen nor weaken a justification of this moral norm. The paper provides arguments for the last view. One of these arguments says that the second view would be a correct one only if demonstrating an evolutionary genealogy of an agent's disposition to take a moral act P were tantamount to demonstrating that an agent's motive to take this act is to foster his or her evolutionary success. The problem tackled in this paper inscribes itself into a broader problem of the limits of scientific explanation: the paper is aimed to show that the metaethical questions (unlike questions of moral psychology or the sociology or morality) are beyond the reach of scientific methods.

10.

Marco Antonio Oliveira de Azevedo
(Unisinos, São Leopoldo / Brazil)

Moral duties and legal permissibility

Abstract:
Some philosophers think that it is perfectly possible to have a moral duty of doing something even if it is legally permissible not to do that; and they usually think also – and this is stronger – that it is possible to have a moral duty of not doing something where we have a legal duty of acting in the same way. They think not merely that there are circumstances where people can have reasons of doing what is nevertheless legally forbidden (or of not doing what they are anyway legally obliged); the view is that there are situations where people have a more strong duty, a moral duty of doing (or not doing) what they are however legally forbidden, that is, that persons can have a moral duty of doing what they, nevertheless, have, at the same time and circumstances, a legal duty of not. What explains it is the alleged autonomy of morality in the face of law. We should note here that this view implies a deontological dualism; but this dualism in untenable. One reason for not accepting that dualism is that morality cannot be completely departed from law, for law forbids behaviors for the sake of ends not completely autonomous from some universally acceptable moral ends or principles. Nevertheless, that is not my direct point in this communication. What I want to show is that the deontological dualism is rationally and logically unsustainable. It is plainly acceptable that, following the principles of the Rule of Law, we cannot have any political duties except the legal ones. A sensible version of Mill's Harm Principle can explain that. But a more complete argument runs as follows. Regarding Hohfeldian semantics, to have a duty of doing something is equivalent of not having the privilege of not doing that; consequently, not having the same duty is the same as having a privilege of not accomplishing the same action. Hence, to say that someone has a moral duty to do A (take it as a verbalization of an action), but he has not any legal duty of doing A, implies that he doesn't have any duty at all; for he has a (Hohfeldian) privilege of not doing A. Then, to say that someone has a moral duty to do A (take it as a verbalization of an action), but he has not any legal duty of doing A, implies that he doesn't have any duty at all; for he has a (Hohfeldian) privilege of not doing A. We cannot have a duty of doing A and have at the same time a privilege of not doing A. Of course, this conjunction is possible for the philosophers that accept the deontological dualism between morality and Law. But that deontological dualism is unacceptable. First, because no one has duties against himself (that would imply to have a claim against himself) – a very acceptable thesis that Schopenhauer made first against Kant, and a view also expressed in 1958 by Elizabeth Anscombe in "Modern moral philosophy" (against Kant, again) – she said, besides a lot of important things, that a duty against himself is psychologically unintelligible; and, second, because we cannot claim A even morally against someone else if that alleged duty bearer has also a privilege to not-A: since he cannot be forced to do A (for he has a claim of not being forced of doing or not doing something except lawfully), how could we have a claim against him of doing A if this claim is not (and cannot be) lawfully – that is, legally – enforceable? A very different issue concerns the reasons for not doing what we have a legal duty of. That problem encompasses the

problem of civil disobedience. My last and concluding remark will be about how we must understand the concept of having reasons for action encompassing the issue of having occasionally reasons for disobeying. This is an issue of political morality; but accepting that we can have occasionally or eventually strong reasons for disobeying does not imply a deontological dualism, for we obviously can have reasons for refusing some legal commands and we can have occasional reasons of not accomplishing what is our legal duty too, but this does not imply that in those situations we are bound or submitted to any other kind of duty.

11.

Krishna Agrawal (Indian Institute of Comparative Law / India)

Law, Morality and Science

Abstract:

A study of various legal systems makes it clear that law and morals have had a long union. There are, indeed, many different types of relation between law and moral and there is nothing that can be profitable singled out for study as the relation between them. It is firmly believed that Jurisprudence depended much upon moral ideals, as just law has need of ethical doctrine for its complete realization. There is a conception that ethics and morality are one and the same thing. These terms are interchangeable. But it is not so. Ethics are those norms or ideals which are laid down for an individual Ethics is the study of supreme good – an attempt to discover those norms which should be followed because they are good in themselves, whereas under morality, they are those norms which are laid down by the society to regulate the conduct of a person in the society. Morality consists of those ideals which are set for a social group. Ethics, therefore, concentrates on individual rather then society. Norms of ethics are not variable whereas the norms of morality move with the advancement of society at a particular time. They are, therefore, variable.

In the present era of scientific development, medical advancement, information technology and use of internet for numerous human technologies, the role of law vis-a-vis such activities have become a hot topic of debate today. Law as the regulator of human behavior has made an entry into several multifarious, complex and difficult problems of civil and criminal nature, effecting morality. If law fails to respond to the needs of the changing soci3ty either it will stifle the growth of the society and choke its progress or, if the society is pragmatic and vigorous enough, it will cast away the law which stands in the way of its growth. Law is applicable both online human activities and also the off line activities.

The development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism of those people, whose moral horizon has transcended the morality currently accepted. Thus, a legal system must exhibit some specific conformity with morality or justice or must rest upon a widely diffused conviction that there is moral obligation to obey it.

Group B: Human Rights, Democracy; Internet / intellectual property, Globalization

WORKING GROUP

WG 12 Globalization	
Session 1	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 1.102
Chair	Golash, Deirdre (Washington / USA)
Session 2	
Date	TUE 16 Aug 2011
Location	RUW 1.302
Chair	Varga, Csaba (Budapest / Hungary)

Lectures:
Session 1

1.

Massimo Fichera (University of Helsinki / Finland)

Criminal Law Beyond the State: The European Model

Abstract:

Criminal law has been recently acquiring an increasingly higher profile at the transnational level and this has not yet been adequately recognised by criminal law theorists. The most pressing issue in the face of this event is that this contradicts the way criminal law has been traditionally conceived so far, i.e. as inextricably linked with the nation State. What is curious of the most recent developments is that they are all taking place separately from each other, with little or no interference. It is possible to discern different models and patterns but their complexity can perhaps be schematised and some common features can be identified. This paper will attempt to do so by analysing two general models, which are here termed the "eunomic" and the "dialogic" one. It will illustrate the main implications of the emergence of these models and their connection with human rights. It will be evident that when we talk about international criminal law we refer to two parallel dimensions. One has as its centrepiece the International Criminal Court and the other, permanent and non-permanent, courts that have been instituted across the world with a specific geo-legal and geo-political role. The other one is the outcome of a network of intertwined relations that overlap and are built around well-tested institutions and practices. Similar patterns have gradually emerged also at the European level. The paper will focus on one particular case study that has attracted the attention of many experts: European criminal law. It will be shown that this model was inherently "dialogic" until the last decade of the past century, but has now come to the fore as an inde-

pendent and unique example of "criminal law beyond the State", perhaps as a result of the simultaneous appearance of European constitutionalism beyond the State. Its slow but steady evolution has been strongly influenced by free market paradigms and this affects inevitably the way the relationship between the citizen and the public authority is shaped. In accordance with classic liberal views, criminal law has always been conceptualised as one of the most salient attributes of the sovereign State. This was admitted under a very strict condition. Holding the monopoly on the use of violence was to be legitimised by the State's deep concern for the sphere of autonomy of the individual. It is submitted in this paper that it is precisely this condition that is lacking in the current European model. These considerations are closely linked to the nature of the European Union (EU) as a polity that possesses some State-like traits. It is for this reason that it is also argued that criminal law, if properly conceived, can function as a powerful vehicle of integration.

2.

Pablo Holmes Chaves (University Flensburg / Brazil)

Global Law and Global Exclusion: Dilemmas of constitutional semantics in the World Society

Abstract:

Thanks to the legal and political semantics of democratic constitutionalism it has been possible, even in the periphery of capitalist global economy, to politicize to a great extent issues regarding the exclusion of the benefits of functional social systems – what has led, specially in high industrialized countries with high levels of inclusion, to a considerable sensibility of the legal code regarding these matters. In fact, modern society seems to be based on a kind of radical differentiation of social spheres in which the stabilizing function of the legal system seems to be indispensable. Modern democratic law guarantees both (1) the differentiation of functional systems against each other – an immunizing function – and (2) the neutralization of possible excluding tendencies of particular systems, as in the classic case of economy – an exclusion-neutralizing function. In today's world society a post-national global law, which has become fragmented in a very complex web of specialized regimes, seems indeed to perform in a quite satisfactory way the first (1) of those functions. It does not seem however to be able to perform its exclusion-neutralizing task (2) in a way that blocks the continuous growth of functional subsystems, which might jeopardize its social and human environment. The main assumption of the present paper proposal is that fragmented global law is not able to perform (2) because it lacks the sort of internal semantics which made possible the politicization of issues regarding the excluding tendencies implied in functional differentiation. The imperative towards inclusion and participation in the formulation of legal norms, which seemed to make possible the legal "observation" of political conflicts, does not shape the semantical framework of the sort of functional constitutionalism governing today's specialized international law.

3.

Quoc Loc Hong (Vu University Amsterdam / Netherlands)

The Role of Courts in the War on Terror

Abstract:

The normative position of the judiciary under the traditional conception of democracy as self-legislation by the people is too weak to protect in an effective way the rights of suspects in the global War on Terror. Drawing on arguments elaborated by Hans Kelsen and Karl Popper, we shall attempt to devise in this paper an alternative democracy conception that could serve as a much more solid foundation for the judicial branch of government in a democratic state. Through this jurisprudential strategy, we hope to be able to maintain the balance of normative power among the Trias Politica, which, in turn, may contribute to the preservation of the legal rights of every person during the struggle against terrorists.

4.

Isabel Turegano (Universidad de Castilla-la Mancha / Spain)

The Role of International Law in State Building: Levels of Transitional Justice

Abstract:

The debate on transitional justice since the 1990s has been focused mainly in the devices, institutions and procedures more suitable for confronting and dealing with a legacy of conflict and past violations of human rights. From the analysis of retributive and restorative models of justice, the relative merits of criminal prosecutions and truth commissions have been discussed. But transitional justice must also reflect on the relative merits of local, national and international resources involved in peacebuilding and of empowerment of population and internal institutions or international community intervention in postconflict situations. That is, space dimension must be included in reflections about transitional justice, analyzing how internal and external processes affect the fundamental problems of rebuilding communities, such as legitimacy, accountability, security, governance and social and economic development.

Efforts to achieve initiatives of transitional justice can come from a variety of spheres or levels, each of which contributes differently to rebuilding and reconciliation. Maybe, transitional justice is only attainable in that interaction between different levels that is able to combine the contribution of each. This multilevel approach demands a concept of legitimacy in which international normativity is coherent with state sovereignty, being the language and strategy that can be used to influence internal events and lead them to overcome conflict.

5.

Ramón Ruiz Ruiz (Universidad de Jaén / Spain)

Globalization, Law, and citizien political Partizipation

Abstract:
Democracy has been conceived in many different ways throughout history, though nowadays the hegemonic is the one usually referred to as "liberal". The problem with this idea of democracy is that it reduces the role of the citizen to that of mere voter who, once has voted, has nothing more to do in the public realm, as after all, liberal democracy does not consist in the government of the people, but in the government of some persons authorized by them: the politicians, who are to rule the community in a very discretional way. This means that on too many occasions, laws and political decisions do not correspond to the real opinions, wishes and interests of the people, which, in turn, gives rise to increasing discontent and disbelief in politics. And this situation is aggravated even more in a globalised world, where the influence of the citizens in the major part of the decisions which are going to affect their lives is even less, as they are taken by instances which they very often do not even know.
Nevertheless, even though this conception of democracy is the most widespread it is not unanimously accepted, but has been contested from a number of intellectual positions, one of the most central in our days being the so-called "civic republicanism". Republicans stress the importance of an intense, responsible and widespread participation due to a number of reasons. However, many contemporary scholars argue that such a wide and intense participation is impossible because it can be excessively demanding for the citizens of our individualistic societies, too much enclosed in their private lives. In my paper, as well as expounding in more detail all the previous questions, I shall also try to give an account of the institutional arrangements that these republicans propose to enable a greater participation – not only at an internal level, but also international – and thus to give a reply to those who sustain that it is impossible to motivate citizens to participate more and to involve themselves more in public affairs.

6.

Bizina Savaneli (St. Grigol Peradze University / Georgia)

General Plan of Mutual Transition, Spiral and Evolutionary Development of Positive Law and Normative Order

Abstract:
I. In contemporary world we have three levels of Single Positive Law: single international law of all states (common international law), single international law of group of states (for example, the European Union law, Organization of American States and African Union law) and single laws of nation states (laws of UN member states).
In contemporary world we correspondently have three levels of Plural Normative Order: plural transnational normative order of all states (common international order), plural transnational normative order of group of states (for example, the European Union normative order, Organization of American States and African Union normative order) and plural normative order of each nation states (normative orders of UN member states).
Single Positive Law or Legal Monism (Public Positive Law and Private Positive Law) indicates how public bodies and private persons ought to act ideally. Plural Normative Order or Normative Pluralism (Public Normative Order and Private Normative Order) shows how public bodies and private persons acts really. "Im Aufang war die Tat". (Goethe).
At the level of the philosophy of law Plural Normative order connected with the idea that the individual acts of private persons (normative facts) do not depend on the positive law or its sources based on the Giant Goethe's formula: "Im Aufang war die Tat". Instead of "How to Do Things with Words", I support the formula: "How to Do Words with Things". Human beings do things without words. The things do words, the words do new things, new things do the new words, the new words do new things and etc. Of course, on the one side, speech act is one of the forms of human being's activity. Through speech act human being's activity can be transmitted from one position to another, or its normative state can be changed, or the volume of its individual rights and obligation can be broaden or get narrow, but, on the other side, in any case, human being more silently acts than speaks. Related to the strictly normative space, speech act is one of the forms of normative fact, but in any case, private person more silently acts than speaks. In whole, speech acts are one of the forms of normative order, but in any case, public bodies and private persons more silently acts than speaks. Permanent and cyclical interaction between things and words, inter-substitution of things and words, and permanent and cyclical inter-transition of things and words at global, regional, national and local levels has a trend to comprehend a sense of law of Humankind, which must be based on the Universally Recognized Human Rights. The aim and goal of such interaction, inter-substitution and inter-transition is to achieve sustainable development of Humankind. Formula "New things produce new words" means that new facts produce new mutual rights and obligations. The entity of new facts and new mutual rights and obligations create new normative space, which causes necessity to establish new positive law and etc. Generally talking: to claim "ought to be" means that such "ought to be" practically possible. In other words: it is nonsense to claim human action which is not practically possible. "Ought to be" should be based on the individual human capacity. In any case, the basis of the law of the negation of the negation concerning jurisprudence is the normative order, because "Im Aufang war die Tat". Things negate words, words negate things, things negate words, and etc. In this sense, for me the Normative Order is "Ordo Ordinans". Legal Monism (what ought to be) and Normative Pluralism (what is) never coincide. Generally, my theory of dialectical jurisprudence is founded on the laws of dialectics of Hegel. They are: the law of the unity and conflict of opposites; the law

of the passage of quantitative changes into qualitative changes; the law of the negation of the negation. Dialectical Jurisprudence is a sphere of science, which explore dialectics of law and order separately and together, and propose a model of dialectics of law and order separately and together.
II. The "legal families" theory or Comparative Law ignores the phenomenon of normative order. Almost all scientists operating in comparative law and legal theory ignore any role of practice of individual normative acts of public bodies and private persons in formation of normative order. However, the state and certain combination of practice of individual normative acts of public bodies and private persons construct individual legal face of country, which is always different from normative orders of other countries, disregard that both could be even entered in the same legal family. So it is necessary to introduce a new branch of legal science: Comparative Normative Orders Study, which at the beginning should not be investigating in the frameworks of Comparative Law Study. In this sense I put forward an idea of practical jurisprudence. Comparative Law is the part of Comparative Jurisprudence. Another part of Comparative Jurisprudence is the Comparative Normative Order.
III. It is a deep mistake to consider positive law as decisive factor of conflict prevention and resolution, because unjust law of legislative power could be factor of conflicts. Important factor of conflict prevention and resolution is the formula: "Making just law makes a dry tree green", as Shota Rustaveli – the famous Georgian philosopher and poet of the XII Century – proclaimed. The Idea of Just Law suggest what sort and kind of law legislators (in Roman-Germanic i.e. "civilianist" legal space) or judges (in Anglo-American, i.e. common law legal space) should make, so that any laws would be just from the Universal Human Rights Law. The Mutual-Transition of Legal Monism, Normative Pluralism and Idea of Just Law must be based on the Universal Human Rights Law as Basic Norms' System, and this process must be repeated dialectically, i.e. spirally, constantly, evolutionary and endlessly. Therefore, we the people of the world need a New Human Philosophy under the auspice of Universal Human Rights Law, which links the East and West, North and South, ethics and religions, public and private life, technologies and environment, and the myriad problems, which have never been exist in the history of Humankind in widespread aspect. Humankind has one high type of law – Universal of Human Rights Law – as the pick of World Law, which rises above the positive laws and normative orders.

Session 2

7.

Domenico Siciliano (Dipartimento di teoria e storia del diritto, Facoltà di Giurisprudenza, Firenze / Italy)

Global Governance des Militärs: Einsatzregeln als Hybride zwischen Recht, Politik und Technik

Abstract:
Die europäischen Regierungen setzen an der Intersektion zwischen domestic law und internationalem Recht immer stärker öffentlich-rechtliche Politik „von oben" durch. Damit entsteht eine Regierungsform, die mit Martti Koskenniemi als Global Governance genannt werden kann. Sie zeichnet sich durch die Merkmale Entformalisierung (informelle Absprachen), Fragmentierung (strategische Ausdifferenzierung des Wissens) und Empire (Top-down-Entscheidungen) aus. Diese Tendenz wird am Beispiel des Militäreinsatzes im Kampf gegen den Terrorismus rekonstruiert und kritisch hinterfragt. Da dieser keine Grenzen kennt, kennt auch seine Bekämpfung keine Grenzen. So wird das Militär nicht nur zur äußeren, sondern auch zur inneren Sicherheit eingesetzt. Damit entsteht ein Regime der Sicherheit, dass die Differenz Innen/Außen zunehmend aufhebt. Die Einsatzregeln sind der Tòpos zur Durchsetzung eines solchen Sicherheitsregimes. In einem ersten Schritt wird durch die Analyse der Produktion der Einsatzregeln im deutschen, italienischen und spanischen Recht die entsprechende Global Governance des Militärs rekonstruiert. Zum einen werden die jeweiligen Regeln zum Einsatz der Gewalt gegen Zivilfahrzeuge im Inland rekonstruiert. Zum zweiten werden die Regeln zum Einsatz der Gewalt im Ausland rekonstruiert und hinterfragt. Die Netzwerke, in denen die Einsatzregeln entstehen, sind informell, die Rechtsquellen meist geheim und durch strategisches Wissen gesteuert. In einem zweiten Schritt wird die technisch-militärische, politische und rechtliche Komponente der Einsatzregeln genauer beobachtet: weder rechtliche Regeln, noch politsche oder technische sind die Einsatzregeln ein Hybride aus allen Regeln, bei dem die technisch-militärische Komponente der Disziplin die Oberhand zu gewinnen scheint.

8.

Mehmet Tevfik Ozcan (Istanbul University / Turkey)

The Rule of Law After Globalisation: Is Myth or Reality?

Abstract:
The rule of law is unique establishment that had taken place in historical milieu as politico-legal creation of capitalist society. Apart from our legal philosophies upon how the society might be bettered, legal system in action relies on certain conditions, as considered likely to the existential condition of living organism which cannot be reduced to its solitariness. To the extent that any legal system was established in historical context, its form and functioning are cannot be channelled by introverted actions of lawyers and legal philosophers. The rule of law emerged in certain conditions, which we say "classical liberalism", in power allocation wherewith we diversify political power and legal power in the milieu of political society, as enunciated as "republic" or "commonwealth". Contrary to earlier forms of legal order, where legal machinery had clearly been an apparatus of political power, capitalism was unique that its super structure

was articulated according to the pivotal role of legal machinery. There was actual or taken for granted equilibrium between legal and political domains that fairly matched with public and private dichotomy, as legal power was very likely to the depoliticized setting of liberal individuals. After monopoly capitalism, social setting of liberalism was dramatically incurred some major modifications in two respect, that was firstly pervasiveness of liberal individual was dislocated by monopoly accumulation of capital, as devastation of the society of small property owners; that was secondly political achievement of the working classes obtained political equality, as drastic consequence of mass society. Additionally, monopoly capitalism willy-nilly undermined individual as natural person in economic and legal domains in favour of legal personality of corporations or other associations, because private entrepreneurs dramatically left out after corporate bodies prevalent. In this milieu, the rule of law metamorphosed to depolitical scene of democratised mass society instead of modus vivendi of liberal individuals, which demarcated the rule of law according to welfare society or sozialrechtsstaat model. After neo-liberal globalisation after 1980's, republican model of political society faded away that transformed to transnational markets, hierarchies and communal settings how crosscut inner equilibrium between politics and law. Under unfortunate decay of working class politics, regionalism and communalism became main tenets of political participation that matched with consumerism and cultural identity politics, detrimental to the civic virtue of greater (i.e. national) society in favour of glocal arenas. Finally, I point an ex post facto property of the rule of law that it would be safeguarded by power allocation, instead of benevolence or supererogation of economic and political power. In this milieu, today, the rule of law is not only most debatable topic among lawyers and legal philosophers, but also it is most vulnerable and unpromising, neither no any reliable guaranteeing provision to safeguard its being.

9.

Seiko Urayama (Senshu University / Japan)

Immigration Justice as a Theory of Global Distributive Justice

Abstract:
Not only global distributive justice theorists but also theorists who are trying to dealing with justice in immigration have not paid an adequate attention on the benefit and burden caused by the international movement of people. On the one hand, remittances from rich countries to developing world today are so huge that they help the economy of developing world. The international remittances to developing countries in 2006 year which amounted to 220 billion US dollars far exceeded the amount of ODA in the same year which was 104 US dollars. Admitting more and more people in developed countries from developing ones might contribute to the global redistribution of wealth. On the other hand, there is a growing concern about the brain-drain problem. It is said that more than 20% of physicians practicing in the highly developed English speaking countries such as US, Canada, UK, Australia and New Zealand are foreign-trained. Sending countries would suffer from a lack of human resources for creating and running the society by losing the most talented and active part of their population. This means that there exists benefit and burden on the movement of people, which their fair distribution matters. On my view, any theory of immigration justice should adequately take it into consideration. I will examine how existing lines of thought on immigration admissions deal with these positive and negative impacts of the international movement of people. Theories I will examine are Joseph Carens' argument from freedom of movement, David Miller and Michael Walzer's nationalism argument, and Daniel Bell and Christine Straehle's view of global economic redistribution. Finally, I will propose that the borders of developed countries be open fairly. Developed countries may welcome the people from the developing countries. At the same time, their immigration policy should not harm the developing countries.

10.

Csaba Varga (Hungarian Academy of Sciences; Catholic University of Hungary / Hungary)

Where Law, Science and New Technology can Meet: The Philosophy of European Law

Abstract:
In reconsideration of the composition and operation of European law, describing its mentality may also answer the query whether European law is the extension of some domestic laws or a sui generis product with no antitype. In action, European law is destructive upon underlying traditions of legal positivism; it recalls post modern clichés rather. Like a solar system with planets, it is two-centred from the beginning, commissioning implementation and initial judicial control to member states. As part of global post modernism, (1) European law stems from artificial reality construction freed from historical particularities and human experience, anything given hic et nunc. By its operation, (2) European law dynamises large structures and makes thereby to move what is chaos itself. It is solely reconstructive human intent that tries to arrange whatever outcome within some posterior ideal of order, without the operation itself (assuring daily management) striving for anything of order or systemicity. This is the way for European law to become an adequate reflection of a (macro) economic basis to which it will serve as superstructure. According to the above, (3) the whole construct is operated (mobilised and integrated into one working unit) within the framework of an artificially animated dynamism. With its "order out of chaos" principle it assures member states' standing involvement and competition, achieving a flexibly self-adapting but unprecedentedly high degree of conformity.

11.

Wang Xigen (Wuhan University / China)

On the right to be free from poverty – a perspective of global justice

Abstract:

The results of the research on poverty issues in international society may be summed up in six categories, including (1) the income approach, (2) the equality approach, (3) the capability approach, (4) the basic needs approach, (5) the human rights-based approach, and (6) the responsibilities approach. Few of these views treat freedom from poverty as a human right directly. Even if someone recognizes it as a human right (e.g., Thomas Pogge), he can not explore its meaning, foundation, legitimacy and legal protection from the perspective of legal philosophy and legal practice. In the current international human rights law system, the right to be free from poverty has not been regarded as an independent human right. Thus, in this paper, we try to disclose the concept of the right to be free from poverty in order to realize the global justice. We will focus on three issues as follows: (1) what – what is the basic meaning and essential characters of the right to be free from poverty? (2) why – why is it a new human right and different from the existing rights, such as right to life, right to health, right to food, right to housing and right to work, etc? Can it be replaced by the existing rights? What is the jurisprudential foundation of this right? (3) how – how to realize this right by rule of law? How to construct a set of system of obligations and legal mechanism to protect this right?

1. The basic meaning and essential characters of the right to be free from poverty.
2. The jurisprudential foundation of the right to be free from poverty.
3. The pedigree of obligation about the right to be free from poverty
4.The legal mechanism of implementing the right to be free from poverty.

12.

Mauro Zamboni (Stockholm University / Sweden)

Transnational Corporate Law: Lex Mercatoria or Lex Americana?

Abstract:

Looking closely at the field of transnational corporate law, one finds that despite the fact the classical question of "what is a corporation" has on one side been central for the corporate debate in state or state-based legal systems, on the other side this issue seems to have been left at the margins when attention is shifted to the transnational context. The main goal here is to analytically identify "what is a corporation" from a legal perspective within the transnational discourse or, using Stanley Fish's terminology, within the transnational interpretative community.

In order to get to the bottom of this central issue, the focus in this paper is on the evolutionary processes that the legal concept of corporation has undergone while moving from a state-based legal regime to a non-state based (transnational) regulatory system. Almost paradoxically, this investigation of the evolutionary process is done to establish the "hard-core" of the legal concept of corporation through its various evolutionary phases, i.e. the legal meaning attached to the legal idea of corporation that has remained steadfast through the time and space of its use.

Through the use of a legal perspective as to the evolution of the concept of corporation in transnational corporate law, the basic goal here consequently is to delineate the external boundaries of the possible developments of this very concept, in particular in relation to the idea of corporate social responsibility in a transnational context. A clear demarcation of the external legal boundaries of the idea of corporation in a transnational context, i.e. its ultimate legal requirements, is particularly relevant in order to determine, from a legal perspective, what can and cannot be demanded as an internal legal duty for a corporation.

WORKING GROUP

WG 13 Human Rights – general	
Session 1	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 454
Chair	Penski, Ulrich (Siegen / Germany)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	IG 454
Chair	Turkbag, Ahmet Ulvi (Istanbul / Turkey)

Lectures: Session 1

1.

Marcelo De Araujo (Universidade do Estado do Rio de Janeiro; Universidade Federal do Rio de Janeiro / Brazil)

Die kontraktualistische Begründung der Menschenrechte

Abstract:

Klassische Theorien des Gesellschaftsvertrages gehen von der Annahme aus, dass Menschen Träger von angeborenen Rechten sind. Diese Theorien versuchen, aus der Idee eines Gesellschaftsvertrages bestimmte politische Prinzipien für die Begründung einer Gemeinschaft herzuleiten, durch die diejenigen moralischen Rechte, mit denen die Natur die Menschen ausgestattet habe, geschützt werden. Seit Mitte der 18. Jh. bezieht man sich auf solche Rechte auch als Typen von Menschenrechten. In den klassischen Theorien des Gesellschaftsvertrages werden moralische Rechte bzw. Menschenrechte also nicht begründet, sondern eher vorausgesetzt. Deshalb waren die Theorien des Gesellschaftsvertrages bis in die zweite Hälfte der 20. Jh. hinein keine Moraltheorien, sondern in erster Linie politische Theorien. Seit Mitte der 1980er Jahre versuchen einige Autoren jedoch, die Moral aus einer kontraktualistischen Perspektive zu be-

gründen. Der moralische Kontraktualismus zielt darauf ab, das Phänomen der Moral in Anlehnung an die klassischen Gesellschaftsvertragestheorien als ein System wechselseitiger Beschränkungen zu verstehen, dem Individuen aus ihren eigenen Interessen zustimmen würden. Wichtige Vertreter des moralischen Kontraktualismus sind z.B. John Leslie Mackie, David Gauthier und in der deutschsprachigen Philosophie Peter Stemmer und Norbert Hoerster. Ihr Anliegen besteht darin, anhand von kontraktualistischen Ansätzen zu zeigen, dass die Moral ohne Rekurs auf metaphysische bzw. naturrechtliche Annahmen begründet werden kann. Diese Autoren versuchen aber nicht in erster Linie, Menschenrechte zu begründen. Das Ziel meines Beitrages besteht darin, Menschenrechte aus einer kontraktualistischen Perspektive zu begründen.

2.

Samuel Brasil (Faculdade de Direito de Vitória / Brazil)

Weighted Maximum Satisfiability in the Optimization of Human Rights

Abstract:
Human rights are a set of basic, fundamental entitlements in the context of justified moral norms or legal rights, and are usually reinforced according to the weight of the circumstances balanced one another in a version of practical concordance. In this paper, the author argues that balancing human rights can properly be represented and solved as weighted maximum satisfiability problem. As one of the optimization extension of maximum satisfiability, in which a variable assignment is sought to satisfy the maximum number of clauses in a Boolean formula, the weighted maximum satisfiability asks for the maximum weight which can be satisfied by any assignment, given a set of weighted clauses. The framework is designed to model the legal reasoning that warrants court decisions based on norms, legal findings, and values for any general or particular legal case concerning the optimization of human rights' weighted clauses. And, although it emphasizes the importance of other formal representations, the paper addresses a claim that all arguments, including rules and principles of fundamental rights, can properly be represented in the proposed weighing formula.

3.

José Renato Gaziero Cello + Cassiana Lara Zequinão (Pontifícia Universidade Católica do Paraná / Brazil)

Reason Crisis in the 20th and cultural relativism: it is possible to establish an universal ethic for human rights?

Abstract:
Originally Philosophy tried to find rational answers to explain the development of the world and the meaning of life, and, throughout the history of Western civilization, has been supplanted, in the perspective of the masses, by techno-science and the explanations of Christianity. But the disenchantment of modernity leads to security that was provided by metaphysics - particularly the Christianity - and science, especially since the explosion of atomic bombs, no longer the safe haven that promised to be in the nineteenth century. Given this philosophical skepticism, which had been mostly relegated to ostracism from Descartes, returns with force in the twentieth century, a fact that becomes relevant to the analysis of individual and culture, especially with regard to cultural relativism. However, when applying relativism to cultures in which people or small groups would have the right to maintain autonomy from the moral standards of living, even if it means the acceptance by the rest of the population practices considered to violate rights established as fundamental to human dignity, faces the pressing question of how is the debate about the necessity of establishing an universal ethic; first, that reason – and its crisis – is grounded in what might call capitalist instrumental reason, and, secondly, that tolerance derived from the ideal of scientific neutrality is not capable of doing the debate about the necessity of establishing an universal ethics and what are its foundations, a fact that culminates ultimately, the debate about human rights, whose foundations are still a philosophical open problem.

4.

Ulrich Penski (University Siegen / Germany)

Menschenrechte im Zeitablauf

Abstract:
Entscheidungen des EGMR, in denen vertreibungsbedingte Eigentumsentziehungen nach dem 2. Weltkrieg bei Qualifizierung als Augenblicksakten von der Anwendung menschenrechtlicher Normen ausgenommen wurden, lassen die Frage stellen, ob und unter welchen Voraussetzungen historische zurückliegende Staatshandlungen der Anwendung solcher Normen entzogen werden dürfen.
Von einem Verständnisses der Menschenrechte als Rechte, die einzelnen – durch diese vermittelt auch Kollektiven – wegen des bloßen Menschseins gegenüber Staaten zukommen, her wäre zu folgern, daß ihre Geltung keiner zeitlichen Begrenzung für die Vergangenheit unterliegen darf. Einer solchen Einschränkung widerspräche ihrem angegebenen Rechtscharakter.
Unabhängig davon ist jedoch zu fragen, ob und inwieweit die Folgen einer Verletzung von Menschenrechten und damit verbundene Wiedergutmachung im Hinblick auf den Zeitablauf anzuerkennen sind. Diese wäre unter dem Gesichtspunkt des zeitlichen Abstandes und der Art und dem Ausmaß der noch vorhandenen Auswirkungen der Verletzung bei den Betroffenen zu beurteilen.
Eine zeitliche Anwendungsbeschränkung zeigte sich demnach als unvereinbar mit dem Rechtscharakter von Menschenrechten. Bei der Festsetzung der Rechtsfolgen von Verletzungen wären jedoch veränderte Umstände im Hinblick eines angemessenen Ausgleichs zu berücksichtigen.

5.

Jacob Dahl Rendtorff (Roskilde University / Denmark)

Ethical principles for biomedical and biotechnological challenges to law

Abstract:

In a number of books and articles I have been promoting the ethical principles of respect for autonomy, dignity, integrity and vulnerability as four important ideas or values for a European bioethics and bio-law. Together with Professor Peter Kemp I was initially responsible for writing the report from the project: Basic Ethical Principles in European Bioethics and Biolaw, VOL 1-2 (Copenhagen and Barcelona 2000). An important resume of the BIOMED project was the partner's Policy Proposals to the European Commission, the Barcelona Declaration of, which is unique as a philosophical and political agreement between experts in bioethics and bio-law from many different countries. In this presentation I want to discuss the ethical and legal relevance of the Barcelona Declaration and other international Documents on bioethics and bio-law, e.g. the Council of Europe's Convention for the Protection on of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, Adopted by the Committee of Ministers in 1996 and The UNESCO Declaration on the Humana Genome 1997. The idea is to defend the argument that the basic ethical principles of the Barcelona Declaration do not only represent European ethical principles for bioethics and biolaw, but they should also be conceived as a conceptual clarification and articulation of global ethical principles, which are central to international concerns for a universal bioethics and biolaw.

6.

Katya Kozicki (Federal University of Parana, Pontifical Catholic University of Parana / Brazil)

Human Rights and Justice in a Multicultural World

Abstract:

This paper intends to discuss some contemporary issues on human rights related to the concept of justice. Is the set of individual rights that is assumed by western democracies really universal? If so, how are they supposed to be interpreted? On the other side if I take into account the "other" and pluralism in a serious way how to conciliate different concepts of justice? Taking Jacques Derrida's approach of justice as its standpoint this paper aims to stress the difficulty to achieve a unique concept of justice as well as to think justice in the sphere of international law and the problem of ensuring human rights in the international order. Western democracies has becoming more and more multiethnic and multicultural and the set of rights that is at the center of the legal order has to be interpreted in a dialogical sense, one that assumes difference and plurality as its starting point. The plurality of conceptions of the good and the impossibility of establishing a unique concept of justice demands the re-creation of a democratic sphere where the dissent and the conflict could be experienced and, at the same time, the legal order needs to ensure individual and group rights against majority's dictatorship. The main goal of this paper is to re-think the interpretation of law in a multicultural scenario in which it is not possible to have only one criteria of justice and difference and pluralism are envisaged are values themselves.

7.

Ali Hassan Razal (University of the Punjab, Lahore / Pakistan)

Global peace in the view of religion

Abstract:

This paper will discussed the challenge of global peace from the view of religion. Firstly, peace is conceptualized with respect to order: defense of people in their person their things and their deals. In respect of each of these challenges the role of religion is examined as potentially positive or negative depending on its connection with politics. The analysis is then extended to order with justice. Special consideration is paid to the "social contract" as a base of the publicpolitical society. In this connection some explanation are made regarding the theocracy vs. democracy argument. How far could each of these systems be seen as a possible danger to peace and if so, is there room for reconciliation? The second part of the paper starts with a conceptualization of human rights as essential human interests sheltered by law. These center interests are based on human self-respect as such, while entailing certain major freedoms and entitlements that everyone ought to enjoy.

Session 2

8.

Amy Bartholomew (Carleton University / Canada)

(Re)Legitimating International Human Rights: Toward a 'Decent Respect for the Opinions of Mankind'

Abstract:

I argue that Habermas's discourse theory of domestic democracy may fruitfully be extended to international human rights debates. While it is ambivalent, Habermas's work on the political constitution of world society may be more productive than even his friendly critics have charged. I will show this by focusing on its implications for the (re)legitimation of international human rights.

While Habermas seems to sever opinion-from will-formation at the supranational level he also provides more deliberative democratic possibilities.

First, by conceptualizing the necessity for a democratic chain of legitimacy Habermas implies that states must democratize themselves through rights struggles in order to be able legitimately to influence supranational politics.

Second, his recent argument for two paths of legitimation running through the supranational level, through the roles of cosmopolitan and national citizens, and conceiving the General Assembly as a constituent assembly lay the conceptual groundwork for viewing the "constitutional project" at the supranational level as radically open to contestation and argumentation under something approaching discursive conditions,

thus rendering the (re)legitimation of international human rights susceptible of the presumption of rational global acceptability.
On this reading, Habermas's argument is well-suited to responding to the critics and to developing a legitimation strategy for necessary but fraught international legal-political norms. We are in need of such a robust construction of the justice of international norms which are still contested and have increasingly far- and deep-reaching implications.

9.

Ahmet Ulvi Turkbag (University of Galatasaray / Turkey)

Stereotypes and Prejudices Versus Human Rights in An Advanced Technological World

Abstract:
Human rights are believed to be the subject matter of law and expected to be primarily under the assurance of international laws then to be followed by national laws. But our everyday experiences draw us a completely different picture than what we learn from
human rights books and documents. Everyday life is governed by social norms and social norms are mostly designed by culture. Every culture has a life vision, a pattern of life including stereotypes and prejudices against the other.
On the other hand advanced technology, especially information technology, increases all kinds of relations and gives new opportunities for face to face relations too. We can easily get information about other people and culture. We are more familiar to each other than any time in history. So thinking and conducting in a pattern or thinking with prejudices seems to get hard in this technologically advanced world. But would we say that information technology and human rights are directly proportional?
This paper tries to give an answer to the question above. In the first part it traces cultural patterns and gives some examples of stereotypes and prejudices which determine our thinking. The second part tries to state impact of advanced technology on patterned thinking, namely stereotypes and prejudices. The last part discusses the relations or interactions among prejudices, advanced technology and human rights both theoretical and sociological levels.

10.

Denis Franco Silva (Universidade federal de juiz de Fora / Brazil)

From human rights to person rights: legal reflections on posthumanism and human enhancement

Abstract:
In the intersection between law, science and technology lies the debate on the overcoming of the boundaries of the biological structure of the human being and its implications on the idea of human rights, on the concept of person and on the conception of equality – being the latter a fundamental tenet of a democracy.
Posthumanism assumes a biological inadequacy of the human body regarding the quantity, complexity and quality of information which it can muster. The same occurs with the needs of accuracy, speed or strength demanded by the contemporary environment. Under such perspective, the body is considered to be an inefficient structure, with a short lifespan, easy to break and hard to fix.
The body, always seen as the locus for the definition of human, emerges as the object of a commodification process that seeks to exonerate men from their burden - by declination towards a virtual existence, totally free and rational – or to enhance them with bionic devices or drugs.
This issue has already been the subject of attention by many scholars like Savulescu, Rodotà, Broston, Fukuyama and even Habermas.
Therefore, the aim of this paper is to seek, by criticism and revision of the positions on the foreseen problems of this process, an adequate theoretical approach on issues like the concept of person and its connection with the idea of human rights in order to promote the fundamental statement that all men are equal without disregard to the values of diversity and personal identity.

12.

Anja Matwijkiw (Indiana University-Northwest / USA) + Bronik Matwijkiw (Southeast Missouri State University / USA)

Stakeholder Jurisprudence: The New Way in Human Rights

Abstract:
In their joint paper, entitled Stakeholder Jurisprudence: The New Way in Human Rights, Dr. Anja Matwijkiw (Indiana University Northwest) and Dr. Bronik Matwijkiw (Southeast Missouri State University) examine and evaluate the stakeholder terminology, methodology and philosophy in connection with the United Nations' "tacit conversion" to the relevant terminology, methodology and philosophy. In spite of the rudimentary nature of the conceptual and normative framework that derives from the new way, which the United Nations introduced in the same time period the so-called Millennium Development Goals (MDGs), there are sufficient premises consistent with the claim that the United Nations have adopted what might be described as a stakeholder jurisprudence for human rights. In the first part of their paper, Dr. Anja Matwijkiw and Dr. Bronik Matwijkiw outline the premises in question with a specific view to explicating their link with the kind of theory which was originally presented by R. Edward Freeman, namely stakeholder theory. As a consequence of the facts that (1) stakeholder theory was designed, developed and defended within the discipline of business management, and (2) was split into two versions, respectively a broad version and a narrow version, the authors argue that while the mission of the United Nations is definitely different from that of a for-profit business, the relevant global organization and partnership nevertheless operates on the basis of a mission that entails management strategies that are supposed to help the United Nations accomplish its mission, however unique. In the event of failure, the outcome would show an absence of

peace and security for humanity. That granted, the two authors also show that the United Nations' new way in human rights puts a great emphasis on the promotion and protection of economic and social human rights and, furthermore, does this in order to affect peace and security for humanity positively, for the sake of justice enhancement in other words. Analytically, it follows that the new way is consistent only with the broad version of stakeholder theory. In the second part of their paper, Dr. Anja Matwijkiw and Dr. Bronik Matwijkiw make use of M. Cherif Bassiouni's scholarship in order to illustrate the practical aspect of the stakeholder theory and jurisprudence. More precisely, they draw on M. Cherif Bassiouni's report on the human rights situation in Afghanistan for the purpose of showing its application potential within the United Nations' business domain. Finally, in the third part of the paper, the two authors raise a series of critical questions which may pose challenges, either to the successful demarcation cum substantiation of stakeholder jurisprudence as a possible branch of traditional/contemporary general jurisprudence or to the overall credibility of the idea and project of resorting to theoretical input from a thinker like R. Edward Freeman, who – in 2010 – set out to correct "misunderstandings and misuses of stakeholder theory", including the absence of a distinction between comprehensive moral doctrine and stakeholder theory. Such theoretical fact-finding may suggest the need for a separation (of stakeholder theory and general jurisprudence) in the future so as to avoid serious (self)image issues or, alternatively, that human rights theorists and United Nations managers may be better off by choosing a third way pertaining to general jurisprudence.

WORKING GROUP

WG 14 Human Rights – specific questions	
Session 1	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 457
Chair	Schaumburg-Müller, Sten (Aarhus / Denmark)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	IG 457
Chair	Indaimo, Joseph (Perth / Australia)

Lectures:
Session 1

1.

Aurelio De Prada (Rey Juan Carlos University / Spain)

Between Confucianism and Human Rights: 君人-the ‚jun individual

Abstract:
In this paper we focus on the question of China and human rights from the point of view that, according to common opinion, is at the very basis of Chinese culture: Confucianism. This point of view is analyzed in its contextual frame as well as in itself and related to human rights. The conclusion is that human rights are foreign to Confucianism and, by extension, to Chinese culture. Ultimately, however, human rights are not necessarily incompatible with that perspective. It is possible to imagine a synthesis based on what here we shall call 君人: the jun individual.

2.

José Antonio López-Garcia (Jaén-University / Spain)

Die Wandlung der Souveränität und die Grundrechte

Abstract:
Die Bedeutung der Souveränität hat im 20. Jahrhundert gewechselt. Nicola Maquiavelo und Jean Bodin hätten den Fürst als superiorem non reconoscunt gezeichnet. Wenn das Fürstentum untergegangen wird, die Aufklärung hat die Souveränität als Volkssouveränität begriffen. Aber die Idee der Hohheit des Fürsten, die aus dem 16. Jahrhundert kommt, bleibt noch. Das Volk ist das neue Fürst. Anfang des 20. Jahrhunderts, wenn die Demokratie als normale Regime gehalten wird, zezt diese aufklärische Idee von Hohheit des Volkes fort. Warum das? Eine Demokratie muss die Regime der Grundrechte sein. Aber die Hohheit kann ein Volk höherer als ander machen. Vielleicht muss man einen neuen Begriff suchen, um eine neue Konzeption des demokratischen Volkes zu erreichen. Nicht mehr das Souverän als „superior" sonder als „inferior". Souverän wäre das inferiorem non reconoscunt. Eine Idee des Souverän die in unserer Geschichte sein muss oder kann.

3.

Nishino Mototsugo (Aichi University / Japan)

Menschenwürde und Menschenleben

Abstract:
In der Neuzeit hat man sich auf Menschenwuerde angesichts des Krisen der Menschheit buruft; erstens gegen unmenschliche Ausuebungen der totaritaeren Staatsgewalt, zweitens gegen den Eingriff in das fruehembryonale Leben und das
Erbgut eines Menschen in der rasch sich entwickelnden Bereich der Biotechnologie und Humangenetik. 1. Soll man darin die Veraenderung des Gehalts der Menschenwuerde (Von der Wurede der Person zur Wuerde des Lebens) oder die Erweiterung der Extension der Menschenwuerde sehen? 2. Wie muss man die Beziehung zwischen der Menschenwuerde und Menschenleben verstehen? Die Position der Entkoppelung der Beiden oder die Position der Zusammengehoerigkeit der Beiden? 3. Wie soll man den sogenannte Status des fruehen Embryos denken? Traeger der Menschenwuerde oder das Objekt des Schutzes des Lebensrechts? 4. Soll man die enge Konzeption oder die weite der Menschenwuerde adoptieren? In diesem Referat moechte ich die obige Problematik anhand von der deutschen mannigfaltigen Diskussionen betrachten.

4.

Ofer Raban (University of Oregon / USA)

Capitalism, Liberalism, and the Constitutional Right to Privacy

Abstract:
The paper is an examination of the principles of political liberalism, and the role they play in the American constitutional Right to Privacy – arguably the most liberal of constitutional rights. Put differently, the paper offers a theoretical lens – that of political liberalism – through which to view and criticize the doctrine developed around the constitutional right to privacy (which includes, inter alia, the right to have an abortion, to refuse medical treatment, to marry the partner of one's choice, and to engage in sexual sodomy free from fear of criminal prosecution).
The paper is divided into two parts. Part I is an exposition of the tenets of political liberalism, pursued via an analogy with capitalism. The purpose here is the elaboration of a short and concise set of principles encapsulating the essence of Anglo-American liberalism. Part II consists in the application of Part I to U.S. Supreme Court cases dealing with the constitutional right to privacy.
The paper criticizes the U.S. Supreme Court for lack of fidelity to political liberalism – which, arguably, is the one coherent theory underlying its constitutional right to privacy cases. Greater understanding of political liberalism, it is argued, would bring greater coherence and consistency to this confused body of constitutional doctrine, which was aptly described by a lower court as "a rickety structure."

5.

Sten Schaumburg-Müller (Aarhus University / Denmark)

The challenges of technology and a three leveled protection of freedom of speech

Abstract:
Freedom of speech has always had a close and ambiguous relationship to technology: 1) Technology provides the technical means of dissemination of ideas and information. This goes for the printing press, film, records as well as the internet. However, 2) technology can be abused in order to provide false information, to influence the general opinion, create scapegoats, pogroms etc. Books, films and to a lesser extend music has provided propaganda, and the internet is used for the dissemination of racism, terrorism etc. Lastly, 3) control of the technical means of publicizing has always entailed power to decide what to publicize and what not to publicize. This is true for editors, film makers and internet hosts alike. In relation to the challenges posed by the internet, such as infringement of privacy, dissemination of hate speech, blocking of politically incorrect pages etc, I contend that the challenges are not entirely new but generally attached to technology. Secondly, I argue in favor of a three leveled protection of freedom of speech: 1) Protection of the right to receive and impart ideas and information, 2) protection against abuse, and 3) providing the structural framework for this to be possible. All three levels have normative backing in i.a. the 1948 Universal Declaration of Human Rights, and they can be defended from a legal philosophical point of view.

6.

Hans Morten Haugen (Diakonhjemmet University College / Norway)

Human rights in scientific professions' codes of conduct?

Abstract:
While the medical professions have a long history of codes of conduct, less emphasis has been on codes for scientific (science and engineering) professions. Those that exist have been adopted by associations on the national level, including Engineers Australia, Engineers Ireland and Engineers India.
Paragraph 41 of the Final Declaration of the World Conference on Science in 1999 recommended that "a code of ethics based on relevant norms enshrined in international human rights instruments should be established for scientific professions."
No code of ethics has been adopted. Paragraph 76 of UNESCO 2008-2013 Strategy says that "UNESCO will support the implementation and refinement of existing normative instruments, and the application of practices and tools to facilitate the growth and use of science and technology respecting human dignity and human rights. It will also support the development of new instruments as may be deemed necessary by the governing bodies."
Moreover, at the second World Conferences on Research Integrity in 2010, the home page announced that there would be work on 'Global codes of conduct'. The 'Singapore Statement on Research Integrity', does not, however, refer to neither global codes or human rights.
The paper will analyse the need for a code of conduct for the scientific professions, and whether a global approach and a human rights approach is desirable, and also if it is desirable that UNESCO or the relevant associations take the lead in this process.

7.

Toshihiko Suehisa (Tohoku Gakuin University / Japan)

The Right of Self-determination and Its Functions

Abstract:
The technical development of the artificial reproduction or prolonging the end-life caused serious bioethical problems. People have lost the trust in medical professionals, known human rights and doubted an objective value judgment on which the paternalistic relationship between doctors and patients was based. That was why the idea of the self-determination was expected to solve such problems. The idea of the informed consent which is one of its necessary conditions also brings us a merit that a medical treatment is informed more openly and precisely. It presses doctors to respect patients as persons who can decide their own questions by themselves.
However most of them are in fact weak and not normal so far as they are in hospitals. There is a deep gap between the idea and the reality of the self-determination. Sometimes it compels patients to be in an isolated situation without any support by medical staffs, just because the matter belongs to their privacies. That lets me doubt whether it still can

be a key concept in the medical practice, while I recognize its great merits.
So, I would like to examine the idea of the self-determination to find a path in which every patient can be really respected and supported. I start with the clarification of its theoretical background, then investigate its real functions, turn attention to the legislation and lastly propose a model of the doctor-patient relationship not based on this idea.

8.

Riken Barua (Premier University, Chittagong / Bangladesh)

Human Rights in Buddhism

Abstract:

In this paper I want to be summed up as the conceptual and doctrinal basis for human rights in Buddhism. I am concerned with the intellectual bridgework which must be put in place if expressions of concern about human rights are to be linked to Buddhist doctrine. There are many aspects to this problem, but three related issues will be considered here: the concept of rights, the concept of human rights, and the question of how human rights are to be grounded in Buddhist doctrine.
(...)
The present paper is a contribution to this process from a Buddhist perspective. Its aims are limited to an exploration of some of the basic issues which must be addressed if a Buddhist philosophy of human rights is to develop. Buddhism, that concern for human rights is a post religious phenomenon which has more to do with secular ideologies and power-politics than religion, and it is therefore unreasonable to accuse Buddhism of neglect in this area. The Buddhist scriptures do not refer directly to specific modern human rights; however in them we may identify a concept that forms the foundation of human rights. To borrow the terminology of modern human rights we may call this the concept of human dignity. This ideological task requires the practical study of various Buddhist doctrines carried out to date by religious groups, and in addition to Buddhology, which involves philological and corroborative research on Buddhism, a new Buddhist theology.

Session 2

9.

Yukiko Stave (Japan)

Confucianism and Rule of Law: Their Compatibility and Inherent Injustice

Abstract:

"[President] Lee [Teng-hui] is my president, and I support him in whatever way I could," said one justice of Taiwan's Supreme Court. Rule of Law is a principle of governance that the State itself is bound by law thus requires separation of powers. In Japan, formal policy of corporations is that men and women are equal in compliance with Japanese employment law. However, at many corporations, female employees are required to wear employer-provided uniform whereas male employees assigned to similar duties are not required. In Rule of law, all persons and entities are accountable to the laws that are equally enforced and are consistent with international human rights norms and standards. Why do we see this odd puzzle: there is law written but little rule of law? Ms. Kim Soon-duk, a former comfort woman who was raped by as many as forty Japanese soldiers for three years, hid her story for over tens of years. There is pressure not to express anger in order not to jeopardize social order even against victims whose fundamental rights were severely violated. Where does this pressure come from?
Confucianism is philosophy defining ethical behavior and social responsibility, which evolved into one of the most influential values in East Asian societies. Confucianism emphasizes social order over individual autonomy and prefers propriety to law as a method of ruling. I review Confucianism and Rule of law to address two issues embedded in the examples above: compatibility and injustice. For compatibility, I contrast Confucianism and Rule of Law. For injustice, I explain what injustice is inherent in Confucianism.
With this analysis, I would like to bring Rule of Law awareness closer to one. Further, I desire it help ending the unnecessary cry of the socially disadvantaged.

10.

Musa Toprak (Baskent University / Turkey)

Implementation as a Key Concept for International Courts (of Human Rights)

Abstract:

20th century was a stage for so many new mechanisms and concepts, international human rights courts is one of these new mechanisms. Courts are founded and designed as a tool of the ruler to reset and reproduce their will and power, and as a result of the power's nature; rulers were extremely jealous about sharing the power among the history. It is not an easy thing to show an example of sharing power unless they have to. We can find examples of separated courts, rights given to certain religious or ethnic communities in specific areas. Such as letting a religious community to decide on family law issues or letting them for deciding about their cases about inner disputes of their organizations. But in all these occasions we see that jurisdictions are divided preciously with thick lines. Authorities did not wanted to share their jurisdiction unless they have to and when they did because of necessities they had always divided the ruling areas and never shared it with any other.
There was no example of a court depending on different authorities power at the same time before the 20th century. It was an era for the development through international commissions to courts. The discussions are focused mainly about deciding if that certain mechanism is an independent court or not. Beside that discussion we should look onto implementation of the decisions because the true nature of a court decision shows the characteristics of its decision makers during its implementation. Is it possible to call a certain mechanism as a court,

even it has no power on the implementation of its decisions?

11.

Bo Zhao (University of Groningen / The Netherlands)

The Social Construct of Posthumous Reputation

Abstract:
Posthumous reputation has been used as a solid argument to support the posthumous harm thesis in the long-hovering philosophical debate initiated by Feinberg. In a sense, however, this argument is so much taken for granted that it lacks a more in-depth analysis from both sides of the debate. The dilemma that lies in this argument, as in other arguments supporting the thesis, is this: on the one hand, there is no subject existing after death and thus no one is in fact harmed; while, on the other hand, it feels just quite right according to our consciousness that one has a reputation even after death and may be harmed as such.
This short essay intends to address the issue in a way some different from the traditional approaches in the debate. It argues that posthumous reputation is a social construct of a community more to help with smooth social transition after one's death and to retain order of that community, large or small. Defamation post-mortem is not done substantively to a deceased person, but to these who remain alive and most related: relatives, friends and acquaintances, and even the whole community. This is the fundamental reason why our communities protect posthumous reputation, whether in the name of honour, individual property, human dignity or personality; and many of them tackle it directly by law.
First this article will briefly review the significance of the posthumous reputation argument in the philosophical debate of posthumous harm and explain the dilemma thus it encountered. Then it will turn to law and exam some legal cases selected from different countries such as Germany, China, Israel, etc. to establish solid evidence of posthumous reputation. It argues that our central concern should be why we need this concept and we have to explain further why it is more protected in some communities than in others. These problems have not been fully addressed before and they are the main topics of this article. It concludes that posthumous reputation is a social construct and its protection is contingent on the nature and characteristics of a given community.

12.

Joseph Indaimo (Curtin University / Australia)

Human Rights & the Law: the Unbreachable Gap between the Ethics of Justice and the Efficacy of Law

Abstract:
This paper explores the structure of justice as the condition of ethical, inter-subjective responsibility. Taking a Levinasian perspective, this is a responsibility borne by the individual subject in a pre-foundational, proto-social proximity with the other human subject, which takes precedence over the interests of the self. From this specific post-humanist perspective, human rights are not the restrictive rights of individual self-will, as expressed in our contemporary legal human rights discourse. Rights do not amount to the prioritisation of the so-called politico-legal equality of the individual citizen-subject animated by the universality of the dignity of autonomous, reasoned intentionality. Rather, rights enlivened by proximity invert this discourse and signify, first and foremost, rights for the other, with the ethical burden of responsibility towards the other. From this post-humanist position, the structure of our contemporary human rights law does not go far enough in ensuring the ethical space for the other. Rather, contemporary human rights law is marked with the potential of an ego-politics of the Self and a justice for the Same, reducing alterity under a homogeneity of socio-political processes, and ethical responsibility to a minimum level of legal tolerance between so-called equal individuals.
The paper explores the potential efficacy of the law in fulfilling this ethical justice of responsibility for others found in a post-humanist human rights of the other. It argues that there is an unbreachable gap between the structure of law and the ethics of justice – the ethical gap between self and other – which necessarily fates law with failure. This is the necessary failure in human rights law of the unending demand of ethical responsibility placed upon us in proximity with others; of an infinite justice always open to the potential reduction of others under the systemic machinations of marginalisation and repression.

WORKING GROUP

WG 15 Democracy in modern society	
Session 1	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 0.251
Chair	Barbosa, Claudia Maria (Parana / Brazil)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18-00 h
Location	IG 0.251
Chair	Karam de Chueiri, Vera (Curitiba / Brazil)

Lectures: Session 1

1.

Claudia Maria Barbosa + José Querino Tavares Neto (Pontifical Catholic University of Parana / Brazil)

Reflection on the social and political responsibility of the Magistrate and the Judicial Power in the context of the Judicialization of Politics

Abstract:
The Constitution of the late 80's marked the phenomena of constitutionalization of social relations in Brazil. The moral reading of the Constitution, the formulation of a theory of principles, the af-

firmation of the juridical value of the rules then taken by programatics, the constitutional provision of social rights and the broad list of fundamental rights recognized, as well as the recognition of new rights and new legal actors are characteristics of this contemporary constitutionalism. This movement expands the space for defining the patch, convenience and desirability to the judicial decision-making, previously taken in the political sphere of the executive and legislative. Such phenomena, which is called judicialization of politics, has imposed to the Judicial Power and the Magistrates as well, a new political role in contemporary democratic states organized under the civil law system. It requires studies aiming to define the limits of the judicial responsibility, which must consider a social and political responsibility of the Magistrate and of the Judicial Power and it is out of the reach of the doctrine of state liability. This discussion involves issues like freedom of judging, legitimacy and legitimation of Judicial Power, as well as the responsibility of judges for their harmful actions or poor delivery public policies, which are the focus of this article.

2.

Vitor Blotta (University of São Paulo / Brazil)

The Fascination of Authority and the Authority of Fascination. Rationalization and legal theory in Habermas revised

Abstract:
The requalification of Habermas discussions on political philosophy and legal theory after the publication of Zwischen Naturalismus und Religion (2005), and his most recent texts and debates on religion and the public sphere, suggest a revision of the Habermasian theory of rationalization as it was firstly presented in Theorie des Kommunikativen Handelns (1982), especially on what concerns the processes of dessacralization and the linguistification of religious authority. In search of contributing to this revision, this paper intends to focus on the problem of a supposedly "lost" aesthetic-expressive understanding of the secularization of religious authority in Habermas theory of rationalization, which may have contributed to a theory of law in Faktizität und Geltung (1992) that does not give satisfactory account to the aesthetical-expressive character of the modern understanding of legal authority. A deeper study of this special character of authority may contribute, however, not only to the avoidance of fundamentalisms and new attempts of "aesthetization of politics", but also to a rational strengthening of the solidarity of the citizens of democratic constitutional states, through the negative solidarity of identifying oneself to the suffering of the other.

3.

Samuel Brasil (Faculdade de Direito de Vitória / Brazil)

The NOSSA LEI Project: Direct Democracy in a Virtual Assembly

Abstract:
Many legal systems have very limited direct democracies provided by three forms of direct manifestation: initiative, referendum (plebiscite), and recall. The NOSSA LEI Project (meaning "Our Law") offers a web based tool to facilitate public participation on the enactment of statutory law in a virtual assembly. The citizens are allowed to debate, bring in, and vote on each and every bill addressed by themselves. Once reached the number of votes established by the Constitution, the bill brought in by the very citizens is submitted to a representative assembly as it comes from popular initiative. The NOSSA LEI project has an immediate impact upon the representative democracy theory and upon the issues submitted to popular deliberation. This experience, though not official, has put forward valuable results which contributes to enhance the direct participation of the citizens on important issues of governments, and to theory of democracy.

4.

Pedro A. Caminos (Universidad de Buenos Aires / Argentina)

The statu quo paradox and the theory of deliberative democracy

Abstract:
Democratic theory has both a prescriptive and a descriptive function. That means that such a theory does not only pretend to take into account the "really existing" democracies, but also provides certain normative criteria related to the features that a democratic regime must have.
The theory of deliberative democracy developped by Carlos Nino tries to meet that standard. In order to accomplish that task, he argued that really existing social practice shoud have a second-order place within his theory. For Nino, social practice creates a framework for action wich allows the deveolpment and enhancement of democracy. For that reason, judges may rightfully hold a staute unconstitutional if it threatens the social practice, becoming then a danger for the ground of the very democratic regime, even though the statute satisfies the regulative ideal of democratic deliberation.
If that is so, it could be the case that a judge commited with deliberative democracy ideal, and who has a subtantive agreement with a statute, should hold it unconstitutional in orden to protect a statu quo, with wich he has only a goal-means commitment. This situation, wich I will call "statu quo paradox", brings about some issues that point at the core of Nino's thought. In this paper I shall examine two of them: 1) the unavoidability of consequentialism; 2) the place of statu quo in a practical reasoning theory that has the transformation of that statu quo as it main aim.

5.

Luiz Philipe De Caux + David Lopes Gomes (Universidade Federal de Minas Gerais / Brazil)

Constitution, document of culture and barbarism

Abstract:
This article aims at discussing the relationship between history and modern constitutions. Based on Walter Ben-

jamin's reflections about history, it approaches the modern constitutions as, at the same time, documents of culture and documents of barbarism.
To support this postulate, the article begins with a distinction between culture (Kultur) and cultural goods (Kultergüter), emphasizing the importance of the concept of tradition or transmission (Überlieferung): culture would not be just an accumulation of precious things, but a spiritual alive relation from the past to the present and from the present to the past.
In the sequence, the article focuses on the relationship between memory and struggles for recognition. On the one hand, it is the memory of the injustices of the past that impel the present to the struggle for recognition. On the other hand, the struggles for recognition play a fundamental role to preserve the memory.
But the dimensions of time involved in the discussions about modern constitutions and history are not restricted to the past and the present. As an inaugural point of a constituent project, these constitutions also concern the future.
All these articulations permit to comprehend modern constitutions as a complex and tension relationship among past, present and future, a relationship that – like history itself – is interpreted and reinterpreted by each new generation.

6.

Eric Ghosh (University of New England / Australia)

Negative republican liberty

Abstract:
Philip Pettit's and Quentin Skinner's interpretation of republican liberty has been applied for the purpose of contemporary guidance in various works of legal scholarship. Their interpretations of republican liberty as a non-positive conception have substantially converged, as is demonstrated by their responses to Ian Carter's and Matthew Kramer's critiques. The critiques and responses appear in Laborde and Maynor (eds), Republicanism and Political Theory (2008). This paper adds to the critiques offered by Carter and Kramer by considering the persuasiveness of Pettit's and Skinner's responses. It also points to an interpretation of liberty that is more faithful to the republican tradition and more attractive.

7.

Ana Lucia Pretto Pereira (Federal University of Parana / Brazil)

Political activity of constitutional jurisdiction: some dimensions

Abstract:
Since the advent of what is known as new constitucionalism, the jurists have faced the difficult task of overcoming the failures of normative positivism. In this context, Judiciary Power has played a prominent role, by operating law as a science, and as a technical. This new role can be justified on grounds of legal theory and institutional reasons. These reasons have led legal philosophers to a series of discussions, such as the relationship between law and ethics. As the Critical Legal Studies denounces, the judge always acts informed by ethical convictions. On the other hand, according to R. Forst (within another context, but also relevant here), this is not really a problem, because a rule can be provided with ethics, but not ethically justified. This openness to moral makes it difficult for the interpretative judicial discourse to be taken as claimed by K. Günther: as a discourse of application only, not of justification. All these controversies, however, lead to a common statement: the constitutional jurisdiction has been exercising a different activity. Some constitutional systems acknowledge such activity as legitimate, like Brazilian's, for example, which states a very broad jurisdiction, provides en extensive catalog of basic rights and also several procedural mechanisms for their protection. This empowers the jurisdiction to exercise what can be called a political activity. Therefore, the Judiciary has discussed a series of moral issues which were once exclusive to the political arena, such as: gay marriage, abortion, affirmative action, religious freedom, federation, separation of powers, distribution of scarce resources. In a democracy, these moral questions must be mainly decided through political choices; exceptionally by Judiciary. The paper discusses these issues, showing also how the jurisprudence of the Brazilian Supreme Court has dealt technically with this relationship between law and justice, from a complex and pluralist society.

Session 2

8.

Vera Karam De Chueiri (Federal University of Paraná / Brazil)

Judicial review and technology

Abstract:
Judicial review reflects the level of commitment between constitutionalism and democracy in contemporary States. Yet democracy as the sovereign government of the people implies a tension with constitutionalism as the rule of law. That is, people ruling themselves or the government by the people – majority government – is limited by the law of law making, the constitution. In Brazil, the improvement of judicial review is nowadays related to increasing the number of decisions given by the Brazilian Supreme Court or rather to the capability of this the latter in deciding a large number of constitutional lawsuits no matter the form and content of its arguments. For the Court is nowadays driven by numbers and to accomplish its goals in terms of numbers (of decisions) it applied to technological solutions such as the digitalization of legal proceedings. It means that as many decision as Supreme Court issues – with the help of technology – the better it is. Relating the numbers of decisions issued by the Court to the improvement of Brazilian judicial review or Brazilian constitutionalism and democracy is a great mistake and a false statement as far as it does not face the main problem of the system, which is the lack of justification of Supreme Court's decision. The point is that, in this case, tech-

nology is just a tool – among others – in order to render legal proceedings faster yet not a qualitative sign of Supreme Court's decisions.

9.

Vesselin Paskalev (European University Institute / Italy)

The Importance of Acting on the Right Reasons: Deliberative Democracy and Science-Dependent Regulation

Abstract:

The proposed paper starts with the claim that the deliberative democracy theory is the adequate theory of justification of the acts of public authority. In the adopted version of the theory, the legitimacy of any single act depends on its correct justification by arguments which are, or at least can be, supported by all. On this account the agreement of all affected citizens on the reasons for the acts becomes crucial and the possibility of such agreement is the main focus of the paper.

For the deliberative democrats the rational discourse in the public sphere can bring about formation of a will shared by all affected citizens. Interestingly, their reliance on rational argumentation as means to this end finds support in Aumann's Agreement Theorem according to which rational people not only can, but unavoidably must agree. Of course, the prerequisite conditions for such agreements – ideal speech situation for deliberative democracy and common priors for the Agreement Theorem – are never met in the real political processes. Yet this may be more likely in the cases where decisions are controversial politically, but ultimately dependent on expert argumentation and especially on scientific evidence (GMOs, pharmaceuticals, etc.). Arguably, in the regulation of technology and risk the political discourse is subject to the scientific one, where the conditions for consensus are closer to the ideal. The paper concludes with discussion how scientific discourse both constrains and empowers political actors and how it bridges certain controversies while opening others.

10.

Chueh-An Yen (National Taiwan University / Taiwan)

Democracy and the Nature of Law

Abstract:

The aim of this paper is to investigate the relations between democracy and the nature of law. Is democracy an essential property of law? Most legal theorists would say no, simply because law, as an important public institution, was already in existence much earlier than our modern political system of democracy and, in the present world, law exists everywhere, even in countries which are not democratic.

However, if democracy is to be considered as identity of the ruler and those who are ruled, there remains much to be discussed whether democracy is the only feasible state form, at least in a reasonable pluralistic world in Rawlsian sense, that can make a ruling system not only a system with coersion and enforcement, but a real legal order. This is not just a legal theoretical question, it has significant practical relevance for many countries in east Asia which adopted western legal system in the past two centuries, but built up democratic systems separately from that reception, like Japan or Taiwan, or still refuses to accept democracy, like China.

I will start with some brief elucidations of the theory of democracy of Kelsen and Dworkin, and then make some arguments for the positive relationships between democracy and the nature of law. My main idea is, if the purpose of law is to protect freedom and sustain a reasonable plural society, democracy is the only way to maintain a reasonable public norm-creating system for that purpose.

11.

Jacob Dahl Rendtorff (Roskilde University/ Denmark)

Ethical principles for biomedical and biotechnological challenges to law

Abstract:

In a number of books and articles I have been promoting the ethical principles of respect for autonomy, dignity, integrity and vulnerability as four important ideas or values for a European bioethics and bio-law. Together with Professor Peter Kemp I was initially responsible for writing the report from the project: Basic Ethical Principles in European Bioethics and Biolaw, VOL 1-2 (Copenhagen and Barcelona 2000). An important resume of the BIOMED project was the partner's Policy Proposals to the European Commission, the Barcelona Declaration of, which is unique as a philosophical and political agreement between experts in bioethics and bio-law from many different countries. In this presentation I want to discuss the ethical and legal relevance of the Barcelona Declaration and other international Documents on bioethics and bio-law, e.g. the Council of Europe's Convention for the Protection on of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, Adopted by the Committee of Ministers in 1996 and The UNESCO Declaration on the Humana Genome 1997. The idea is to defend the argument that the basic ethical principles of the Barcelona Declaration do not only represent European ethical principles for bioethics and biolaw, but they should also be conceived as a conceptual clarification and articulation of global ethical principles, which are central to international concerns for a universal bioethics and biolaw.

12.

Pedro a. Caminos (Universidad de Buenos Aires / Argentina)

The statu quo paradox and the theory of deliberative democracy

Abstract:

Democratic theory has both a prescriptive and a descriptive function. That means that such a theory does not only pretend to take into account the "really existing" democracies, but also provides certain normative criteria related to the features that a democratic regime must have.

The theory of deliberative democracy developped by Carlos Nino tries to meet that standard. In order to accomplish that task, he argued that really exist-

ing social practice shoud have a second-order place within his theory. For Nino, social practice creates a framework for action wich allows the deveolpment and enhancement of democracy. For that reason, judges may rightfully hold a staute unconstitutional if it threatens the social practice, becoming then a danger for the ground of the very democratic regime, even though the statute satisfies the regulative ideal of democratic deliberation.

If that is so, it could be the case that a judge commited with deliberative democracy ideal, and who has a subtantive agreement with a statute, should hold it unconstitutional in orden to protect a statu quo, with wich he has only a goal-means commitment. This situation, wich I will call "statu quo paradox", brings about some issues that point at the core of Nino's thought. In this paper I shall examine two of them: 1) the unavoidability of consequentialism; 2) the place of statu quo in a practical reasoning theory that has the transformation of that statu quo as it main aim.

WORKING GROUP

WG 16 Democratic development in individual countries I	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 4.202
Chair	Vergara, Oscar (Galicia / Spain)

Lectures:

1.

José Renato Gazierro Cella + Juliana Vieira Pelegrini (Pontifícia Universidade Católica do Paraná / Brazil)

The Prohibition of the Right to Anonymity on the authoritarian Brazilian Constitution and its Impact on Social Networks

Abstract:

The Constitution of the Federative Republic of Brazil, enacted in 1988 during the democratization process of the country after the end of an authoritarian regime preceded by several others that show a non-democratic tradition in the Brazilian Republic, remained still remains an authoritarian state Patronizing and Paternalist, the example of the final part of the Article 5, item IV, which claims to be the free expression of thought, but forbids anonymity, prohibition which deserves to be rethought, especially in the internet, where the navigation data of people deserve protection, as well as their rights to remain anonymous, a fact which entails the need for reflection on the scope and how best to interpret the constitutional provision cited, a debate that, in the proposed article should think the ideas of paternalism, authoritarianism and freedom, whose focus will be within the Internet, social networks and the Knowledge Society.

2.

Carlos Frederico Oléa (Universidade Estadual de Londrina / Brazil)

Die Vergerichtlichung in Brasilien: Fragen und Perspektiven

Abstract:

Das Wachstum der Vergerichtlichung in Brasilien ab den 90er Jahren wird in den offiziellen Statistiken gezeigt. Allein im Obersten Bundesgericht wurden im Jahre 1990, 18.564 Verfahren mit 16.449 Gerichtsurteilen registriert, während im Jahre 2010, 71.670 Verfahren mit 103.869 Urteilen registriert wurden. Dieses Werk versucht die Möglichkeiten der Identifizierung von Faktoren zu finden, die für das Wachstum an Vergerichtlichungen beitragen und die staatlichen Versuche zum Stopp und zur Schlichtung von Rechtsstreiten zu prüfen. In den Untersuchungen wurden Statistiken, in Diskussionen vorgeschlagene Normänderungen und pädagogische Richtlinien der Rechtskurse, die zu einer Erklärung führen könnten, berücksichtigt. Das Wachstum der Vergerichtlichung, nach der Verfassung von 1988, zeigt einen möglichen Einfluss des demokatischen Paktes, der Verfassungsarchitektur, der Zusammenfassung von Regeln und Werten der Gesellschaft und, möglicherweise, andere Faktoren, beginnend mit der Ausbildung in den Rechtskursen, bis zu den neuen Technologien. Indessen existieren derzeit Mechanismen zur Reduzierung der Vergerichtlichungen und der eigentlichen Rechtsstreitigkeiten, inklusive der Erlaubnis an das Oberste Bundesgericht zur Genehmigung der Entscheidung mit bindender Wirkung und, zur Bildung des Bundesgerichtsrats, zwecks Kontrolle, mittels Schaffung einer Bewegung zur Versöhnung, mit Unterstützung von Zielen für Rechtsverfahren und der Einführung von Schnelligkeit in der Handhabung von Rechtsverfahren gemäss des Verfassungsnachtargs von 2004, welcher die vernünftige Dauer der Prozesse sicherstellt. Hinzu kommt das Projekt zur Reform der zivilen Prozessgesetze, unter anderen analysierten Fragen.

3.

Ugochukwu Emmanuel Osuagwu (St. Francis Xavier Solicitors and Advocates / Nigeria)

Corruption and Democracy in Nigeria

Abstract:

Nigeria's democracy has remained grossly unstable since the country returned to democratic form of governance in 1999. The political terrain has been characterized by violent ethno-religious crisis, contract killing and political assassinations, inter and intra-party fracas and civil disobedience. At the heart of democratic instability in Nigeria is pandemic bureaucratic and political corruption. This study shows that political and bureaucratic corruptions have grave

implications for democratic stability in Nigeria. It is argued that democratic stability will be difficult to attain as long as corruption remain pandemic and unchecked. Nigeria's democratic project has been under perpetual threat since 1999 when the country returned to democratic governance especially as a result of high prevalence of corruption. Put differently, corruption is a major challenge to democratic stability in Nigeria. The political climate, to say the least has been hostile to democracy. The general scepticism has been whether the current experience will last. This cynicism is justifiable when one consider the fact that all the factors that precipitated the collapse of the First and Second Republics are currently at play. Widespread violence, electoral frauds, political assassination, politically inspired ethno-religious conflict, apathy, evitable economic woes and its attendant consequences (abject poverty, slums etc.,), flagrant disregard for the rule of law, disrespect for human rights and pandemic corruption remains the key features of Nigerian political life. These manifestations of democratic instability are the symptoms and consequences of basic system pathology, majorly, political corruption. Corruption has become prevalent and has not only greatly eroded the basis of the authority of the state but also challenge the legitimacy of democracy as the best form of governance. The problem of democratic instability persists because the political system has failed to engender, maintain and sustain the belief in Nigerians that democracy is the most appropriate system for the society. This study demonstrates that corruption has robbed Nigerians, the government which they chose to represent and pursue their interests and the consequence- democratic instability is inevitable.

4.

Hugo Sabino + Júlio Oliveira (PUCMINAS / Brazil)

Phronesis and the control of Public Administration Acts in Brazilian Legal System

Abstract:
Phronesis is an intellectual virtue which is presupposed in every moral virtue. In this way, it is a condition for a just act.
The Brazilian Constitution sets principles to be observed in all acts performed in the duties of Public Administration. Those principles are: legality, impersonality, morality, publicity and efficiency.
As a legal requirement, every act performed by the public administration must also observes competence, object, form, reasoning and purpose.
Neither the Constituion or the law set standards trough which those requirements could be verified. Therefore the acts performed by the public administration are due to an improbity control in terms of Brazilian Federal Law. This law determines improbity acts and levels of responsibility to be applied in each case.
In September 2.010 the Superior Tribunal de Justiça, which is the court responsible for setting national understandings about the federal law in Brazil, decided that any improbity act requires deceit or guilty, narrowing the terms of law. In consequence of it, the public administrator in Brazil is allowed to practice any act without possibility being held responsibly, except in cases of deceit or guilty.
There is, certainly, a decrease of responsibility, once it previously also reached results. Acts can now be dealt in a broader ratio by the administrative officer and phronesis might lay less required.
This study tries to determine the truth of this last affirmative.

5.

Thiago Aguiar Simim (Universidade Federal de Minas Gerais / Brazil)

Miscegenation, identity and race relations in Brazil

Abstract:
In the development of social sciences in Brazil miscegenation had several resignifications to suit political purposes of each context. This was seen between the homens de sciencia (men of science) as problem and solution – by whitening – according to the racial evolutionists theories of the late nineteenth century, but it is mostly in the 1930s that a few "interpreters of Brazil", mainly Gilberto Freyre, have used the mixing between the three races – white, black and indigenous – as constitution of the nation, to fill the element of "the people" in Brazil. This notion brought legal and social consequences, sometimes imperceptible, from the use of the mulatto as an "escape hatch", as Carl Degler believes, or as "epistemological obstacle" in refutation of Eduardo de Oliveira e Oliveira. The aim is to show why this discourse hides deep tensions and how he brings legal consequences today, when talking, for example, about affirmative actions such as quotas for blacks in universities. This will require going through changes in the treatment of miscegenation in the social sciences and to demonstrate how such discourse empties the possibility of struggle for rights and recognition of different races and classes in Brazil. The role given to the mulatto as "the people", which stay in the boundary between the social sciences, politics and law, is the basis for interpreting the problem of the identity and the masking of race relations in Brazil.

6.

Venceslau Tavares Costa Filho (Federal Univesity of the State of Pernambuco / Brazil)

The juridical Rethoric in the slavery of the imperial Brazil (1822–1889)

Abstract:
With an Aristotelic focus, this article investigates the usage of various arguments apparently incompatible in the slavery juridical legitimation during the rupture with the Portuguese Empire (1822) period and the proclamation of the Republic in Brazil (1889). Any problem might be presented, considering the multiple topics, as it could be applied to a general topic onto a plurality of issues. Such ways of topic usage are justified regarding their usefulness due to their dialectic or rhetoric argumentation. Thus, two species of juridical topics were used to legitimate the slavery of the Imperial Brazil (1822–1889): the historicist and the liberal. The former

characterized the Brazilian slavery as a national juridical institution which had to exhaust its economic and social functions until superseded. The latter refuted abolitionism for it was seen as an undue intervention of the State in the private property. Teixeira de Freitas and José de Alencar are examples of jurists under the Empire service who sustained being the Brazilian slavery a national juridical institution, not yet superseded; invoking the German historicism, and specially, Savigny´s ideas. This was the most decisive juridical argument pro slavery, as Imperial Brazil hardly would be inserted in a juridical liberalism context, since it was refractory to the State laicism, and to a notion of universal equality. The influence of the Roman Law on the Brazilian jurists, to which they used to appeal as subsidiary legislation, is also a slavery justification factor during the imperial Brazil. The use of such arguments, theoretically incompatible, seem to emphasize a rhetoric character of the juridical argumentation, as it supports the compelling pro slavery maintenance more than the construction of a theoretic coherent basis for the positive law of that time.

7.

Oscar Vergara (University of Corunna / Spain)

Some Remarks about the Spanish Transition to Democracy and the so called Historical Memory

Abstract:
Spanish transition to democracy (1978-1982) has been deemed a model until recent years. Although politically full and economically satisfactory, Spanish transition has been considered not completely fair by some. Among the unresolved matters the need to exhume the mortal remains in numerous common graves spread along the country deserves an outstanding role. Nevertheless, besides this legitimate claim there are other claims of doubtful legality and opportunity. Among other topics, this paper analyzes the attempt of the judge Garzón of initiating a criminal process against the highest responsible for the coup d'état of 1936 and the question of the validity of the Law of Amnesty 1977. It is also raised the question about whether the victims of the Spanish Civil war and the Dictatorship have received a suitable recognition from the moral point of view. For that purpose, it is specifically considered the so-called Law of Historical Memory. Furthermore, the question of the national reconciliation in a postmodern world in which everything seems to be revisable is also examined. Finally, it is made a plea for a cosmopolitan identity beyond the load of the old loyalties that caused the war of 1936-1939.

WORKING GROUP

WG 17 Democratic development in individual countries II	
Session 1	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	HOF 1.27 / Dubai
Chair	Hannesson, Ólafur Ísberg (Firenze / Italy + Iceland)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	HOF 1.28 / Shanghai
Chair	t.b.a.

Lectures:
Session 1

1.

Jordan Daci (Wisdom University / Albania)

Law in post-communist countries: case of Albania

Abstract:
Communist regimes in general and especially the one in Albania destroyed almost every aspect of political, social, cultural and economic life, including the notion of pluralism and intellectual elite of the country. In Albania the transition into democracy in 90' was done through extrication which means that authoritarian government was weakened, but not as thoroughly as in a transition by defeat. As a consequence, the former Communist elite was able to negotiate crucial features of the transition and very quickly was transformed into the new pluralist political class. This position enabled the communist elite to be rehabilitated and together with the new emerged communist elite to remain a strong influential actor in new emerged democracy and de facto to run in continuance the country. The purpose of new emerged communist elite to maintain control was favored inter alia by the absence of any new strong intellectual elite and was done merely by sharing the power among its members separated into different political parties and also by using the 'pluralist' law as a tool for social control over new emerging intellectual elites. The use of law as a tool of social control by the political class has severely damaged people's understanding and expectations on the law its relations with the state as well as international community. Indeed, such experience of the use of law by the political class for its own narrow interests, have made people lose confidence in law and state as well as has severely weaken the law enforcement in the country. To conclude the overall purpose of this paper would be the analysis of understandings and development of law in a post-communist society such as Albania from different points of view.

2.

Nezahat Demiray (Ufuk University, School of Law / Turkey)

Mistrust in Constitution Making Process in Turkey

Abstract:

All of the Turkish constitutions had weak political legitimacy, because none of them were prepared through a process of negotiations, bargaining, and compromise. This time, a new effort might not be described as a missed opportunity to write a constitution on broad consensus. Consequently, it becomes vital to establish trust and consent in constitution making process in Turkey. Indeed, in order to find a way to bridge the gulf of mistrust that divides people, Turkey needs "constitutional politics". This issue that seem to be the most problematic in constitutional politics in Turkey is establishing a broad consensus. But the revolution in popular communications is able to provide the most extensive participation of people in this process. They might be used as legitimating techniques. In light of important debates on the preparation process for an entirely new constitution, Turkey offers a rich laboratory for an analysis of the most extensive participation of people. This paper examines these debates and explores its legal and political ramifications.

3.

Ólafur Ísberg Hannesson (European University Institute, Law Department / Italy)

Legal Pluralism: Reformulation of the Traditional View in Iceland

Abstract:
Doctrines developed by EFTA Court have placed considerable demands on national courts in the EFTA States. The Court now considers the EEA Agreement to form an "international treaty sui generis which contains a distinct legal order of its own." It would thus seem that EEA law has transformed into an independent legal order, and subsequently has a claim to validity which emulates the self-referential or self-legitimising presentation of the EU legal order. This, however, is not an empirically verifiable fact, but a particular understanding which arises when one adopts the viewpoint of the EFTA Court. EEA law takes place in a different realm when interpreted and applied in the national order: this realm is essentially a construction of the constitutional order. Case law shows that the Icelandic Supreme Court is far from accepting some of the EEA judge-made principles. In light of this apparent opposition, the EEA and Icelandic jurisdictions seem locked in conflict.
This study proposes a theoretical model, designed to manage the relationship between the EEA and Icelandic (and, mutatis mutandis Norwegian) judiciaries. It will describe a context of legal pluralism by reference to the Icelandic legal system and its relationship with the EEA legal order. To illustrate the discussion, the most important case law relative to the interaction between Icelandic laws and EEA law will be considered in the light of legal pluralism - particularly the principles of contrapunctual law designed by Miguel Maduro. The paper argues that the Supreme Court's internal domestic approach to the application of EEA law will inevitably become a source of fragmentation unless it takes place within an institutional framework of judicial tolerance and judicial dialogue.

Session 2

4.

Hung Hwan Kim + Il Shin Hang (Yonsei University / Republic of Korea)

A Study on the New Relationship between Democracy and the Rule of Law in Korea

Abstract:
We have some common understandings of the rule of law(or Rechtsstaatsprinzip) in legal academia; the government should enforce its power based on law, and individual rights harmed by the governmental actions can be redressed through the judicial process. With the development of constitutionalism, understandings of the rule of law has been broadened from only procedural concepts to substantial ones. Now, it is recognized that even the legislative power should be subject to the constitutional review under the substantial standards of law.
While the rule of law supports democracy in this way, sometimes they struggle with each other. Excessive work of the rule of law may weaken democracy. Since mid-twentieth century, constitutional adjudication has blossomed in the many democratic countries. Some critics point out that by the constitutional court's frequent interruptions, so called "judicialization of politics" or "Juristocracy", the people could not have a chance to develop democracy through the autonomous political process. Korea has the same problem. Especially after the judicial review in constitutional court about the Relocation of the Capital Act in 2004, so called "countermajoritarian difficulty" is important subject in the area of constitutional jurisprudence and political science. Now, this academic interest is extended to the appropriate understanding of rule of law. This paper will examine these subjects in the light of South Korean experiences.

5.

Omid Payrow Shabani (University of Guelph / Canada)

The Burgeoning Non-violence in the Iranian Protest Movement

Abstract:
In measuring the aftermath of the fraudulent presidential election in Iran one question has defied analysis more than other complexities of this event: What can explain the non-violent character of the Green Movement in Iran? I propose that the answer lies with the following three learning processes: 1) The experience of loss brought about by the Iran/Iraq war; 2) the relative opening during Khatami's presidency; and 3) the work of the postislamist thinkers that aimed to make political Islam compatible with democracy and Islam. Together these learning processes fostered a new mode of thinking that is civic and non-violent in character.

6.

Li Yanping ("One Country, Two Systems" Research Center of Macao Polytechnic Institute / China)

The subnational constitutionalism in the context of Chinese "one country, two systems:"the case of Macao S.A.R.

Abstract:
The political idea of "one country, two systems" has been put in force for more than ten years in Macau. It is a successful way to unify the Great China and to keep the social stability and development of Macau. Most of people identify with the policy "One country, two systems" is an important Chinese Constitutional project because Article 31 of Chinese constitution defines the basic principle of the policy. There are a lot of constitutional spirits in the policy. It confirms the legal relationship of local and central government and offers democracy and rule of law for the region which are the basic conditions for subnational constitutionalism. But the subnational constitutionalism should be incomplete if no support of national constitutionalism. It is critical for the theory of "one country, two systems" to promote the achievement of subnational and national constitutionalism together.

WORKING GROUP

WG 18 Democracy and new technologies	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 0.457
Chair	Liu, Yigong (Dalian / China)

Lectures:

1.

Federica Casarosa (Robert Schuman Centre for Advanced Studies / Italy)
Enforcement in Internet private regimes: is there still a role for courts?
Abstract:
The development of new technologies has opened new perspectives for private transnational regulation. Internet can on different levels provide a framework for such regimes where international and national market actors interplay in order to regulate reciprocal behaviours.
Within these regimes the enforcement systems are usually based on informal mechanisms that escape from the expensive recourse to court proceedings, in particular where alternative dispute mechanisms are implemented. However, such systems could not completely exclude the interaction with courts at national or supranational level. The importance of a dialogue between courts and private regulators could be evaluated in terms of legitimation of the private regime itself, or in terms of coordination between private and public rules, where courts can steer the development of private rules.
The paper will try to frame such dialogue, taking as examples two types of private regulation that can be found in the Internet: the ICANN system and the online auction sites model. After a brief description of the enforcement mechanisms adopted in the two cases, the paper will provide evidence of the court decisions concerning such regimes, focusing on how courts use and apply transnational private standards in their reasoning to solve a specific case: they decline their application as private rules do not meet national perceptions of legitimacy, transparency, etc. or they apply private rules interpreting them in a different way.

2.

Anne Sy Cheung (Department of Law, The University of Hong Kong / China)
Privacy and its Discontents: The Exploitation of Shame and the Right to be Forgotten in the Global E-Village
Abstract:
Since the introduction of new Web-based technologies in the early 21st century, Web 2.0 has presented two conflicting dilemmas for many of us. While we witness the unprecedented blossoming of user-generated content, there is also an urgent call for privacy protection. In particular, online shaming, exposure and social sanctions imposed by netizens have become popular and worrying. This phenomenon where citizens "engage in social policing by shaming transgressions via the Internet" has left victims often with little recourse through the avenues of defamation or privacy lawsuits. With the permanent memory of the Internet and an easily retrievable archival system, many also question whether the present Web technologies and its setup have violated the societal belief in giving second chances to people to begin a new life. Recently in November 2011, the European Union proposed reform of personal data protection by advocating the "right to be forgotten." If this is implemented, inevitably this would have direct impact on Google, Youtube, Facebook and other social networking sites. Thus, through the study and analysis of the above phenomenon, and an examination of the "right to be forgotten," I would like to explore the interrelationship between privacy, personality right, and freedom of expression from a legal and social perspective. My tentative argument is that: other than adopting a substantive human right based analysis, the protection of personality and personal data may be better protected through the due process of information management.

3.

Yigong Liu (Institute of Jurisprudence, School of Humanities and Social Sciences, Dalian University of Technology / China)
China's E-Democracy in Information Age
Abstract:
I. Definitions
1. Information Age
The Information Age, also commonly known as the Computer Age, Digital Age or Information Era, is an idea that the

current age will be characterized by the ability of individuals to transfer information freely, and to have instant access to knowledge that would have been difficult or impossible to find previously.

In 1940's, people began to use computer. The emergence and popularization of computers in the late 20th century has completely changed our way of life. The emergence of computers has also led to the third technological revolution, many changes have taken in information technology, biological engineering, new materials technology, marine technology. These new technologies are fundamentally changing our social and economic life.

2. E-democracy

E-democracy (electronic democracy) refers to the use of information technologies and communication technologies and strategies in political and governance processes. Democratic actors and sectors in this context include governments, elected officials, the media, political organizations, and citizens.

E-democracy is a new mode of political participation; people may express their political will through Internet, as electronic voting, electronic forums and e-campaign. E-democracy aims for broader and more active citizen participation enabled by the Internet, mobile communications, and other technologies in today's representative democracy, as well as through more participatory or direct forms of citizen involvement in addressing public challenges.

II. The advantages of E-democracy and its problems

1. The advantages of E-democracy

E-democracy as a new form of democracy in information age has some advantages that traditional representative democracy cannot match. Chinese Internet users has reached over 300 million, ranking first in the world, online media and communication platform for the rapid rise of all levels of government launched the official website for Internet users to provide a public platform for expression and political participation. Internet users can directly express their own views on public affairs, Internet users' political participation enthusiasm continues to grow, and become more and more influential. China's Constitution gives people the right to freedom of expression, and the emergence of the Internet BBS(Bulletin Board System), providing an important channel for ordinary people to express their opinions.

The advantages of e-democracy, mainly as follows:

(1) Information disclosure, sharing of resources. The advantages of e-democracy is that it has the full benefit of information sharing. Government departments have rich information resources, if the information resources are opened to public and used fully and effectively, it will bring significant social, political and economic progress.

(2) The equal participation and freedom of expression. E-democracy provides citizens with more freedom and equality of political participation. In cyberspace, everyone can be equal to the exchange and access to information, everyone can express their political views and opinions freely.

(3) Strengthening the supervision of government and fighting against corruption. E-democracy also help to strengthen public supervision, anti-corruption, and enhance the public's sense of political responsibility.

Case I: "Sun Zhigang incident." This case embodies the power of e-democracy and led to abolish the "urban vagrants and beggars in detention and repatriation measures" issued by the State Council in May 1982.

Case II: "SARS incident. " This case led to the great political progress in the democratic process. China established a complete set of press spokesman for "SARS" from central to local.

2. The problems of e-democracy

However, e-democracy also has some problems due to its virtual characteristics, such as false information, users's non-rational speech, and violations of personal privacy, etc.

(1) The false information. As the virtual character and concealment of Internet, therefore, the information spread on Internet is hard to identify. Meanwhile, the Internet also has some ulterior motives deliberately create some false information to mislead Internet users.

(2) invasion of privacy. As the publisher of internet information is often not easy to find, so some people on the network interested in exposing someone's privacy and "human flesh search", which may cause infringement of the privacy of citizens.

(3) limitation of e-democracy. E-democracy is limited democracy. Although the Chinese Internet users has reached 300 million, but compare to whole population , it is still small. The lower classes, especially the poor underclass, they are lack of the necessary conditions for participating in e-democracy. The main groups involved in e-democracy must be the middle class and upper class society, therefore, we can not simply say that Internet users represent the majority of members of society.

III. The future of e-democracy in China

In order to increase e-democracy and rule of law in China, we should pay attention to the following aspects.

1. To draft a more unified and standardized information technology rules, such as "Electronic Authentication Law" and "Government Information Disclosure law." Electronic authentication is the most essential aspect of the validity of electronic authentication, it must be in legal form. For "Government Information Disclosure Law," Government Information Resources should provide complete and duly information to public, so citizens can better understand the information, and rationally participate in discussions and decision-making.

2. To Create a better network environment, strengthening and improving communication between government and citizens. Government departments may understand the real situation, problems and difficulties through dialogue, and then try to solve the problems, and promote social harmony and stability.

3. To analyse and process users comments timely, guarantee the right of the people's supervision, improve the relationship between government and citizens.

E-democracy is a new type of democracy in information Age, it has problems and it is not perfect, but we still have reason to believe, with the continuous improvement, e-democracy will have a bright future.

4.

Guilherme Sena De Assuncao + Alexandre Araujo Costa (University of Brasília [UnB] / Brazil)

How Internet changed the process of legitimation of state violence in the invasion of Morro do Alemão

Abstract:
In November 2010, the Police and the Armed Forces carried out the invasion of Morro do Alemão, a slum in Rio de Janeiro that was dominated by drug traffickers. This situation was presented in the media as the return of legitimate state authority over the area, presenting little dispute about the legitimacy of this act, which received support from a broad segment of the population. This coverage tended to present the invasion as a peaceful one, given that it was an operation aimed at arresting the traffickers based on site.
However, as it is common in operations marked by an intensive use of violence, the intervention led to a series of violations of rights of people living on the premises: houses were searched without warrants, people were arrested, properties were damaged. These violations of individual rights, justified in the name of the collective interest, hardly have been aired on mainstream media, but were widely disseminated by mass self-communication – a new form of communication allowed mainly by the use of information and communication technologies (ICT).
This study analyzes the role ICT in the process of legitimation of the mentioned invasion. Thus, the aim of this work is to strengthen the notion that access to those technologies have become a fundamental right in contemporary democratic systems, without which the public debate that allows the social construction of legitimacy becomes less comprehensive because a series of social discourses can only be made public through this medium.

5.

Marta Zuralska (University of Warsaw / Poland)

Independent Regulatory Agencies: New Mode of Governance in the face of Technological Change

Abstract:
Over the last half-century, we have witnessed how significant technological change together with parallel economic growth brought about the transition from "the positive to the regulatory state". Simultaneously, change in a role entails change in a mode of governance. Rule making requires scientific, engineering and economic knowledge combined with stability and policy continuity. These are the demands that traditional methods of department governance were unable to satisfy. The first part of the paper will examine the factors which contributed to the emergence of independent regulatory agencies and new mode of governance in new realities. The second part of the paper will discuss the position of independent regulatory agencies within a democratic matrix. Since there are strong pragmatic reasons behind the emergence of such institutions it is worth asking whether they really are, as some adversaries claim, a challenge to basic principles of democratic theory. The emphasis will be placed on the question of their legitimacy and accountability.

6.

Rolf Weber (Universität Zürich/ Schweiz)

Privacy

Abstract:
Ten years ago, Jonathan Zittrain summarized the political economy of privacy: „With privacy, worry has come largely from individual seeking protection against a whittling away of privacy by well-organized corporate interests." In his seminal work "Code: Version 2.0" Lawrence Lessig addressed the problem solving mechanisms of privacy be stating that the interests threatened would be diffuse and disorganized, notwithstanding the fact that the values of protection (security, war against terrorism) would be compelling. On the basis of these statements, the paper looks at the background of legislative actions in the privacy field. Available regulatory models are international agreements (being confronted with the problem of a globally not "harmonized" appreciation of necessity and scope of legal provisions), national laws (having the disadvantage of limited impact due to the territoriality principle) and self-regulation (lacking enforcement and sanction mechanisms). These three approaches should be complemented by a more technologically oriented regulatory approach realizing the principle of user friendliness (promotion of PETs for the implementation of the "Pricay by Design"-concept). In particular, the "combination" of self-regulation and code-"regulation" through Privacy Impact Assessments (PIA) merit more attention. After first experiences have been made overseas, the Art. 29 Working Party (EU Data Protection Directive 95/46) has now also moved towards acknowledgment of such concept. The PIA concept must be mirrored in the light of an analysis of user perception of regulatory models. Therefore, the paper will look at the PIA challenges with the lenses of legal theory and legal sociology trying to establish a framework reflecting a theoretical approach based on an appropriate application layer. Concrete aspects are the development of a comprehensive coherent approach guaranteeing the right of self-determination and the simplification harmonisation of notification systems.

7.

Jose Maria Seco Martinez (Pablo de Olavide University / Spain)

Is media consolidation a real threat to democracy?

Abstract:
TV, radio, newspapers, and internet are our main sources of news and information. They shape our values and beliefs.

Media are also essential to preserve our democratic values. Free speech is one of the fundamental pillars of our system. We depend upon media to get information about our communities, to serve as an essential check on corporate and government power. Media consolidation is a real threat to democracy. A few corporations own most of the media. These huge conglomerates, i.e. News Corp, only care about the bottom line, not serving the public interest. Many civic associations (i.e. Free Press, Rainbow Push Coalition) consider that, when governments allow these few corporations two much control over the flow of information, they undermine our democracy. We focus on the new legislative framework in US media and the consequences of the digital change. We analyze political and legal impact of these reforms.

WORKING GROUP

WG 19 Internet I	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 0.251
Chair	Chen, Chi-shing (Taipei City / Taiwan)

Lectures:

1.

Melike Akkaraca Kose (Istanbul Kultur University / Turkey)

Balance between the right to privacy and public security in telecommunication interceptions: a mission impossible for the judiciary?

Abstract:
Telecommunication interceptions may be perceived as a side-product of the collaboration between technology and law for the sake of security. In this respect, it straightforwardly poses the challenge to find a delicate balance between the rights to privacy and public interest. Yet, the direct link between surveillance and criminal law complicates, if not prevents, an effective democratic or international control over the wiretapping as an administrative tool. Thus, the judicial decisions play a decisive role in the permitted practice of telecommunication interceptions, as the 2005 legal reforms of Turkey regarding surveillance over communications do give the required authority to the judiciary. Additionally, the legal standards set by the 2005 national regulations are similar and in some respects even higher than the European standards. Contradictorily, wiretapping has become a scandalous issue in Turkey since 2008, especially with the sensational outbreak of wiretapping practice directed to the judiciary among the others. This paper intends to discuss the role of judiciary in the telecommunication interceptions and to question how far the balance between the privacy and security is seek judicially by analysing Turkish law and jurisdiction as a concrete and current case, however in a comparative legal perspective.

2.

Chi-Shing Chen (National ChengChi University / Taiwan)

A Co-original Approach toward Internet and Law Making

Abstract:
There is an emerging interest to find out whether we can develop internet into a public sphere where significant citizen participation can be incorporated into the law making process. However, no well accepted e-participation model has prevailed. This article points out that , to be successful, we need serious critical reflection on the legal theoretical front, and we also need further institutional construction based on the theoretical reflection.
Theoretically speaking, the contemporary dominant legal theories demonstrate too strong a legal internal point of view to empower the informal, social normative development on the internet. No matter whether we see law as a body of rules or principles, the social is always part of the background and attracts few attention. This article believes the procedural legal paradigm advanced by Juengen Habermas represents an important breakthrough in this regards.
What is more, the Habermasian co-originality thesis reveals a neglected internal relationship between public autonomy and private autonomy. I believe the co-originality provides the essential basis on which further connecting infrastructure between the legal and the social could be developed. In terms of the development of the internet public sphere, co-originality can also help us redirect our attention away from the public opinion formation on the national legislative level, and toward the local, so called governance, which represents an emerging trend itself, emphasizing bottom up as well as dialogical approach toward law making.
If we can successfully develop a network of local, distributive and more focused 'local' public sphere, these network can serve as the needed empirical basis for the public opinion formation of the nationwide public sphere. In a sense, the co-originality thesis also suggests the existence of an internal mutually reinforcing relationship between the public sphere and the network of 'local' public sphere.
Based on Susan Sturm's ideas of governance derived essentially by her three institutional empirical studies, this article offers three critical elements for building of a successful 'local' public sphere. First of all, the empowering character of the

state-made law is instrumental to kick off the governance and its associated 'local' public sphere; the Harris decision of the Supreme Court of the United States in the field of sexual harassment is demonstrated as an example. Secondly, multi-partiality instead of neutral detachment should be adopted as the criteria for impartiality to evaluate the legitimacy of the joint decision making process of the 'local' public sphere. Thirdly, intermediaries, both institutional or individual, need be adequately deployed to connect disassociated social networks, especially when the breakdown of communication occurs due to a gap caused by lack of data, information, knowledge, or disparity of value orientation.
In the end, this article provides a critical analysis of the contemporary digital copyright law making based on the above discussion.

3.

Wouter De Been + Khaibar Sarghandoy (Erasmus University, Erasmus School of Law Legal Theory / Netherlands)

Leaking by the Bucketload: The Nature of Database Leaks

Abstract:
The British expense account scandal, the recent revelations by Wikileaks and Al Jazeera's disclosure of the Palestine papers have in common that they are all database leaks. Such leaks were not impossible before the information age – think of the Pentagon Papers – but they have become much simpler in the present day. The question we will address in this paper is how to understand such database leaks. They are not primarily leaks of a single controversial act or decision, although some controversial acts or decisions may be revealed. Rather, they provide the raw data for an understanding of the wider culture and attitude of an institution, or a group of officials. Is this a form of gossip and voyeurism that raises privacy issues, or is there a clear public interest in exposing the mores of elites? Does it herald new form a "scientific journalism" as Julian Assange has claimed, in which the public is provided with the raw data to interpret for themselves, or do the traditional media remain essential intermediaries for the filtering and interpretation of the raw data? We will argue that databases allow for a different type of exposure and demand new standards of evaluation.

4.

Peter Ebenhoch (Universität Innsbruck / Austria)

Regulierte Selbstregulierung für digitale Rechtsprobleme?

Abstract:
Erfindungen und Innovationen technischer Natur sind ohne soziale Verankerung nicht überlebensfähig; was nützt z.B. ein Auto ohne Straßennetz und Tankstellen? Technische Artefakte benötigen soziale Anschlusshandlungen und diese einen rechtlichen Bezugsrahmen.
Der Streit um die Vorherrschaft zwischen Juristen und Ingenieuren zur rechtlichen Ausgestaltung dieses technischen Umfelds wurde vor über 100 Jahren mit dem Regelungsmodell der regulierten Selbstregulierung einvernehmlich gelöst: Im Rahmen der rechtlichen Vorgaben sind technische Normen der Industrie maßgeblich. Dieses aufgabenteilende Regelungsmodell bewährte sich nachhaltig und wurde im Zuge der Einführung des New Approach 1985 als Maßnahme zur Einführung des Binnenmarkts europaweit verankert.
Die durch die Entwicklung der Internettechnologie seit den 1990er Jahren bewirkte Medien- und Netzkonvergenz hat enorme soziale und wirtschaftliche Auswirkungen mit sich gebracht. Die rechtliche Reflexion erfolgte dabei eher anlassbezogen und unstet, ohne vergleichbare Gebietsabgrenzung zwischen Informatikern und Juristen.
Immer häufiger werden zudem an Stelle rechtlicher Regelungen technische Maßnahmen zur Lösung von entstehenden Konflikten eingefordert.
Der Beitrag untersucht, ob das Modell der regulierten Selbstregulierung nicht auch im Umfeld der Internettechnologien eingesetzt werden könnte bzw. welche sachimmanenten Umstände eine direkte oder analoge Anwendung erschweren oder verhindern.

5.

Alexandra George (University of New South Wales / Australia)

The Metaphysics of Intellectual Property and the Challenges of Scientific Progress

Abstract:
It has been established that usual definitions of 'intellectual property' fail to elicit more than a superficial or instrumental definition. This paper takes an alternative philosophical approach to explore what 'intellectual property' is and how it is created and sustained by the tool of legal definition.
Drawing on techniques of metaphysical analysis, this paper presents a method of defining 'intellectual property' by seeking to identify common features of the legal doctrines that are commonly classified as 'intellectual property' (ie. copyright, trademark, patent and design law). It suggests that core criteria to a finding of 'intellectual propertyness' are that an ideational object has been evidenced in a documented form and its scope has been defined through application of the related concepts of 'authorship' and 'originality'. 'Rights' are then associated with the object. As such, intellectual property objects are legal constructs whose objects of regulation are created and sustained through the use of performative utterances.
This paper explores the way in which scientific developments can challenge the boundaries of 'intellectual property', and how legal definitional techniques have been used to bring developments such as genetic engineering within the ambit of intellectual property (eg. gene patents) or push it outside intellectual property (eg. rejection of patents over traditional knowledge), thus preserving the internal consistency of 'intellectual property'.

6.

Raylin Tsai (Department of Mass Communication and General Education Center / Taiwan)

A Virtual Justice in the Documentary Film of 'Rebiya Kadeer: The 10 Conditions of Love'

Abstract:

Owing to the technological revolution with contemporary information communicating, we are now entering the hybrid world of (post-)modernity, of which consisted in a post-human condition of new media, digitization and internet environment. No matter what religion, ethics, politics and law are concerning, among that, there rises the phenomena of remixing values and transformation of 'actual reality' and 'virtual reality.' Yet, also this extension of Globalization faces its necessary end, and here is the question: should we expect a proposal of 'worldly law' with universal value, then adopt it in an adequate and perfect position of cosmopolitanism to treat the international events in our surrounding world? In a word, without the power of information communicating and circulation of message in the net, then seemingly, there are no any law and normal of virtual reality at all. Hence we highlight on an event of cultural expression, the Documentary Film of 'Rebiya Kadeer: The 10 Conditions of Love' in Film Festival, of the Uyghur movement for East Turkestan in Xinjiang, China, by which to inquire into an assumption of 'the maximum of law with the minimum of universal frame,' i.e., it is an require, whatever a nation is minority or not, to claim for the right to according to certain evidence of 'rhetoric enthymeme' in self-constituting themselves into nation movement, and have their forbidden eidetic meaning? With the international communication of information, is there a symbolic power appears out of the cyberspace, appeal to public opinion (democratic discuss) and is forming 'virtual justice' to performances itself, as well as various liquid, fragile 'surplus-plots' for strengthening or breaking through their own minority? Thus, it does need to remixes ethics, economics and politics as a whole in a new ecological world view, and corresponds to the complexity of legal values and structures. In this article, following above, we also inquire our expectation and understanding about the contemporary Left thought, and ask: are they showing themselves a tendency to cosmopolitanism? or regionalism? internationalism?

7.

Elif Küzeci (Bahçesehir University Faculty of Law / Turkey)

Digitized Personality: The Rise of the Surveillance, the Fall of the Personal Integrity

Abstract:

Personal information has been important for "others" throughout history. Even though the reasons and target information types change, other persons (spouses, relatives, friends, neighbors, etc.), certain communities (employers, associations etc.), administrators (either pre-modern or modern) have always wanted to know us more inclusively. Especially after the development of information technologies in 20th century, the possibility of realizing this ambition has undergone a signification transformation.

The governments keep track of their citizen in order to ensure a rationalistic regime and the security; enterprises monitor their clients for increasing profitability, whereas employers watch their employees for getting a better performance. The consequence, however, is very clear: Individuals, whose lives are identified with figures in cyber space … Such figures, varying from student numbers to credit card numbers, gradually acquire an importance almost competing with our names.

It should not be very easy to continue describing the pieces of a society, which consist of numbers, as "individuals". The novels "1984" by Orwell, "Brave New World" by Huxley and "We" by Zamyatin depict how the government, which is ever-monitoring the people, can destroy human dignity. In an absolutely-planned world of mathematical exactness, there is no place for much needed creativity, accidentalness and a value that is peculiar to humans: individual autonomy.

The modern individual, besieged by technology, is almost completely naked and requires a zone of protection in order to conserve his/her private space and to continue his/her social life in different guises. This is the principal value provided or promised by data protection law to individuals.

WORKING GROUP

WG 20 Internet II	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	RUW 1.303
Chair	Sunde, Inger Marie (Oslo / Norway)

Lectures:

1.

Rafal Michalczak (Jagiellonian University, Faculty of Law and Administration / Poland)

Transhuman and Posthuman – About Influence of "Cyborgisation" on Law and Ethical Issues

Abstract:

First I will define a concept of "cyborgisation" and show that it is not only an idea from a science-fiction literature. To support this claim I will recall and describe experiments by K. Warwick and his team. These experiments were aimed to create a first "cyborg".

Considerations from first part will became premise to turn attention to a problem of human enhancement. I will describe a concept of "human enhancement" in a wider context of a transumanism. I will show main features and aims of this project. I will also emphasize that this project is fully realistic. After providing a terminological background I will turn to law and ethical issues connected with "cyborgisation" and transhumanism. The first one will be so

called "morphological freedom" considered by people involved in transumanism as a civil law. I will highlight which parts of theory of law could be affected by realization of mentioned law. Especially I will focus on concept of "person" which could change in greatest degree. The second one will be "cognitive liberty" considered as extension of freedom of thought. It will be shown in context of augmented cognition – one of the transhumanists purpose – as issue affecting on concept of responsibility.
I will summarize my considerations by stressing that technological changes included in transumanism could have influence on concepts from each area of theory of law.

2.

Aleksandra Samonek (Jagiellonian University / Poland)

Elaboration of a work. A gametheoretical analysis of intellectual property law

Abstract:
My paper aims to analyze the conflict connected with the elaboration of a work, that is the one between the author of a source work and the author of its elaboration (e.g. translation). The problem can be reformulated in terms of the economical analysis of law (in this case, intellectual property law), which can provide us with a clearer view of the kind of effectiveness intended within the constitution of legal acts concerning the field and the formulation of contracts between the original authors and the parties willing to elaborate the source work.
By taking a closer look at the European legislation in this matter, we can easily find out in which cases a certain party is protected by law. The modifications that follow such legislation can be usually found within contracts and range as far as intellectual property law acts lack the explicit solution. I shall analyze the examples of such solutions in the perspective of effectiveness. I will also argue that the type of effectiveness that serves such contracts is not necessarily supposed to be the type that is implied by legal acts.

3.

Minobu Shimazu (Graduate School of Humanities and Social Science, Chiba University / Japan)

How law should treat Information and Communication Technologies and Society, against real world?

Abstract:
Rapid Progress in Information and Communication Technologies and Society (ICT&S) has demanded us any treatments of law.
This paper claims that we should turn our eye's to the fact ICT&S is pressing to alter some major conceptions of modern law : the limit and possibility of jurisdiction, private ownership, modern self on which modern law is based, and so on, as some study of Information ethics tells us so.
For example, if some data which cannot be possibly said to be ownershiped, were leaked or prevailed, how and by what reason should law treat? And, who should be protected by law? In both theoritical phase and practical cases, data leakage (or falsification) demands how we should recognize individuals which law should protects as they have any rights.
If we express cyberspace as the bit of world, it will be full of bits, data, and first of all people will appear and inhabit as assembly of bits, aggregate data in it. Of course, "right" is the word to be spoken attributedly to individuals, but the line of what right should be protected in cyberspace is drawn by considering the relation of the data with the others.
This case cyberspace raises, leads us to a more basic question. What law should treat cyberspace as, against real world? Is cyberspace the exceptional of real world, or the unexceptional?

4.

Inger Marie Sunde (Norwegian Police University College / Norway)

Criminal Law as Technical Fact: An Analytical Approach to Internet Crime

Abstract:
The paper offers an analysis of the normative significance of automatization in relation to criminal law and Internet crime. The proposition is that automatization removes the distinction between the legal rule as such and the actual application of the rule (i.e., the subsumption). This is possible in the digital world, as opposed to the physical where each case must be individually appraised even if it is similar and perhaps identical to the previous one (e.g., heroin is illegal, yet, in every case one has to check whether the alleged offence really concerns heroin in order to rule out the possibility of some legal substance). In the virtual world justice can be institutionalized by programming the interpretation of a rule as decided by court in criminal cases, into the network technology for automatic reapplication on all instances of the criminal phenomenon.
The analysis adapts the perspective of Scandinavian Legal Realism. Automatic reapplication of legal decisions emanating from court constitutes a fact of law, relating to empirical facts set by ICT. Furthermore, the legal principle of equality must be broadened with a technical dimension when applied to the net. The dimension is inherent in ICT and may be exploited by automatization for the purpose of justice.
The approach is new; it takes into account that facts of the physical and virtual worlds are not similar, maybe not even comparable, and opens new alleys of thought in relation to law and technology.

5.

Marie-Theres Tinnefeld + Friedrich Lachmayer (University of Applied Sciences, Munich / Germany + Innsbruck University / Austria)

Transparency, State Taboo and Privacy. Some remarks on Plato's "Simile of the Cave

Abstract:
Principles can be directly expressed by law or may be found in jurisprudence, philosophy or literature. Often the principles are contradictory, as in the case of transparency and the taboo of state information disclosure. There is also the

matter of business secret and disclosure. We are also concerned with privacy and disclosure of information at the individual level. sense and purpose of privacy may compliment each other. As we all know, the rise of cyberspace blures the distinction between privacy and public. The core value of privacy in personal live is fading.

The development of the internet and of the social networks can alter the once apparently stable legal situation, bringing a new dynamic into play in both state and individual spheres. In the context of the internet it is as though the secret workings of the state are projected on its "walls and facades", reminding us of Plato's " Simile of the Cave". As Plato described, disillusionment and reflexive defensiveness can follow.

Group C: Bioethics / Medicine / Technology / Environment

WORKING GROUP

WG 21 Bioethics, Biopolitics and Law	
Session 1	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 2.101
Chair	Campbell, Tom (Australia)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	RUW 2.101
Chair	Dais, Eugene (Calgary / Canada)

Lectures:
Session 1

1.

Fatmal Irem Caglar Gurgey (Kocaeli University Law School / Turkey)

New Reproductive Technologies in Turkey and Bioethics Regulations

Abstract:

As advancements in reproductive technology have been at a break neck speed for the past few decades in the world as well as in Turkey, the Turkish government introduced detailed regulations in particular with regards to the technical aspects of reproductive technology and regulatory oversight of the medical institutions. Although these regulations seem to comply with the international standards, it is yet hard to claim that the same is true for the issues related to the bioethics which has still been a neglected area in Turkey so far. Especially ethical concerns related to the women's rights deserves more attention and needless to say more regulation.

2.

Tom Campbell (Charles Sturt University / Australia)

The Liberal Case for Permitting Pre-implantation Genetic Diagnosis

Abstract:

Pre-implantation Genetic Diagnosis (PGD) is a process of selecting embryos arising from in vitro fertilisation (IVF) for implantation in a womb and the intended development and birth of a child, the selection being done on the basis of scientific evidence relating to the genetic constitution of the embryos available for implantation. This distinguishes PGD from both pre-natal diagnosis followed by the termination of the pregnancy, and from genetic alteration of embryos. This paper is a critique of state regulation of PGD which points to some weaknesses in reasoning commonly used to support narrow and restrictive regulative control of PGD. It sets out a presumptive case for broad parental reproductive rights with respect to PGD along the lines that prospective parents should be free to take such steps as they think fit to have what they regard as healthy and capable children, provided this does not cause undeniable serious harm to these children or to other people. Counter arguments to this 'liberal' position are then shown to be flawed, or simply too weak to overcome the strong case for parental freedom with respect to PGD. A principal theme in the analysis is that moral considerations which may reasonably be taken into account by those considering whether or not to avail themselves of the opportunities which PGD does, or may in the future, make available to them, are erroneously used to make a case for legal restrictions which are based on no more than personal moral preferences, anxieties or dislikes.

3.

Joao Chaves (Federal Public Defender's Office School / Brazil)

Law inside biopolitics as a conceptual problem: a new approach on Foucault, Agamben and Negri

Abstract:

The concept of biopolitics has its origin in the Michel Foucault works developed from 1975 to 1979, when he introduced the foundations for a new approach of a modern government, based in both crescent correctional practices on individuals and the control of populations. The theme has attracted the attention of some critical political studies, with many practical uses. However, there is not enough consolidation about biopolitics as a concept and a comprehensive theory of the new political mechanisms. This uncertainness is more evident when the very role of Law is questioned in a biopolitical model, due to the archaic nature that Foucault gives to it. Therefore, the aim of the paper is to identify the theorethical

comprehension of biopolitics in two contemporary authors – Giorgio Agamben and Antonio Negri – to show the differences among them and the original idea of Michel Foucault. I propose that both Agamben and Negri have the same difficulties to deal with legal theory and Law inside biopolitics. After a critical review on selected works of these three authors, I conclude that a settlement of the concepts of Law and biopolitics depends on (i) the surpassing of the Foucaldian version of Law as sovereignty, (ii) a clear delimitation of a common core among the authors and (iii) the research and affirmation of the concept of Law in Agamben and Negri, better refined than in Foucault's one. A right answer to this last point can be decisive to a biopolitical understanding of Law.

4.

Katja Stoppenbrink (Université du Luxembourg / Luxemburg)

Reproductive technologies, parental choice and legal limbo. On the ethics of biopolitical law-making

Abstract:

The legal landscape regulating assisted reproductive technologies (ART) such as in vitro fertilisation (IVF) and intracytoplasmic sperm injection (ICSI) is a very rocky and rutted terrain both on a worldwide and a European scale. Faced with a situation of legal limbo as far as, e.g., age restrictions, cryopreservation options and prenatal screening prohibitions are concerned, desperate childless would-be parents increasingly resort to fertility clinic tourism that amounts to reproductive 'forum shopping'. Departing from this empirical diagnosis, I will highlight the evaluative and normative issues at stake for the couples and individuals involved. In particular I will reflect upon the concepts of reproductive autonomy and reproductive justice and ask whether they are (or rather: should be) seen as part of the right to establish a family or the right to respect for one's private and family life. From a primarily German perspective, I will thus illustrate the tensed relationship between medical and technological progress, individual rights and democratic biopolitical decision-making within a multilevel legal order. I then go on to analyse recent proposals of how legislators can meet these challenges in a way respecting both the requirements of legal ethics and democracy. To this end, I propose and discuss a tableau of potential normative critera of good biopolitical law-making that possibly may not only apply to ART regulation.

5.

Carolina Pereira Sáez (Universidad de A Coruña / Spain)

"Principlism: Bioethics as a Procedure?"

Abstract:

«Principlism», a particular comprehension of Bioethics influenced by Rawls' Theory of Impartiality, tries to address the problem of the multiplicity of moral codes in our societies. To this end, four general moral principles are proposed as universally accepted. Principlism understands Bioethics as the application of these principles to biomedical cases with conflicting interests in order to determine which of them must be preferred. Therefore, instead of the different, varied moralities coexisting in our globalized societies, it would seem possible to agree on a minimal, procedural Ethics that would enable us to solve our biomedical moral dilemmas. Yet, is the agreement on the Four Principles so universal as Principlism claims? Can they subsist divorced from the substantive comprehensions of the good life? And – more interesting – does Principlism enables us to solve hard bioethical cases?

6.

Otavio Luiz Rodrgues-Junior (Federal Fluminense University / Brazil)

Life, Science and Law: Dialogues and Shortcomings

Abstract:

The human personality begins at the hour of birth. This is an axiomatic truth that several Civil Codes repeat, in order to establish legal certainty to natural phenomenon. Technological developments, introduction of new means of reproduction and of different uses for the human genetic material overcome traditional legal concepts. Legal regulation of this theme has three characteristics: a) legislative principles of minimal intervention; b) judicialization; c) use of biological or philosophical categories made by the judges. Philosophy of Law has failed to contribute to the Civil Law for the renewal of theoretical frameworks derived from Bioethics. So the legal function of the legislator as guidance is neglected and the Courts operate without the necessary critique of legal doctrine. The recognition of these limitations and the adoption of new theoretical and philosophical references are essential. The research of the Brazilian Supreme Court decisions on questions of Bioethics is an interesting way to empirically analyze the problem and compare with the solutions of legal doctrine.

Session 2

7.

Anna Vezeleva (Saint-Petersburg State University / Russia)

Biopolitics and social-psychological approach to Law as a methodology studying Law as psy-technology

Abstract:

The article is an attempt to apply the concept of power and biopolitics of Michel Foucault as one of the possible methodologies for studying the evolution of modern government practices, the foundation of which is targeted psychotronic and information impact on the collective consciousness. In addition, we consider the functional role of law as a mechanism for orientation behavior of subjects in the communicative interaction. In the evolution of concept of power Foucault can be distinguished, depending on the intentions of the authorities, two main stages: disciplinary power over the body and biopower – the power of consciousness and life itself. However, we consider the development of socio-psychological approach to the law, presented by Russian scientists, lawyers, Leo Petrazycki

and Nicholas Timasheff. Both of these approaches (biopolitics and social-psychological approach to law) are presented as one of the supposed key ideas in the way of the study modern psychotechnology, including the author's attempt to consider law itself and the practice of his constituents as a tool of psychological influence. The paper also contains the author's assessment of the possible practical significance of the proposed approach and analysis of examples of psy-technologies in the modern information society.

8.

Chunyan Wu (Huazhong Univ. of Science & Tech. / China) + Haibin Qi (Huazhong Univ. of Science & Tech. / China) + Xiaoning Fan (Yale University / USA)

On legal protection of human genetic resources – from a China's legislation and practice perspective

Abstract:
While biotechnology has had a broad impact and far-reaching consequences in human health, the biotechnology industry has a strong dependency on human genetic resources. As human genetic resources are important for the future of biotechnology progress and can be viewed as an irreplaceable strategic resource, there is a undeniable basis to obtain intellectual property rights. However, it is not easy to balance the protection of human genetic resource intellectual property needed by the biotechnology industry, with reasonable and practical observance of basic human rights and respect for human dignity. Therefore regulations should be made that consider the legal, technical, and ethical issues, inherent in the collection, processing, storage, and use related to human genetic resources.
China has one of the richest human genetic resources in the world and has attached great importance to its conservation. Protecting the human genetic resources in China and safeguarding the national gene resource for human health has taken on significant strategic importance. However, the legal framework for this protection of human genetic resources appears to lag behind. As early as June 10, 1998, the Ministry of Science and Technology and the Ministry of Public Health jointly formulated the "Interim Measures on Management of Human Genetic Resources", but it still cannot meet the needs for the development of biotechnology. To this end, the Ministry of Science and Technology has been actively promoting the drafting and revising of "Regulations for the Administration of Human Genetic Resources". In 2009, the "Action Plan on Intellectual Property Protection in China" has set clear requirements for "accelerating the drafting of the Regulations for the Administration of Human Genetic Resources, improving the system of the protection, development and utilization of human genetic resources as required by law and creating a reasonable mechanism in access to and benefit-sharing genetic resources."
This paper will discuss issues related to China's current legislation and practice, integrated with the "Interim Measures on Management of Human Genetic Resources" and the most recent of draft "Regulations for the Administration of Human Genetic Resource." This discussion will outline core essential problems related to the protection of human genetic resources and explore options for selecting reasonable management and protection policies including: (1) issues on "Right to Know", privacy protection, benefit sharing and intellectual property protection in obtaining and conserving genetic resources. (2) balancing the interests and coordinating the relationships between individuals, families, researchers, and national interests in terms of the "consent" and management of providing genetic resources. (3) the design of framework and policies for coordinating legal, regulatory, and technical aspects for the development of human genetic resources for biotechnology.

9.

Eugene Dais (University of Calgary / Canada)

Kant On Autonomy And The Case Of Genetic Engineering: The Teleological Challenge

Abstract:
The continuing and contentious debate over the use of scientific research and medical technologies to alter the human genetic structure (DNA) widely use the idea of autonomy conventionally attributed to Kant to defend how genetic engineering should be regulated. Michael Sandel famously rejects the idea of autonomy as itself morally wrong. He premises his rejection on teleological grounds which also serve to justify its own obligations, permissions and prohibitions on genetic engineering. But the idea of autonomy Sandel rejects is the conventional one which Kantians argue is confused and mistaken. But, even assuming Kantians can agree on Kant's clear and correct idea of autonomy, which is not free of controversy, the crucial question which this paper explores is left open: Can teleological grounds justify the regulation of genetic engineering against Kant's idea of autonomy properly understood?

WORKING GROUP

WG 22 Medicine, Law, Eugenics	
Session 1	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 0.457
Chair	Lohmann, Ulrich (Berlin / Gemany)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	IG 0.457
Chair	Montero-Sanchez, Sara (Madrid / Spain)

Lectures:
Session 1

1.

Javier Blàzquez (Universidad Pública de Navarra / Spain)

Legal philosophical implications of nanotechnology applied to the field of health

Abstract:

Nanotechnologies have seen a constant development in recent years. Its various and numerous applications open endless possibilities, both in the car and computer industry, like in the environment and telecommunications. The same can be said referring to the specific field of health in which nanotechnology will greatly influence when it comes to establish more accurate clinical diagnoses, or prevent the onset of disease and facilitate various therapies. They will also enable design and produce specific prostheses that may contribute to improve the quality of life for people affected by various pathologies. But at the same time that the nanomedicine opens up multiple possibilities, it is also a unavoidable challenge to legal analyse, which can not remain outside the rise of these new technologies. If their potential is not regulated and channeled, in some cases the respect and the protection of fundamental rights such as dignity, intimacy and privacy could be affected. Hence the need and desirability of explicitily raise the relationship between applications of nanotechnology and the field of health, from a legal philosopher view. Perspecitve that can allow us to follow closely the various implications ELSI (Ethical, Legal and Social Implications) that can be derived.

2.

Hasan Atilla Güngör (Istanbul Kultur University / Turkey)

The Effect of the science on „personhood" debate; „when does human life begin?"

Abstract:

The beginning of "human life" or "personhood" has been one of the most controversial issues for science, religions, philosophy and law in the last century and probably it will be so in this century too. The technological and scientific developments on this matter will keep the heat of the debate just as before, because they are generally used to influence public opinion and to shape the law on matters related to "beginning of the human life", such as abortion. Thus, these scientific-based arguments have the potential to influence, limit or enhance the scope of human rights and especially of the rights of women. This work will discuss the influence of technological and scientific developments on the debates of abortion and on the law regulating it in a chronological perspective.

3.

Jihye Kim (Ewha Institute for Biomedical Law & Ethics / Republic of Korea)

Chemical Castration Treatment for Sex Offenders: Bio-Medical Power's Wrongful Encountering with the Power of Criminal Justice

Abstract:

This paper aims a critical overview of how medical and criminal law knowledge came to be in collusion with each other as discursive powers in a recent Korean enactment of July 2010 for punishing sex offenders who are described as 'monsters'. The Law on Medication for Sex Offenders Sexual Impulse stipulates that the court can order chemical castration treatment for a patient of sexual perversion who raped a person under 16 and has the risk of recidivism.

While under discussion in the legislature, the law on chemical castration was supported by many citizens arguing for physical castration because of their rage to child sex offenders. Chemical castration order holds the meaning of strong 'punishment' for offenders, but can be justified as a 'treatment' according to the professional arguments with expertise on law, psychology, medical science. In other words, While treating sexual offence as a disease, chemical castration attempts to inflict a harsh punishment on sexual offenders in the name of treatment.

According to the law, the court selects appropriate sex offenders for the medication depending on the diagnosis of a psychiatrist. Medication used through the court's order is a 'treatment' which brings physical changes in offenders' body, eventually with some side effects, however, surprisingly it is performed without their consent. Medication for sexual impulse is the same hormone drug employed by males who want to be a transgender. Medical experts argue that this medication can deter sexual offences by decreasing offenders' sexual drive. It must be pointed out, however, that this medication is merely grounded on biological reductionism and a sexuality interpretation, which is centered on genitals and heterosexuality.

4.

Ulrich Lohmann (Alice-Salomon-Hochschule Berlin / Germany)

Das neue Gesetz über Patientenverfügungen in Deutschland – ein Überblick

Abstract:

Der Deutsche Bundestag hat 2009 ein Gesetz über Patientenverfügungen verabschiedet. Dem war eine lange wechselhafte Entwicklung und eine bis zuletzt streitige Diskussion vorausgegangen. Kernpunkte der Auseinandersetzung waren u.a. der Indizcharakter bzw. die bindende Wirkung einer früheren Willenserklärung, Formerfordernisse, Geltung in jeder Lebenslage oder nur bei nahendem Tod, eine vorlaufende Pflicht, sich aufklären und beraten zu lassen oder schließlich die Beteiligung der Betreuungsgerichte bei der Umsetzung von Patientenverfügungen. Im Falle des Fehlens einer (hinreichenden) Patientenverfügung haben Patientenvertreter (Betreuer, Bevollmächtigter) Behandlungswünsche bzw. hilfsweise den mutmaßlichn Willen des Patienten festzustellen und auf dieser Grundlage zu entscheiden.

5.

Ana Maria Marcos + José Ramón DIEZ (Department of Philosophie of Law, Faculty of Law / Spain)

Bioethics and Healt Law: the living will. Proposal to create a Living Will Record in Europe

Abstract:
Developments in science and technology have strongly contributed to one of the main human's aspirations: to increase people's life expectancy. However, this phenomenon is resulting in new situations where individuals are deprived of their capacity and autonomy to decide whether to apply a medical treatment or not.
For this reason, the figure of the "living will" is of particular significance, allowing individuals to express their will if they are deprived of that capacity. In other words, the living will represents a form of consent in advance of a possible future event regarding the application of any medical treatment.
The figure of the so-called "living will" is not exempt from controversy and big questions, such as issues related to the truly autonomy of the individual that draws it up, is it possible to be done by minors? is it possible to appoint a person to act on their behalf in those cases? What is the role of the representatives? Should they be a mere guardian of the will previously expressed by the individual?, or are they allowed to replace their will?
Another important aspect that has to be taken into account in order to ensure the individual's autonomy (as an essential bioethics' principle), is determined by whether to introduce the legal requirement of regularly updating the living will, so that those legal documents do not become out-dated by developments on science and technology.
From another point of view, but closely related to technology, following aspects should also be mentioned: the way living will records work, the possibility to use electronic records and, overall, the access to the data contained on the records that may affect the privacy of individuals.
And last, it will also be proposed the possibility to create a European living will record. Since in an open society where citizens are constantly moving across different countries and the existence of the European convention on Human Rights and biomedicine (Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, made in Oviedo, 4th April 1977), it should be ensured the effective application of the individual's autonomy principle and respect, in any country within the European Union, their wills that have been freely expressed.

6.

José-Antonio Santos (Universität Rey Juan Carlos / Spain)

Philosophie des Strafrechts, Rechtspositivismus und Eugenik in der Weimarer Republik

Abstract:
Der Versuch, die Gesamtheit der zerstreuten Doktrinen und Ideen des philosophisch-juristischen und strafrechtlichen Denkens, welches zu Zeiten der Weimarer Republik entwickelt wurde, zu systematisieren, ist mit viel Anstrengung und Ehrgeiz verbunden. Um den Forschungsgegenstand in diesem Sinne präzise einzugrenzen, beschränken wir uns auf die Analyse der juristisch-philosophischen Sprache und Ideologie, die zum Thema der „Euthanasie" und des Rechts damals entwickelt wurden. Um dieses Thema zu vertiefen, muss man auch Fragen der Soziologie und Geschichte der politischen Ideen betrachten, auch wenn die Analyse sich darauf beschränkt, die Hauptthemen, Argumente und Gründe aus rechtstheoretischer Sicht darzustellen und kritisch zu beleuchten. Vorliegende Darstellung soll folgende vier Aspekte beinhalten: a) Darstellung im Überblick der Situation bis etwa 1850 sowie Formulierung von Hauptzügen und -ideen im Zusammenhang mit den Begriffen Recht, „Euthanasie" und Eugenik, b) Vertiefung des sozialen Darwinismus, der Eugenik und der Rassenhygiene im Rahmen des biologischen Positivismus und der forensischen Anthropologie, c) bestimmte rechtstheoretische Auffassungen von Franz von Liszt und Karl Binding als hauptsächliche Vorläufer der unmittelbar darauf folgenden Ereignisse, d) Bewertung der Entwicklung der vorhin definierten Bereiche sowie Auslegung der Faktoren, die den schrittweisen moralischen Niedergang jener Epoche begünstigten.

Session 2

7.

Sara Montero-Sanchez (UNED / Spain)

Autonomy in Bioethics: the principle of responsibility and the precautionary principle

Abstract:
The approach to science and technology as a paradigm of change shows how perceptions of scientific and technological progress, although they are permeable, are charged with fear because science and technology are viewed with ambivalence.
The limiting components formulated in this paper are the resistances or limitations to autonomy and the true determinants and motors of decisions regarding biotechnological applications. For this, the main objectives of this paper are to attempt to establish, first of all, the association and the kind of relationship that exist between information and autonomy, in second place, those that exist between responsibility and autonomy; in third place, between freedom and autonomy; in fourth place the relationship between the precautionary principle and the principle of autonomy and finally, those that exist between the social link and autonomy.
Context:
During the 1980s, the German philosopher Hans Jonas further developed the ethical implications of vorsogeprinzip, and it subsequently entered the English language as the precautionary principle. Jonas argued that, formerly, humans were a part of nature. They understood themselves as integral to nature, and could not act so as to seriously disrupt their environment. The Enlightenment revolutions in science, technology and economics changed that way of think-

ing and our capacity to destroy the environment upon which society depends. We humans are now able to intervene in nature in ways not previously possible. A number of these technological interventions can cause irreversible harm to human health and that this demands more sustained ethical reflection from every stakeholder, those who benefit and those who are harmed by these technologies. Jonas proposed that humans now suffer from an ethical gap, and that traditional understandings of ethics do not provide sufficient guidance. In his mind, the gap exists between our technological capabilities and our capacity for exercising moral responsibility, to other forms of life and future generations. Jonas and the precautionary principle offer a major contribution from the field of applied bioethics, and address a fundamental challenge of environmental ethics: most ethical principles were created to arbitrate problems within the human community.

Research Problem:

The autonomy of the subject of bioethics, being an abstract formulation, is a problem that cannot be observed directly; it thus needs to be made into something that can be dealt with using research tools.

Thus, it is not autonomy that is observed, but rather:

1) the components from which autonomy has been constructed

2) the way these components are articulated

3) and also the relationship of the «unit of observation» to concrete aspects of the problem.

Autonomy is something that is gradual and dynamic. It is an issue of degree not only because of the information, but also because of the consideration of how push and limiting factors, which make this an issue of degrees, are articulated.

Autonomy and information in liberal bioethics:

The contractual basis on which liberal bioethics stands has judicialized the philosophical concepts of this discipline. The apparent reduction of autonomy to information has been promoted by informed consent as the way this exaltation of information materializes and as the formula that promotes autonomous decisions.

8.

Sieglinde Pommer (Oxford University Faculty of Law / UK)

Regulating Responsibility: Health Law in the Wake of Science and Technology

Abstract:

Both law and sci-tech have had an immense impact on modern society. Our social environment has been created and shaped by science, technology, as well as law. Most obvious have been the technological changes. Science and technology are not separate fields but merely different aspects of the same discipline. Technology can be understood as applied science; science being the theoretical and research sibling of technology. Modern science depends upon technology and technology is helpless without science. Indeed, the distinction is not always evident, as is also reflected in the abbreviation "sci-tech".

Less dramatically, but just as thoroughly, law has permeated modern life. Law, although it has sometimes been called a "science", has little in common with the quantitative study of physical phenomena that is generally denoted by the term science. Initially, both law and science seem to have relied more on prayer and incantation than on observation. Today, science is empirical, law is dialectical. Science is descriptive, law is normative or prescriptive. Conclusions in science are always probable and tentative. Conclusions in law are usually certain and dogmatic. Science is necessarily independent of politics and ideologies, law is increasingly becoming a part of politics. Law has always been dependent upon legislation which is a political phenomenon. But is the legal rule scientific?

Law still influences and reacts to technological change. Technological developments can undermine important interests the law seeks to protect. Given a current or anticipated technological landscape, how can legal rules ensure that fundamental values are protected?

Science and Technology Studies, for instance, investigate how social, political, and cultural values affect scientific research and technological innovation, and how these in turn affect society, politics, and culture. STS seeks to overcome the divisions, particularly between the two cultures of humanities (interpretive inquiry) and natural sciences (rational analysis).

Other scholars stress the need for the development of a proper theory of law and technology which critically examines the questions posed by recent technological developments and provides insights into the ways the whole law is transformed by policy decisions at the intersection of law and technology. They discuss how legal analysis should adopt a flexible and forward-looking approach that broadly considers the interplay between technology and law to protect values and interests when they are threatened by technological developments.

Recognizing that the interplay between law and technology is complex and interactive, an increased cooperation among the members of the legal and scientific professions is advocated to remedy the lack of understanding on the part of scientists about the role of law. The fundamental point that scientists as well as lawyers must understand is that both the dialectic method of law and the empiric method of science are merely means of gathering and helping to organize data, and that date may answer some specific questions but they do not provide answers to all problems, particularly of the kind with which law and government deal. As the empiric and dialectic are complementary methods, and as there is a growing need for the study and use of science in law, no science is coming to the stage where it confronts problems that cannot be met wholly by its own methods. Despite the protestations of some scientists that science is inherently ethical, science is now confronting problems which are neither soluble by any empirical data nor by any of the principles inherent in the empiric method. It cannot be claimed that the

dialectic method of law will provide scientists with any sure guide to a proper course in problem areas, any more than employment of the empiric method will provide certain solutions to legal problems. However, as the underlying concepts of the empiric method are appropriate, and perhaps indispensable, to consideration of some of the problems confronting the law, so concepts of the legal dialectic are equally applicable to such ethical problems of science.
New developments in science and technology require us to make value judgments. This is a dynamic process that continually adjusts to the changes caused by new knowledge of science and by new tools of technology. Taking examples from the field of health law, one of the areas where science and technology produce some of the most difficult problems, we explore in how far sci-tech and law are rival systems, investigate the changed role of law in the wake of science and techonology, highlighting an ethics of responsibility beyond risk regulation suitable for our area of legal globalization.

9.

Anton Vedder + Laura Klaming (Tilburg University / Netherlands)

Moral Responsibilities and Accidental Enhancement

Abstract:
A patient with severe Obsessive Compulsive Disorder (OCD) receives Deep Brain Stimulation (DBS) treatment. While the treatment soon turned out to be ineffective with regard to the recurrent thoughts and repetetive ritualistic behaviours typical of OCD, the patient nonetheless felt much better. He indicated to feel more cheerful and optimistic and to think and deliberate more clearly than before the start of the treatment. We ask: ought the doctor to continue the treatment? We will consider this question from different perspectives: the moral obligations typical of the medical professions, the autonomy of the patient and the professional, and the justice and fairness of access to health care. Finally, we will reflect upon the impact of this discussion for the general discussion on cognitive and affective human enhancement.

10.

Sophia Stone (Purdue University / USA)

Death as Legal Problem in the Age of Medical Science

Abstract:
From the beginning of the Hippocratic Oath born in S. Italy, 5th Century B.C.E, doctors have taken an oath not to harm their patients. Killing a patient is generally thought of as harming a patient. If we look at Joel Feinberg's definition of harm, he narrowly defines harm as unjustly impeding another's interest. Following Mill, Feinberg argues that the moral limit in allowing the law to impede one's liberty is when the law prevents that individual from harming others. The question my research addresses is not whether a person's autonomy entails that she has a right to die, as arguments for euthanasia seem to do, but rather whether one's own death can be seen as an interest in the Feinbergian sense. If death is an interest, then the physician's role in the death, patient consent, and the difference between killing and letting die comes to the fore in a new light.
My paper argues from Feinberg's moral limits of the law for death to be an interest. If death is seen as an interest, then a number of things follow. First, consent would be absolutely essential to one's interest in death. Second, if death were an interest, it would have to be regulated. Everyone considering suicide would require counseling, and this counseling is more likely to prevent people from mistakenly ending their lives. Third, if death were seen as an interest, and if the proper requirements of consent and counseling were met, then the physician's role in the death would not be considered a harm, but furthering an interest. If death were an interest, the moral preference for allowing death in a patient would no longer have the same hold over killing a terminally ill patient at the patient's request.

WORKING GROUP

WG 23 Environment	
Session 1	
Date	FRI 19 Aug 2011
Time	15.30 h – 18 h
Location	RUW 1.301
Chair	De Paula Oliveira, Maria Lucia (Rio de Janeiro / Brazil)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18 h
Location	RUW 1.302
Chair	Kabashima, Hiroshi (Sendai / Japan)

Lectures: Session 1

1.

Jaqueline Sena (University of São Paulo / Brazil)

The relations between legal doctrine and technology: an analysis of the ineffectiveness of environmental law

Abstract:
The close relationship between law and ethics, science and technology is evident when the problem of preserving the environment is discussed. And in this case, countries like Brazil, which have important natural resources, appear in the center of this debate. However, the effectiveness of environmental law is questioned when the technical and legal instruments that aim to preserve the

environment are absorbed and appropriate by the capitalism logic, in order not to to preserve the environment, but the capitalist production system itself. This article aims to discuss the intricate relationship between legal doctrine and economic policy issues, focusing on the effectiveness of environmental law in the Brazilian case.

2.

Maria Lucia De Paula Oliveira (Universidade Federal do Estado do Rio de Janeiro / Brazil)

Law, Environmental Policy and Kantian Philosophy

Abstract:
Is the Kantian philosophy, and its basic principle of respect for persons, hostile to the protection of environmental values ? Answering this question, this paper elucidates how the Kantian ethics can take seriously environmental values. In the period opening with the Critique of Judgment in 1790 and closing with the Metaphysics of Morals in 1797, the subject would be presented by Kant in a different manner; although the respect that we may owe to non-human nature is still grounded in our duties to mankind, the basis for such respect fields in nature's aesthetic properties, and the duty to preserve nature lies in our duties to ourselves. In opposition to the "market paradigm", as it is called by Gillroy, the Kantian philosophy can offer a better explanation of the relationship between environmental policy and the theory of justice. Kantian justice defines the "just state" as the one that protects the moral capacities of its "active" citizens, as presented in the first Part of the Metaphysics of Morals. In the Kantian paradigm, the environmental risk becomes a "public" concern, not subsumed to a individual decision, based on a calculus.

3.

Clarissa Marques (ASCES / Brazil)

The Environment And Future Generations: The Past, The Future And A New Individual

Abstract:
This study proposes to analyze if solidarity acts as a limitation between generations used by the Law, as well as the implication of such an issue: control would occur with the actions of existing individuals, however, in the name of unborn ones. In view of the proposal of precaution which guides the promotion of the human right to the environment, and that is fundamented on the duty of a moral order of today's individuals towards those of tomorrow, it is possible to use the idea of an amplified analysis of the future starting from the construction of a new human responsibility, a new ethical theory as theoretical fundament for the hypothesis that solidarity constitutes a limiting bond between generations. Thus, when speaking of a new ethical theory, it is assumed that mankind has never acted as being deprived of technique, but it is necessary to analyze how modern technique changed human actions and the consequences of this change in relation to nature. Once more, the paradigmatic transition is under observation. Therefore, the ethics of simultaneity and immediateness do not answer to the new dimension of human action, therefore demanding an ethics of prediction and responsibility for the formulation of new limits with high reach, due to the amplitude of human power and the need for anticipated awareness.

Session 2

4.

Omar Dahbour (City University of New York / USA)

From Indigenous Rights to Ecosovereignty: A New Agenda for International and Environmental Law

Abstract:
This paper articulates a principle of ecosovereignty as an entailment of political self-determination in the 21st century. Ecosovereignty is distinguished from earlier ideas of sovereignty based on concepts of state authority, national identity, or indigenous rights. These earlier notions are either conceptually flawed, inappropriate for the problems of the current era, or too restricted in scope. Ecosovereignty constitutes a new legal principle for adjudicating claims in twenty-first conflicts over natural resources, territorial boundaries, and cultural traditions. Building upon the 20th-century discourse of anticolonialism, ecosovereignty provides an alternative to the statist concept of sovereignty, as well as that based on the idea of national self-determination. Furthermore, while acknowledging the importance of the protection of indigenous life worlds and practices, it generalizes the notion of indigenous rights to a wider set of concerns about local and regional autonomy, security, and sustainability. It does this in three ways. First, it utilizes the notion of ecological regions (rather than states) to legitimate sovereignty claims against existing states, under certain conditions. Second, it rejects the ideal of the nation-state in favor of a concept of state legitimacy rooted in local and regional communities, ecologically defined. Third, it combines the concern for indigenous life worlds with similar concerns about the security of intact environments and the sustainability of local forms of development. In these ways, the principle of ecosovereignty establishes a new agenda for international and environmental law.

5.

Shizhong Zhou (Guangxi Normal University / China)

The Development of Laboratory Animal Science and Animal Care of Legislation and Consummation

Abstract:
Laboratory animal science is the use of non-human animals in experiments to obtain new knowledge and new technologies in biomedical research and testing. In order to develop science and technology, the human carried out a large number of animal experiments, theses experiments greatly expanded the vision of related research field, and make a great contribution to human beings. Meanwhile, animal experiments also bring us a certain extent of negative effects. Countries around the world have adopted legislative measures to regulate

behavior of animal experiments, but in the process of legislation and enforcement are not satisfactory in many places. On the basis of present situation of laboratory animal science and existing problems, with the comparison of animal welfare act between Europe and China, the author puts forward the ideas of perfecting experimental animals' laws and its enforcement proposals.

6.

Hiroshi, Kabashima (University Tohoku / Japan)

Social costs, limits to growth, right to growth: approacing global environment oriented to philosophy of law

Abstract:

Question: how can we tackle the global warming in accordance with the economical growth especially in emerging countries?

K. W. Kapp, "The Social Costs of Private Enterprise" (1950), defines the social costs as direct or indirect damages which are not compensated by the producer, but added to the third parties. An example might be the disaster of the BP plant in April 2010, in which the polluter can hardly cover all the damages so as to make the seawater clean, to regenerate the harmed natural lives and to recover the jobs and the everyday life of the residents on site.The Club of Rome, "The Limits to Growth" (1972), makes us aware of the five conditions which set the limits to growth: population, industrialization, pollution, consumption of food and natural resources, which tendentiously increase in a exponential progression. The GDP growth 10% a year means that it will be 2.59 times as large in ten years, whereas technology could resolve problematic concerning five elements at highest in arithmetical progression.Remarkable would be that the modern industrial civilization has brought social damages in form of global warming. Developed nations have not payed for it yet. All the people in the world should have right to economical growth at any rate, which would however be limited by those five conditions. Conclusion: the developed nations should give up the consumption lifestyle for the sake of the equal right of every citizen in the world to reasonable standard of living.

WORKING GROUP

WG 24 Technology and Law – general questions	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 4.101
Chair	Bregvadze, Lasha (Tbilisi / Georgia + Frankfurt / Germany)

Lectures:

1.

Lasha Bregvadze (Goethe University Frankfurt am Main / Germany)

Natural Law and Law of Nature: Emerging Plural Legal Orders of the Technological World Society

Abstract:

Increasing processes of juridification (Verrechtlichung) of life-world have led to legal instrumentalism operating in different spatial and functional areas of modern societal system. World society, once conceived by Niklas Luhmann as functionally differentiated network of balanced social communications, based on self-regulation of respective social subsystems, becomes dominated by certain functional rationalities, including economy, politics and technology and is exposed to dangers of external-regulation coming from particular internal dynamics of the given societal subsystems. Influence of economic rationality, political power and technological developments are transforming, radically narrowing and even marginalising the boundaries of modern society, what totally disregards the role of nature in modern world. The logic of technological revolutions has also dominated the essence and even substance of legal system. Natural law as totality of universal values, operating beyond time and space, looses the normative character and regulatory strength under the technocratic dominance. "Technological law" is not responsive towards social and natural values and demands, stands even in opposition to the "law of nature". Nature itself, as for a long time neglected source of human existence needs to be reconsidered in legal terms for being declared as the most important values under (legal) defence. It will be argued in the essay that the idea of legal pluralism can still be used productively to break the margins of legal instrumentalism, oppose technological rationality of legal system and bring back law to society through acceptance of spontaneous legal orders, "living law" (to misquote Eugen Ehrlich) of communities and nature.

2.

Morag Goodwin (Tilburg Law School / Netherlands)

Mutual-shaping and notions of progress: law and technology in the development context

Abstract:

Technology and the law have played an inauspicious role in the history of development. Technological superiority and the law came together to provide the joint means of colonial domination; and the implicit understanding of progress and superiority that they inspired were used to justify those colonial ventures. As part of a broader project examining the interaction and mutual shaping of law, technology and development, this paper considers the place of law and technology in the development context through the prism of the notion of 'progress'. Progress, and the notions of modernity and superiority that it contains, has been intimately associated with – indeed, built into – the concept of development since Harry S. Truman delivered his Inaugural Address in 1949 calling for greater production as the key to prosperity and peace for all. Science and Technology Studies (STS) has shown that technology, regulation and ethical perspectives interact and shape one another in a continuous and dynamic process. If this is the case, how

can we steer the relationship between law, technology and the dominant ethical framework in the development context in order to break away from the notion of progress that arguably continues to underpin current international regulatory systems and that continues to justify the developed/ developing dichotomy?

3.

Raúl Madrid (Pontifical Catholic University of Chile / Chile)

Small is beautiful. Some reasons to consider chile the future of law and technology in latinamerica

Abstract:

This paper intends to expose the reasons why the small Republic of Chile, placed very far away from the big decission centers, can despite become the most important and developped settlement for Law and Technology researchers in Latinamerica.

The causes to justify such assertion are the following:

1. Chile has developped throughout its history very strong social and juridical institutions, like a long lasting democracy, a neat separation of powers, and a great respect for Law.

2. This last issue is very important: due to historical and cultural reasons, Chile is a country where the Rule of Law is of greatest importance.

3. Chile has also, with Brazil, some of the most successfull universities in the area, like the Pontifical Catholic Univerisity, with a graet capacity to develop interdiscipline, which is undoubtly the base of Lae and Technlogy patterns.

4. The country has also generated in the last 40 years a solid and strong free market economy, which has led the universities to privilege innovation. It is a track the has been slowly consolidating and growing firm in the academic mentality.

A country can have very high social or economic indicators, but may be more undevelopped than another with lower signals, but stronger institutions. And that´s another issue of the paper, starting from the chilean example: technology helps social institutions, as democracy, human rights respect, Rule of Law, but, in order to be really effective, it must rely upon pre-existing institutions. In other words: technology creates a unitarian world, everything is here, everywhere is close. Technology makes the world a place without territories, and consequentially without distances. But the Law is a condition of this effect: there can be no association between Law and Thechnolog if the social institutons protectd by Law do not work efficiently.

4.

Kitahara Munenori (Hiroshima Shudo University / Japan)

Law and Technology Security Standard

Abstract:

Laws would often follow technologies. Information technology has an electronic rapidity and a legislation technology has a paper one. There might be a lag between law and technology. I will deal with the relationship between law and technology from the viewpoint of technology security standard. One of the relationships can be found in that law has been provided a security standard of technology. The standard must be based on a relative security level. The relative level would premise on the ordinary, lawful and ethical usage of technology. Most technology has been opened to the public without any technology impact assessment. Technology would have some defect, which the producer has overlooked. The users might often meet with the accidents caused on the defects. Then, law should provide a technology security standard to exclude the defects as possible as many. The security standard must be reflected on the structure standard of technology. The structure standard may be a yardstick whether the producer can evade the responsibility for the accidents. The standard would also premise on the ordinary, lawful and ethical usage of technology. The ordinary usage means that the users should use normally technology within the extent of the structure standard. The ethical usage means that the users should use technologies being conscious of the defects in order to avoid the accidents. The relative security level may be the sum of the structure standard and the ethical usage of technology.

5.

Ryuichi Nakayama (Osaka University / Japan)

Developing a Philosophy of Precaution in the Age of Risk

Abstract:

The term “Risk Society”, which was introduced in 1980s by a German sociologist, U. Beck, is now used worldwide, and is referred to in various contexts which range from safety level of nuclear plants, antibiotics, GMO foods, or pandemic like bird flu to anti-terrorist measures and financial crisis. Main objectives of this paper are to scrutinize the shifts in legal thought with the term “risk” and “precaution” as guiding indexes, which subsequently lead to a critical analysis of an era of uncertainty.

Three issues will be presented. Firstly, the notions of “risk” and “precaution” will be re-situated in the context of history of epistemology with special reference to the notion of “probabilistic revolution” and the study of emergence of the welfare state, pioneered by F. Ewald. Secondly, diverse usages of the word “risk” will be sorted out and located between two poles, i.e. risk-objectivism and risk-constructivism. Importance of the distinction made by F. Knight between calculable “risk” and incalculable “uncertainty” will also be touched upon. Thirdly, relevant topics in respective areas will be connected. Those include; pros and cons of the “precautionary principle” in environmental law; increasing aspirations of deliberative democracy in face of incalculable risks in constitutional law; conflicts between preventive measures and protection of liberties and human rights in criminal law; and loose and flexible confederation of the peoples (which Kant and Rawls dreamed of) against global risks in international law.

Every single topic mentioned above inevitably evokes fundamental questions as to the possibilities and limits of human agents equipped with rational

choice and free will, which has served as the foundation of the modern law.

6.

Igor Nevvazhay (Saratov State Law Academy / Russia)

Technical Development and Natural Rights

Abstract:

Scientific and technical achievements in the last decades can cause deep changes in spheres of morals and law. I am going to discuss some philosophical conclusions which follow from two significant ideas of contemporary civilization. First of them is a thesis about indistinguishability of natural from artificial, and the second one is an opportunity of creation of artificial human.

The first thesis is a consequence of the principle of relativity of physical reality to conditions and a way of observation, on which both interpretations of quantum theory and Einstein's theories of relativity are based. I show that the given principle deprives us of objective criteria to distinguish natural from artificial, freedom from necessity, freedom from violence.

Today power of technique is directed not only on the external world, but also on a person. Owing to information technology and biotechnology an opportunity of creation of artificial and controlled individual increases. So human loses many features of a person and transforms to a part of a collective super individual subject. In modern time a search of the transcendental basis of law and power leads to impersonal human and recognition of super individuality.

Traditional belief about natural rights will disappear. There is necessity of revision of such concept as right of freedom. Liberal belief about freedom as a condition of human existence is changing. Prospects of technical development make justified R. Dworkin's reflections about superiority of right of equality in comparison with right of freedom. Using J. Baudrillard's works, I discuss different meanings which can have the notion of right of equality in a context of modern civilization development.

7.

Marcelo Thompson (University of Oxford / Hong Kong S.A.R.)

Resisting Enframing: Law and the Poiesis of Techne

Abstract:

Contemporary critiques of legal instrumentalism identify the understanding of law as merely a means to an end with a technological view of the law (see, inter alia, Robert Summers, "Law as a Machine Type Technology"). Here, technology itself is seen as an instrument and law as an instantiation of it. This paper will focus on the shortcomings of those critiques. At best, I will argue, they ignore that the view of technology as merely a means to an end is itself challenged in the field of science and technology studies. There, theories that understand technology as entirelly socially constructed – as an empty vessel, a metaphor that occurs both to Brian Tamanaha, in Law, and to John Law, in STS – are opposed by the socalled autonomy view (e.g. Max Weber, Jacques Ellul), which understands technology as assuming socially irresistible ends of its own. At worst, and paradoxically, the identification between legal instrumentalism and technology reinforces the inexorable process of 'enframing' that characterizes the autonomy view of technology. This happens as law, absorbed by a process of rationalization, becomes, in Ellulian terms, dissolved in the technological phenomenon and, due to its limited reflexivity, rests incapable of responding to its own dissolution. The answer to such a dehumanizing prospect, which I bring from Martin Heidegger's work, lies in a thoughtful refletion on the origins of techne – in understanding enframing as poiesis and law as technology and yet as art.

WORKING GROUP

WG 25 Science, Technology and Law	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 4.201
Chair	Ferreira, Flavio (Juiz de Fora / Brazil)

Lectures:

1.

Ana Rosa Amorim (Centro de Estudos Superiores de Maceió / Brazil)

Neurolaw: how the concept of a Universal Juridical Grammar can provide a return to physis

Abstract:

The idea that humans share a Universal Grammar has launched the bases for a revolution in the study of linguistics, benefitting from an intense process of rapprochement with biology and cognitive sciences. Recent studies based on neuroethology and evolutionary psychology have argued that right to property has a biological origin, working as some kind of property instinct. Ecological rationality can also contribute to that assumption. The patterns presented by property regulation can suggest that we are dealing with ecological rationality and heuristics: possibly fast and frugal heuristics, environmentally adapted. If that assumption be confirmed, and expanded to other rights, neuroscience can provide a basis to prove that some human rights have not only a biological origin, but are also universal, with great impact on Legal Philosophy. Those human rights could function as Chomsky's principles and parameters theory, leading toward a truly Universal Juridical Grammar. Ancient greek philosophy, especially the sofist movement, has developed the distiction between two philosophical categories: nomos and physis. The concept of natural rights was once influenced by the idea of physis. The decadence of a jusnaturalistic approach in legal philosophy was also accompanied by the obliviousness of physis as a legal category. Human rights have replaced natural rights as the most common legal term and the notion of human rights

has progressively moved toward a rhetorically build concept of right, enforcing its conection to ancient idea of nomos. Neuroscience can help philosophers establish a new and scientific based theory of natural law, rescuing the concept of physis from ostracism.

2.

Katarzyna Eliasz (Jagiellonian University / Poland)

Struggle for neuronal territory, or how to apply neuroscience in trademark protection law

Abstract:
From some time on, neuroscience have been applied in law, however limited to criminal law and crime detection. The area of trademark protection law has been passed over by both jurists and scientists, and there are only few publications treating of this issue, which is quite confusing as the process of choosing a mark, or associating logos is strictly connected with psychological and neuronal processes. Revealing a neuronal process of decision making and the results of M. Morrin and J.Jacoby experiment (which shows how alike mark names confuse consumers brain) proves that judge's decision in trial concerning trademark infringement shall be enriched with scientific evidence. Such foundation would show that the processes of blurring associations is not always obvious, and might be omitted by human mind, but not the brain. This will lead us to conclusion that trademark can be both infringed and diluted. Dilution is an unconscious process in our brain, which might occur when one mark uses the same or alike name or logo. FMRI analysis proved that each mark owns a space in our brain, which might be suppressed by another, with legally doubtful methods. That it why fMRI analysis along with neuroscience can improve law as far as trademark protection is concerned, checking if some subconscious prerequisites don't affect our decision making process in a way forbidden by the law.

3.

Juan Ramon Fallada (Universitat Rovira I Virgili, Catalonia / Spain)

Technocracy inside the rule of law: challenges in the foundations of legal norms

Abstract:
Technocracy is usually opposed to democracy. Here, another perspective is taken: technocracy is countered with the rule of law. In trying to understand the contemporary dynamics of the rule of law, two main types of legal systems (in a broad sense) have to be distinguished: firstly, the legal norm, studied by the science of law; secondly, the scientific laws (which includes the legalities of the different sciences and communities). They both contain normative prescriptions. But their differ in their subjects' source: while legal norms are the will's expression of the normative authority, technical prescriptions that can be derived from scientific laws, which are grounded over the commonly supposed objectivity of the scientific knowledge about reality. They both impose sanctions too, but in the legal norm they refer to what is established by the norm itself, while in the scientific legality they consist in the reward or the punishement derived from the efficacy or inefficacy to reach the end pursued by the action. The way of legitimation also differs: while legal norms have to have followed the formal procedures and must not have contravened any fundamental right, technical norms' validity depend on its theoretical foundations or on its efficacy. Nowadays, scientific knowledge has become and important feature in policy-making. Problems of antinomy can arise between these legal systems. These conflicts are specially grave when the recognition or exercise of fundamental rights is instrumentally used, or when they are violated in order to increase the policies' efficacy. A political system is technocratic, when, in case of contradiction, the scientific law finally prevails.

4.

Flavio Ferreira (Faculdade de Direito da Universidade Federal de Juiz de Fora / Brazil)

Technological Change, Accident Prevention and Civil Liability

Abstract:
The improvement of accident prevention technology in many fields of social life has spurred new challenges to the doctrinal tools of fault and strict based civil liability in the law of torts. Amid these challenges lie the identification of the proper scope of the respective criteria of liability in a changing factual environment, their suitability as doctrinal tools, as well as their actual application to concrete cases given the amount of information which would be needed to render adequate judgments. The relative value of precedents and old laws will be discussed in this paper, taking into account the tacit cost-benefit analysis embedded in such instruments which may or may not serve the interests of welfare maximization in an environment with constantly renewed accident prevention technology.

5.

Marcelo Galuppo (Pontifícia Universidade Católica de Minas Gerais / Brazil)

To witch extent has technology and science urged for new concepts in the Jurisprudence?

Abstract:
Jurisprudence helps lawyers to clarify legal concepts, and provide a guide to solve many problems and misunderstandings that happen to legal argumentation. Nevertheless, not everybody realize that the emergence, developing and death of the concepts it utilizes depend on historical events. Although some historians have perceived the influence of economical and political history on those concepts life, very few have perceived that the development of science and technology has also contributed to their change. A good sample of this kind of influence can be found in the radical changing of the juridical concept of personality. The evolution of diagnosis' techniques has modified the criteria by which we can decide on the beginning and the ending of personality. On the other hand, the evolution of genetics and fertilization in

vitro can have brought about the human nature to a changing itself, which urges also for a revision of the concept of personality. This paper intends to deal with those problems, mapping its state of art and proposing a redefinition of the human personality.

6.

Ubena John (Stockholm University / Sweden)

Legislative Techniques and ICT: In the Wake of Law keeping pace with Technology

Abstract:

This paper investigates a relation between legislative techniques and ICT. In particular, the paper explores how traditional reactive legislative technique affects ICT innovation. Moreover, it explores how change and convergence of ICT is impacting upon legislation which is a supreme social control and steering mechanism. The paper envisages that embracing the legislative techniques vitally guarantees a possibility of pursuing ICT innovation parallel to maintaining quality and stable legislation. Moreover, the paper is litmus under which the legislative techniques are tested against various challenges resulting from ICT change and convergence. E.g., cyber crimes prone situations or where advent of ICT threatens fundamental rights, which technique is realistic? Conversely, where competition and innovations are encouraged which techniques are ideal? In so doing the paper seeks to investigate the question whether the change and convergence of ICT can be overcome by revisiting legislative techniques. It is implicit that legislative techniques are the determinants of legislative process including; defining the problem, goal setting, determine means to achieve the goals, drafting, promulgation, implementation or enforcement, monitoring and evaluation of legislation. Generally, the techniques serve as good means to eliminate problems occasioned by ICT change and convergence.

7.

Sibylle Tönnies (Universität Potsdam / Germany)

Der Einfluss der Naturwissenschaften auf die Rechtsphilosophie

Abstract:

Die Rechtsphilosophie möchte gern Einfluss nehmen auf die Naturwissenschaften. Tatsächlich verläuft der Einfluss in umgekehrter Richtung: Die Rechtsphilosophie wird (wie alle Philosophie) von den naturwissenschaftlichen Erfolgen ihrer Epoche geprägt. Das lässt sich von den ersten Erfolgen der Physik in der Renaissance über die Entdeckung des Protoplasmas im 19. bis zur Entdeckung der Selbstregulierung im 20. Jahrhundert nachweisen. In den letzten Jahrzehnten haben die Technik (Kybernetik) und die Biologie (Autopoiesis) die Bilderwelten geliefert, in denen sich die Rechtsphilosophie bewegt hat.

In der Gegenwart wird sie dominiert von dem Triumph, den das Konzept von Dezentralität und Vernetzung in der digitalen Welt feiert. Darüber ist das Bewusstsein für die Notwendigkeit einer zielgerichteten zentralen Führung, speziell einer staatlichen Entscheidung, in den Hintergrund getreten. Das dezentrale Funktionieren der digitalen Technik hat zu der Vorstellung verleitet, dass auch die Gesellschaft keiner zentralen Entscheidungsinstanz bedürfe. Unter dem Einfluss dieser Vorstellung verlagert sich diese Instanz immer mehr von der Politik in die pluralistisch agierende Wirtschaft

WORKING GROUP

WG 26 Technology and Law – selected problems	
Date	MON 15 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 0.254
Chair	t.b.a.

Lectures:

1.

Jorge Alzamora (Andres Bello University / Chile)

The application of the precautionary principle on the use of nanoparticles

Abstract:

Nanotechnology is not only a novel science that promises benefits for humankind but also raises multiple concerns about its likely effects for people and the environment. Governments, universities and companies around the world are investing billions in research and development in nanotechnology and related technologies. However, speculation about the harmful effects of this technology is producing fear and uncertainty in the people. This dual context is negative for the development of a complex science such as nanotechnology.

The peculiar features of nanoparticles, due its behavior ruled more by the quantum than classical mechanics, produce several uncertainties related to the effects of these particles that are not totally addressed by the scientific community yet.

Because these uncertainties, appears as the proper tool to regulate this technology the precautionary principle that establishes that the lack of firm evidence or scientific uncertainty related to the existence or the extent of a risk is not a reason to delay the adoption of preventive measures to protect the human health or the environment.

The paper will analyze the interplay between this new technology and the law, adressing the issue whether the adoption of a precautionary measure requires a minimum set of indications showing that the suspected risk is well founded and, therefore, the public authorities are not relieved of the requirements to deliver proof when confronted to risk.

2.

Samir Chopra (Brooklyn College of the City University of New York / USA)

Pragmatist Humanism and the Law

Abstract:

I argue that armed with a 'humanist' metaphysics, we can understand how law creates, promulgates, and reifies, the central concepts by which we organize

human and social interaction. In this picture, law is not a set of rules, but a set of evolving behavioral co-ordination strategies, which require for their success the belief in a certain set of entities. Without the concept of a person possessing agency and free-will and committing acts for which he can ascribed responsibility and held to be the cause of, this set of co-ordination strategies that binds us together fails to exercise traction. These metaphysical concepts are inter-related; 'person' get its traction from responsibility, agency and blame, and not the other way around, for it is only a 'legal' society, which needs concepts like these; 'person' is parasitic on social/moral concepts and there is thus an unavoidable historicity in any talk of personhood. When debate about the meaning of these metaphysical concepts is divorced from the conceptual scheme dependent on them and an attempt is made to ground them wholly naturalistically, incoherence results.

The law, by its practices, emergent legal theory, and its larger expressive impact, the intuitive grounding for a cluster of metaphysical concepts. In enacting positive legislation, in rulings on case-law, in undertaking statutory interpretation, the law gives rise to a set of practices, a language which anchors these concepts and is the repository for our intuitions about them. I will argue therefore, that the pragmatist humanist's argument that legal reality is socially constructed enables an understanding of the grounding, traction, and plasticity of crucial metaphysical concepts in the moral domain.

3.

Lliya Manasiev (Faculty of Law "Iustinianus Primus", University of St. Cyril and Methodius / Republic of Macedonia)

Towards a constructive Law, Science and Technology coexistence

Abstract:

The aim of this scientific paper is an interdisciplinary approach to the selected topic, from the perspective of the following three sciences: Legal Theory, Legal philosophy and Sociology of law.

We already know that one of the function of the law itself, is to manage and organize the social and legal status of the human being and its natural and social surrounding. That is why law and the legal proffesion is very closely related to other social and natural sciences. The first thesis that is to be examined in this paper is the relation law and social sciences as relations to ethics and sociology. At one point also some certain legal aspects, but as well as many moral and ethical dillema are being discussed in matter of using newest tehnologies and human social welfare.

The second thesis is that law should be more realistic towards new tehnologies, in a sense of providing theoretical and practical approach towards redefining legal personhood. As it is mostly common at the moment, the majority of the legal scholars set legal person to be only human or corporations and human assotiations as an entity. One of the points of this paper proposes arguments that a certain legal personhood is supposed to be given to advanced technological robots and machines, capable or usefull to mankind. Arguments are considered, and sistematicaly given from the period of ancient roman law untill modern days.

The conclusion of the paper is that Law remains related to every possible science that involves human and non human position in nature and society, but as well provides future existence of morally accepted scientific experiments. Further this paper gives argumented discussion about the special legal personhood and status for non human, able to be capable and usefull for society.

4.

Raúl Sanz Burgos (Universidad Nacional de Educación a Distancia / Spain)

Democracy and technological politic in the risk society

Abstract:

The new technologies generate risks that affect directly in the spheres protected of the fundamental rights. To control and to mitigate such risks, and in conformity with the protection duty that many in force Constitutions at present impose to the States, there are made diverse mechanisms.

The most frequent, the advice to the organs entrusted to decide on the implantation or not of a technology, on the part of commissions of experts. There mission consist of evaluating the magnitude of the threat that they accompany on the introduction of a new technology on the spheres protected by the fundamental rights.

The political instances adopt later their decisions in the light of the reports of the experts: The legitimacy of such reports is not situated only in the technical capacity his authors, but also in the impartiality of there recommendations. In numerous occasions, nevertheless, the effective presence of this note is situated today under suspicion.

It owes to the economic importance of the decisions to adopting, but also to the entail of the experts of some areas to the societies interested in introducing certain technologies in the processes of production and of consumption.

This problem can be solved in different ways. First reinforcing the mechanism of which it rests the evaluation technocratic of the risk. For example, across the transparency in the experts selection. Secondly, by means of the incorporation of democratic mechanisms in the scientific-technological politics.

The exhibition of the internal conditions to the dynamics of the technological change that they make possible the institutionalized implication of the society in the control of the risk, as well as of the mechanisms to realize it are the principal matters of this work.

5.

Adriana Spengler (Universidade do Vale do Itajaí / Brazil)

The transnational criminal investigations with new technology and the relativization of fundamental rights

Abstract:

This work focuses on economic macrocriminality and restrictions on fundamental rights and guarantees, in relation to the transnational criminal investiga-

tion with the new technology. It seeks to offer a reflection, by means of collated doctrine, on the relativization of intimacy fundamental right, in the taking of evidence in global therms, through various types of violation of secrecy, and telephone tapping. It begins with a study of the characteristics of economic criminal law, followed by the main characteristics of so-called economic Macrocriminality, consubstantiated in injury to supra-individual judicial property, lack of visibility of damages, the new modus operandi, and connections with the public internacional authorities. Next, it collates, by way of illustration, the main economic crimes that exist today around the world, namely, crimes against the international financial system and the crime of money laundering. This is followed by a focus on fundamental rights and their relativity, in terms of their concepts, theories and principles. Next, it discourses on the principle of proportionality as a mechanism for applying restrictions on fundamental rights in the concrete case, followed by its application to punitive law. Finally, it deals with telephone tapping and violation of bank secrecy as forms of concrete restrictions on the intimacy fundamental right.

6.

F.W.J. Van Geelkerken (Stockholm Universität / Sweden)

Biometrics in the Dutch passport; security measures or measuring security?

Abstract:
EU-regulation stipulates that all EU-passports should contain two fingerprints of the bearer embedded in an RFID-chip in the cover of the passport. The Netherlands, however, takes four fingerprints, and next to embedding them in an RDIF-chip in the cover of a passport they are stored in one centralised database which is directly accessible for law enforcement and security services.
A number of general cases voicing complaints about the mandatory storage of four fingerprints in a centralised database have been filed at lower courts, none of which have been declared admissible up to now. Next to that several cases of people refusing to give fingerprints are in courts at the moment.
In my presentation I will give an overview of both the EU- and Dutch-legislation and elaborate on the different cases in court at the moment.

7.

Jan Winczorek (University of Warsaw-Faculty of Law and Administration / Poland)

Technological transformations and the anthropologies of criminal law

Abstract:
The paper attempts to trace the long-term historical parallels between the evolution of criminal law and technological developments. The emphasis will be put on how the visions of the individual, explicitly or implicitly formulated in the law and organizing the criminal process and punishment systems, change together with developments in various fields of technology. Broad historical material, streching from early modern age to the 21st century will be utilised to substantiate the claims of the paper, including the changes in time measurement methods, information processing systems or production technologies. On a theoretical plane, the paper will adopt a sociological view of the law, informed by concepts from Luhmann's version of systems' theory, most importantly the „Technologiedefizit" thesis, pertainting to the fundamental uncontrollability of individuals by social systems. By means of a conclusion, a number of theoretical observations will be offered, regarding the nature of relationships between the criminal law and technology and allowing for a critical encounter with some other social theories utilised in the field.

8.

Nizam Muhammad Awang (Brunel Law School, Brunel University / UK)

Fairness and Regulation of Nanotechnological Risk in Food: A Reinvigoration to Safety Approach

Abstract:
Key perspectives in nano-food safety and regulation of risk are narrowly polarized between technological risk standards and scientific uncertainties. In view of lacking toxicological studies, resort to precautionary measure is set to continue framing the discourse in governing nanotechnology. At the outset, commitment to 'safe and responsible development' appears to be shaping the very core nanotech policy. This is all very well, but the negotiated approach to food safety is still arguably trade-centric, sidestepping fairness as the ultimate goal in the practice of regulation. Built on Rawl's theory of procedural justice, this aims to provide a critical analysis on: (i) what is the role for fairness in applying regulation of technically and scientifically complex in nature? (ii) how far have the divergent regulatory approaches to food safety been connected or fragmented due to neglect of homogeneity in international law?, and (iii) how can fairness be a catalyst for the regulation of risk and safety in nano-food? In conclusion, fairness is critically essential to shaping the interests of regulators in managing nanotechnological risks in food.

Group D: History of Philosophy; Hart, Kelsen, Radbruch, Habermas, Rawls, Luhmann; General Theory of Norms, Positivism

WORKING GROUP

WG 27 Kelsen and analysis of the „Pure Theory of Law"	
Session 1	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	HoF 3.36/ Chicago
Chair	Golding, Martin (North Carolina / USA)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	HoF 3.45 / Sydney
Chair	Marcelo Solon, Ari (São Paulo / Brazil)

Lectures:

1.

Martin Golding (Duke Univerity / USA)

The Basic Norm as Fiction: Kelsen's Final Doctrine

Abstract:

The Basic Norm is central to Kelsen's theory of law. It serves two functions: a normative function, whereby it infuses the laws of a given legal system with their "oughtness"; and an epistemological function, whereby one is able to cognize the elements of the system. The Basic Norm, says Kelsen, is "the typical case of a fiction in the sense of Vaihinger's Philosophie des Als-Ob." In his last published book, The The0ory of Norms, he further states that the Basic Norm is a self-contradiction. In this paper we shall consider what this means and some of its problems. According to many exponents of "paraconsistent logic," a system of logic that tolerates self-contradictions, there can be true self-contradictions (dialetheism). But does Kelsen need to maintain some form of dialetheism? Moreover, does Kelsen need to reject the principle of ordinary logic that anything follows from a contradiction, ex contradictione quodlibet? Most importantly, how can a self-contradiction function normatively and epistemologically? We shall attempt to answer this question.

2.

Hyun Kyung Lee (Seoul National University, College of Law / South Korea)

From Institutional Facts To the Institutional Normative Order - Reflecting on the Changes in Neil MacCormick's Institutional Conception of Law

Abstract:

Neil MacCormick who is well known as the initial advocator of the Institutional Theory of Law has provided an alternative conception of law, which supplements defects of previous major legal theories. His presentation of law consists of 'Law as Institutional Facts' and 'Law as Institutional Normative Order'. Although these two kinds of theses share the same logical structure, they are different in their meaning and content. Therefore, the exploration of their correlation and its implication is necessarily required.

In order to carry out this task, this paper starts with the analysis of core meaning of these two concepts. In Part I, I will demonstrate the differences between two propositions in methodological aspects and from substantial perspective by tracing the changes of his conception of 'Institution' and institutional terminology. Part II seeks to establish the correlation between two theses. MacCormick's early conception of 'Law as Institutional Facts', is defined as the concrete concept which is ontologically-oriented and embodies the notion of legal professionals. The later thesis, 'Law as Institutional Normative Order', on the other hand, embodies a philosophical and sociological conception as well as a general conception of law. Finally, I will briefly point out the theoretical and practical implication of MacCormick's destination-conception of 'Law as Institutional Normative Order' in the context of multi-layered and dynamic characteristics of modern legal system.

3.

Detlef von Daniels (Universität Witten/ Herdecke / Germany)

The Jurisprudence of Crisis. The dispute between Schmitt and Kelsen in the light of contemporary political theory

Abstract:

The Weimar Republic was certainly a period characterized by a series of political crises. I want to argue that it also embodied a crisis of political theory,1 and in particular, a crisis of liberal political theory. Since liberalism appears in our times as an uncontested overlapping consensus of political theory, and a universal guide that informs political practice, I will start by questioning a familiar narrative that tells the unremitting success story of liberalism. I will then show that the debate between Carl Schmitt and Hans Kelsen may serve to reveal a crisis of theory. In presenting their debate, I will frequently make reference to contemporary developments in order to show that the problems that appear in this debate are still relevant today, and if they do not develop into a crisis it is only because of contingent reasons. I will end with a reflection on the boundaries of political theory.

4.

Yongliu Zheng (China-EU School of Law / China)

Kelsen in China

Abstract:

Eine quantitative Uebersicht ueber die chinesische Kelsenrezeption der letzten 80 Jahre ergibt das folgende Bild: sechs uebersetzte Baende und 16 uebersetzte Schriften aus Kelsens Werk, eine chinesische Monographie ueber Kelsen, 66 Aufsaetze und 22 Doktor- sowie Magisterarbeiten. Darueber hinaus finden sich Darstellungen und

Analysen von Kelsens Werk in dutzenden von Lehrbuechern und Monographien zur westlichen juristischen Ideengeschichte und Rechtsphilosophie. Die Kelsenrezeption in China begann

in den 1930er Jahren; richtig bekannt wurde Kelsen in juristischen Fachkreisen aber erst mit dem Beginn des 21. Jahrhunderts. Die ‚Reine Rechtslehre' stand seit jeher im Mittelpunkt der Studien und Uebersetzungsbemuehungen. Die Verzoegerung in der Rezeption von Kelsens Werk laesst sich vielleicht damit erklaeren, dass seine Schriften einerseits keine Verwendung fuer die Rechtspraxis finden und andererseits auch nicht die ‚Needham-Frage' der chinesischen Rechtsstaatlichkeit beantworten konnte.

Session 2

5.

Ari Marcelo Solon (Universidade de São Paulo (USP) / Brazil)

Judaism and Antidudaism in Jurisprudence (Schmitt versus Kelsen)

Abstract:
My intention is to research the contribution of Judaism in the work of Hans Kelsen and his school and of antijudaism in the work of Schmitt and his school following these data.
On October 3th, 1936, at a Conference given under the general theme Das Judentum in der Rechtswissenschaft, then made into an article entitled Die Deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist, Carl Schmitt refers to the Viena School and to Hans Kelsen (1881–1973) as "die Wiener Schule des Juden Kelsen".
Certainly, Schmitt didn't intend to draw attention to the Jewish ancestry of the of Auguste Lowi's and Adolf Kelsen's son, but strived to uncover the non positivist character of the hermeneutics carried out by the Prague jurist, who was fully committed to a social justice ideology that instigates popular sovereignty, as originally conceived in Greece and Israel, in the 5th Century B.C.
Schmitt is fully right in both criticisms. Kelsen, not being a great jurist, became famous as a great philosopher of the so-called science of law. In fact, however, what motivated him was an ideological passion for democracy and for socialism and, to a lesser extent, for German nationalism. However, the ideological interference is not specific to the work of Hans Kelsen. As the foundation of the Pure Doctrine reveals itself as an ideology of a justice of redemption, it is possible to notice in Schmitt an ideology that moves in the opposite direction.
Under the pretext of establishing a new meaning to Nomos, Schmitt makes founded.

6.

Andityas Soares De Moura Costa Matos (Universidade Federal de Minas Gerais / Brazil)

Deus ex machina? A critical discussion about the nature, function and importance of the basic norm.

Abstract:
The basic norm of Hans Kelsen is the most controversial element of his scientific project of fundamentation of Law. The present paper is divided into four parts, in which is sought:
1) Discuss the nature and the function of the basic norm, as it evolves throughout Kelsen's work, in particular in the article Zur Theorie der juristischen Fiktionen (1919), in the first (1934) and in the second (1960) edition of the Reine Rechtslehre and in his posthumous work, Allgeimeine Theorie der Normen (1979). This paper aims to investigate the alleged change of position occurred in Kelsen's thinking, who would have first classified the basic norm as a logical-transcendental hypothesis in the manner of Kant and the "Philosophy of As-if" by Hans Vaihinger ("Die Philosophie des Als-Ob") before conceiving it as a fiction, in the same line of Herman Cohen's ideas. We intend to demonstrate that such an interpretation is mistaken, since the path followed by Kelsen isn't from hypothesis to fiction, as commonly sustained, but from fiction to hypothesis;
2) Present critics to both conceptions of the basic norm (hypothesis or fiction) based on current literature, regarding the works of Amselek, Celano, Dreier, Edel, Goyard-Fabre, Höffe, Honoré, Luf, Paulson, Raz and others;
3) Propose a new theoretical understanding of the basic norm, seeing it as a scientific postulate;
4) Discuss the relevance of the basic norm in the juridical practice, questioning the relation between science and social reality.

7.

Wilson Levy (University of São Paulo / Brazil)

For a critique of legal positivism of Hans Kelsen: the relationship between knowledge and interest in Jürgen Habermas

Abstract:
This paper aims to investigate the contribution offered by the work Knowledge and Human Interests of Jürgen Habermas in the analisys of legal positivism of Hans Kelsen. The intention is to explore the notion of neutrality of the ideas of the Austrian jurist, similar to the ideas of neutrality of modern science and reason. It is expected to result in a understanding of the relationship between knowledge and interest in the construction of legal knowledge, as much as it is done in the understanding of modern science.

WORKING GROUP

WG 28 Habermas, Honneth	
Session 1	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 251
Chair	Ekardt, Felix (Rostock / Germany)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	RUW 4.101
Chair	Mastronardi, Philippe A. (St. Gallen / Switzerland)

Lectures: Session 1

1.

Eduardo Bittar (University of São Paulo / Brazil)

Democracy and social utopias: a study about Albrecht Wellmer and Axel Honneth

Abstract:

This work intends to analysis the philosophy of history and to discuss the consequences of its death to the Critical Theory. The concept of reason and the devices of democracy and human rights are discussed in a revision of the historical debate about the end of history operates the life in the interior of the modern society, especially about the intellectual condition at the information society.

2.

Viktor Blotta + Ines Prado Soares (University of São Paulo Law School / Brazil)

Public hearings as publicity of the constitution policies in supreme courts. An intersubjective approach

Abstract:

This paper aims to discuss in which sense public hearings in supreme courts of democratic rules of law can be seen as publicity of the constitution policies. These policies constitute expressions of a normative claim for a wider "publicization of law" by democratic states' institutional powers and organs; a claim that becomes evident when one undertakes an intersubjective interpretation of law. This theoretical argument will be presented in the first section of the paper through a new articulation of Jürgen Habermas' discursive theory of law and his most recent studies on the concept of political public sphere, such as in Ach, Europa (2008). This articulation will suggest some remarks on an internal relation between law and political public sphere, which is implicitly present, but insufficiently explored in Faktizität und Geltung (1992). The theoretical section gives normative and procedural criteria for the last section of the paper, which consists on a critical analysis of the procedures and practical cases of public hearings held at the Brazilian Supreme Court, constituting the first scientific study on the Court's use of this legal instrument to date. This last discussion attempts to evaluate the latter's capacity to compensate the legitimacy deficits of supreme courts in democratic rules of law, as well as to give expression to the publicity of law claims that become evident in this new articulation between discursive theory of law and political public sphere.

3.

José Manuel Cabra Apalategui (Universidad de Málaga / Spain)

A realist interpretation of the theory of legal discourse

Abstract:

In this paper, I will focus on the interpretation of the discourse theory proposed by Habermas pupil Cristina Lafont. Lafont's interpretation strengthen the realist and cognitivist presuppositions of discourse theory at the expense of the constructivist and consensualist aspects of it. Her main thesis is the denial of the constitutive relation between discourses and validity: the truth or correctness of our empirical or normative (moral) beliefs, or to put it in discourse-theoretical terms, the validity of our claims of truth and correctness, do not depend on these being accepted by everyone (or the affected regarding moral norms), not even in a discourse under ideal conditions. Therefore, discourse is neither sifficient nor necessary condition for the truth or correctness of our beliefs. I will try to defend here that this strategy, followed to explain within the terms of the discourse theory the concepts of truth and moral correctness, just as the rol of discourses as justification and test procedures for our beliefs, not only can help the understanding of some relevant concepts for the conception of legal argumentation as a rational legal discourse (Sonderfallthese), but also allows a realist (objective) interpretation of legal discourse, in which the central concept is not that of consens, but the realist presuposition of legal correctnes, as something to what every validity claim formulated in legal discourses aspire.

4.

Rafael Schincariol (University of São Paulo / Brazil)

Recognition, reification and social pathologies in Suffering from indeterminacy

Abstract:

This paper investigates how the concepts of recognition, reification and social pathologies, discussed in Axel Honneth's "The Struggle for Recognition", "Reification" and "La Société du Mépris" (respectively), are used in Honneth's reconstruction of Hegel's "Philosophy of Right" – as it is elaborated in "Suffering from Indeterminacy". The distorted character of life forms in western modernity and its requirements for self-preservation and social reproduction will be approached in the first section. It will be demonstrated that the conceptual and evaluative structure that, when internalized, constitutes subjects capable of rational deliberation is pathological: it provides pathological life forms by producing social suffering as a result of failing in taking in to account the requirements of recognition and its expectations of self-realization. In the second section the paper discuss Honneth's theory on social recognition as it is presented in "The Struggle for Recognition". Then, the concept of reification, defined as forgetfulness of recognition, will be approached. Finally, concepts formulated in the dynamics of the reconstruction of Hegel's "Philosophy of Right" will be articulated, recognition spheres and action spheres will be connected in order to deepen the epochal diagnosis to proceed a proposal for a theory of justice.

5.

Felix Ekardt (University of Rostock, Baltic Sea Institute for Environmental Law / Germany)

Toward a New Approach in Discourse Theory of Justice and Law

Abstract:

This contribution describes a new ap-

proach toward discourse ethics, defined as a discourse theory of justice or the right law respectively. It is significantly different from the classic discourse theory of Karl-Otto Apel and Jürgen Habermas, to some extent also from Robert Alexy. Those differences concern (1) some aspects of demonstrating why objective or universal norms can exist at all and (2) the content of those norms, particularly of the principle of freedom including its intergenerational and global extension. Altogether, it still seems true that discourse theory is the most promising approach toward a modern universalism and a modern law of reason in times of pluralistic and technological civilizations (also including rules for balancing and risk assessment). In any case, the controversy about theories of discourse rationality should bring about much clearer arguments than the conventional debate about "positivism or law of nature" (the very notion seems misleading), in favor of and against universalism. At the same time, the contribution criticizes some aspects of economic theories of efficiency which actually do not concern "another aspect besides justice" but rather describe a (wrong) ethics.

6.

Tiago Pinto Alberto + Sabrina Pinto Alberto (Pontifícia Universidade Católica do Paraná, Faculdade de Direito Tuiuti / Brazil)

The contribution of Jürgen Habermas 's ideas to Brazilian Democracy

Abstract:
The work to be presented will analyse the philosophical ideas of Jürgen Habermas with brazilian democratic experience, especially in the post-dictatorship. Jürgen Habermas, with his theory of communicative action and speech, supports the need for autonomy and strengthening of public spaces for political deliberation, in order to rescue the primary functions. The idea sustained by the Author of undeniable character procedural, is that the discursive confrontation between the political actors to decide on their own living, introduce network negotiations with several possibilities, not necessarily formatted and attached to the supremacy of State face of the Civil Society. Under this bias, we wanted to analyze the historical foreshortening of democratic experience in Brazil, with special emphasis on the role played by civil society. Meanwhile, considering the philosophy of institutional performance , it will give highlight the current situation faced by Brazil, where the powers are working together to achieve the fundamental freedoms of individuals and as a consequence the fullness of the Democratic State of Law.

Session 2

7.

Marcin Matczak (University of Warsaw / Poland)

Legal interpretation, context and speec act theory

Abstract:
Is it justified to interpret a legal text according to the meaning the words of the text have today even if the text was promulgated many years ago? The originalists would answer this question in the negative, for they believe judges should prioritize the original meaning of the text. In this paper I intend to put forward a competitive theory of legal interpretation, using speech-act theory as its theoretical basis. I argue that the theory, despite neglecting the differences between spoken and written language, may be used as a descriptive tool for legal language. It would, however, involve an adaptation to embrace written language. My analysis is focused on re-describing speech acts as they occur in written communication, i.e. while the audience is distant in time and/or space from the speaker. The result will prove, I believe, that the impact of a speech act must be shifted beyond the moment of utterance to the moment of reception of the message by the reader.
In the second part of the paper I argue that the modified speech act theory applied to written communication in legal acts does not support the originalist position. This is so because written text, as opposed to oral communication, can be an object of interpretative reflection without the presence of its author; i.e. illocutionary uptake happens as a result of an interaction between the text and its contemporary reader rather than between the reader and the author. This approach entails treating the reader's contemporary context as a crucial part of interpretative work. Thus it can be concluded that the written character of the communication through law and the detachment of the text from its author actually require the meaning to be updated at the moment of its interpretation rather than to be based on its historical origin.

8.

Claudio Corradetti (University of Rome "Tor Vergata" and European Academy / Italy)

Discursive Dialectics and Human Rights

Abstract:
This paper advances a dialectic reformulation of the Habermasian notion of discursive theory. A justification of a theory of human rights is then derived from the proposed normative model, aiming at combining procedural mechanisms of justification with substantive ones. The intention is to advance a "post-metaphysical" or a "post-natural" law doctrine capable of integrating a standard form of universalization with a multiplicity of "exemplarily" valid possibilities of human rights configurations. While largely indebted to several classical and contemporary scholars, this argument attempts an original interpretation of traditional categories of political thought and a distinctive model of human rights validity and of normative political validity in general.

9.

Philippe A. Mastronardi + Florian Windisch (Universität St. Gallen Law School / Switzerland)

Wie vernünftig entscheiden? Die Verfassung des interdisziplinären (interrationalen) Diskurses

Abstract:
Es ist die Aufgabe der Wissenschaft, richtige, d.h. möglichst vernünftige Entscheidungen anzuleiten. Der Anspruch auf wissenschaftliche Gültigkeit umfasst immer sowohl einen Wahrheits-, wie einen Wert- und einen Gerechtigkeitsanspruch.
Vernünftige Entscheidungen lassen sich nur in einem zugleich rationalen und interrationalen Diskurs erreichen:
1. Im rationalen Diskurs wird der Anspruch erhoben, innerhalb einer bestimmten Rationalität richtige Antworten auf ausgewählte Fragen zu finden (meist innerhalb der Grenzen bestimmter institutionalisierter Schulen oder Disziplinen).
2. Der interrationale Diskurs setzt bei der Relation zwischen verschiedenen Fragen mit unterschiedlicher Rationalität an und versucht,
a. zwischen diesen Fragen eine wechselseitige Verständigung herzustellen (Diskurs zur Verständlichkeit), bevor er
b. auf den Diskurs über die Richtigkeit von Antworten verschiedener Fragestellungen im Zusammenhang eintritt (materieller interrationaler Diskurs).
Der interrationale Diskurs bedarf der richtigen Verfassung:
1. Der formellen Verfassung des Diskurses
a. Institutionelle Strukturen und Prozesse (z.B. Gleichberechtigung aller Beteiligten, Symmetrie der Strukturen).
b. Methodische Argumentationsstrukturen und -abläufe (z.B. Wahrheit, Wert und Gerechtigkeit; Fragen- und Antwortdimension).
Der materiellen Verfassung: Inhaltliches Argumentarium guter Gründe im Diskurs (bewährte Argumente aus bisherigen Diskursen).

WORKING GROUP

WG 29 Dworkin, Hart, Luhmann, Raz, Rawls	
Session 1	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 2.102
Chair	Chein Feres, Marcos Vinicio (Juiz de Fora / Brazil)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18.00 h
Location	RUW 2.102
Chair	Chang, Chia-yin (Taipei / Taiwan)

Lectures:

1.

Raphael Adebisi Akanmidu (University of Ilorin / Nigeria)

Moral issues in the rule of recognition

Abstract:
It is generally believed that the distinctive character of the legal order of the modern state is to be acknowledged in the manner in which it combines its primary and secondary rules. Primary rules are those that directly regulate the conduct of the members of a society. In this case, the criteria of validity may not be ascertained within the parameters of general acceptance. The secondary rules, apply not directly to conduct but to other rules to which a society is authoritatively identified.The concept of morality in this work is considered as a procedure that seeks for convenience between reason and justification of decision. It is agreed that what legal counsel has to sell is skill in law and legal argumentation but the exercise of these cannot be facilitated properly without reference to moral impressions.
In this paper, we focus on the rule of recognition as a dimension of secondary rules and analyze moral issues involved in it. As Hart puts it, the actual rule of recognition in a given society may be extremely intricate; they may not, indeed, even be stated or easily statable, but may remain implicit in a variety of procedures for determining which rules are valid rules of that system. As stated here, the element of intricacy is, as Taylor says, inwardly delivered, personal, original identity doesn't enjoy this recognition a priori. It has to win it through exchange. Since there is a strong link between the law and its interpretation ,there some factors that are which cannot be sidelined in the of the judge. These include the position of interest within the subjective terrain,the strenght of predispositions and the seeming conflict between the subjective and the objective. It is within this framework that morality concept has been used to estimate the aspects of the rule of recognition.
Since the essence of the rule of recognition in the legal system of a modern state is embroiled in human nature, then, the whole outfit has become one of morality. By this reasoning, we estimate from the moral point of view the process of inward derivation which is inherently embedded in epistemic consciousness in the process of application,interpretation and analysis of the law.All this have meaning in the process governed by human ability.Both the theoretical and practical understanding of the law,require the sense in which it has been accepted and the functions the law is expected to serve.
This epistemic consciousness captures the conditions for justice beyond policy decision but rests on matters of detail. The implications of this is that judjmental utterances take root from legal interpretations and the streams of thought cannot conclude without some intervening moral factors. It is upon this that moral issues in the rules of recognition are to be analysed in this work.
The position upon which this work is grounded is that it is morally obligatory and morally coherent to expect that the criteria of validity within the legal system of the society to should be morally sustained.

2.

Carla Henriete Bevilacqua Piccolo (University of São Paulo / Brazil)

Morality and the concept of law in H.L.A. Hart's works

Abstract:
The contemporary debate in Jurisprudence is a eminently methodological

one and perhaps its most crucial point resides in the so called separability thesis, defended by legal positivists and attacked by almost everyone else. H.L.A. Hart provides us with one of the clearest expositions and defenses of such thesis, reaffirming in his Postscript to The Concept of Law the possibility of a legal study totally disengaged from moral considerations.

But what does it mean to assert that law is different from morality? Isn't that a most trivial observation, which no sound legal theory would dare deny? What is then there left for controversy in it? The first aim of this paper is to address these questions and provide a clearer picture of what the separability thesis really represents. However, the main purpose of this paper is far more ambitious: that is to demonstrate, through a thorough study of Hart's works, embracing not only his famous jurisprudential texts but also giving a special attention to his unfairly less known works in moral philosophy and criminal law, that all of his arguments for the separability thesis are normative ones, regarding the moral merits of a positivist approach, and not epistemological arguments, as one would expect.

If the arguments presented here are right, then the role played by legal positivism in the contemporary jurisprudential agenda must be revisited in the light of such arguments and not only ethical positivism, but also several forms of pos-positivism, must be hence understood not as deviations from a more orthodox legal positivism such as exposed by H.L.A. Hart, but as natural and, why not, obvious consequences of Hart's own arguments

3.

Josue Mastrodi (Faculdades de Campinas / Brazil)

Taking the concept of autopoiesis seriously: why Law cannot be understood under Niklas Luhmann's paradigm

Abstract:

According to the concept of autopoiesis, society and the law system have been created by themselves. This is not the very problem of the Theory of Systems, since many theories grounded on positivism poses likewise (e.g., the Kelsenian Pure Theory of Law).A system can be logically understood by the presence of two characteristics: the element of unity (what belongs to it) and the element of order (in which form the elements are related to the whole system and to one another). Hans Kelsen worked specifically with the element of unity: any points related to order were not considered part of Law, but elements of politics. Niklas Luhmann, however, used the autopoietic assumption to found both elements of any social or legal system. By the autopoietic paradigm, the Luhmannian system creates the conditions for depicting all and every components that belong to it (element of unity) and also the criterion for internally organizing its elements under a predetermined order given by system itself (element of order).The assumption according to which a social system (that is not formed by human beings) has the keys of either social or legal internal organization could not be taken seriously, since it affirms that is an objective and neutral (and strangely mysterious) entity – the social or the legal systems – the one empowered to organize and rule people's lives. When assuming this position as scientific, Luhmann conceals the ideological sense of his theory, since there will always be someone operating the system and ruling it.

4.

Marcos Vinício Chein Feres (Universidade Federal De Juiz De Fora / Brazil)

Law as integrity and law as identity: legal theory, state intervention and public policies.

Abstract:

State intervention in economy is naturally fulfilled by the formulating of public policies. In this context, an important question must be raised: is state intervention in the market, by the use of public policies, legitimate taking into account both ordinary regulations and constitutional principles? Obviously, the legitimate use of public policies, as far as state intervention is concerned, will be analysed taking into consideration the legal procedures and the necessary legal interpretation. Methodologically, the theoretical object of this research is to conciliate the idea of law as integrity, developed by Dworkin, with the idea of law as identity, complemented by Taylor´s idea of identity and Bankowski´s idea of living lawfully. In fact, the methodological approach consists of reconstructing a system of analytical concepts based on contemporary legal theory in which an attempt is made to develop the idea of moral reading of legal rules and constitutional principles. So as to accomplish this methodological tool, it is necessary to revaluate Dworkin's idea of integrity in Law, adding substantial moral content to "the dimension of fit" not only from the viewpoint of the qualitative distinction of value in Taylor's proposal but also from the viewpoint of living lawfully as in Bankowski's legal theory. To sum up, the final intent is to figure out new means of interpreting legal economic regulations and finding new grounds for the legitimate evaluation of public policies.

5.

Wojciech Ciszewski (Jagiellonian University / Poland)

Rawls' difference principle and its critics

Abstract:

John Rawls based his theory of justice on the conception of a hypothetical original position. People being in the original position behind a "veil of ignorance" approve two principles of justice. The first one is the principle of equal freedom. It provides that each individual should be allowed as much freedom as possible, as long as it is not interfering with the freedom of others. The second one is the difference principle, claiming that economic and social inequalities should be adjusted in the way that would improve the situation of the worst-off. On one hand, this principle provides for the way of distributing economic goods in a just society, on the other hand, it serves as

an incentive for the talented to use their skills in a way that is socially beneficial. The difference principle is undoubtedly one of the most controversial elements of Rawls' theory. This paper analyses the most significant objections to the principle of difference formulated from the point of three other contemporary conceptions of justice: libertarian, marxian and communitarian. In the summary of the dispute on the difference principle the author makes a claim that the presented conceptions of justice may be perceived as ways of rationalizing their underlying intuitions. Among those intuitions the one concerning private property and its relation to subjects of law is of primary importance. Various justice theories taking various approaches towards the nature of the property law will subsequently, within their respective theoretical systems, ascribe various functions to it.

6.

Alexandre Da Maia (Federal University of Pernambuco´s Law School / Brazil)

Legal Rights As Image: A Possibile Approach

Abstract:
In this article we will see some projections of certain specific images on the legal rights from two theoretical frameworks (Luhmann and Ferraz Jr.) who flee foundationalist appeals of those seeking to make the legal theory a manual adjustment to the wishes of the Ministers of ulterior Supreme Courts. Therefore the proposal is to show variable forms of imagining the legal rights – which, ultimately, can provide us with projections of images of law itself. All the images are projected and processed in a feeling that works, in the language of systems theory (our first theoretical framework) as a medium for the production of these images as forms.
Thus, the theory of images try to argue that the traditional distinction between rational / irrational is an expression of feeling, although the use of such a distinction can not understand their own blind spots, ie, the feeling in perception. That dinstinction creates the crystallization of something "rational", even though the statement involves something irrationalizable in understanding. The image, therefore, is a paradox, in which the feel of where it rises can be understood as a dark side of what models of rationality do not like to establish themes, ie, as something that belongs to every conscience, while contingent mainly by the paradox of self-observation and mutual inaccessibility of conscience.

7.

Sophie Papaefthymiou (Institute for Political Science in Lyon / France)

On Dworkin's Theory of Moral Truth

Abstract:
In his latest book, Justice for Hedgehogs (2011), Professor Dworkin defends the metaphysical independence of value and offers an account of "Hume's Principle" as supporting morality "as a separate department of knowledge, with is own standards of inquiry and justification", and as independent "from science and metaphysics".
The author confirms his thesis that morality is an interpretive enterprise and argues that moral claims as well as interpretive judgments can be true. He further suggests that truth is to be understood as an interpretive concept. In the light of Peirce's theory of truth, he proposes a "very abstract statement" of the concept of truth, i.e. "truth as the intrinsic goal of inquiry", as "what counts as the uniquely successful solution to a challenge of inquiry", as well as the formulation of "more concrete specifications of truth for different domains by finding more concrete accounts of success tailored to each domain". Distinguishing between interpretation and science, the author considers "value theory" as a "candidate account of success" in the domain of interpretation, and the theory of "moral responsibility" as "a candidate application of the value theory to the more specific interpretive domain of morality"; a "different account of success and hence truth would be offered for science".
This paper explores, first, the relation between Dworkin's theory of moral truth and contemporary philosophy of knowledge, i.e. the dominant paradigm since the "axiological turn", according to which knowledge is more than "justified true belief" (cf. Tiercelin). With this aim, it focuses on Peirce's pragmatist theory of truth, contemporary theories of knowledge as "inquiry" and recent theories which promote a "social" model of knowledge, challenging the individualist approaches.
Second, it focuses on two characteristic traits of Dworkin's theory of moral truth, i.e. morality's independence from metaphysics and the individualist moral virtue of responsibility, in order to question the concept of knowledge implied by this theory.
Finally, it attempts to draw some conclusions about truth in morals.

8.

Dragica Vujadinovic (Faculty of Law University of Belgrade / Serbia)

The Role of European Civil Society in Building the European Polity

Abstract:
Discourse on civil society has become a structural part of debates about the democratic legitimacy defi cit of the EU governance. One of the main answers to the question of how the democratic defi cit of the EU may be restituted – is connected with civil society, another with improving the democratic quality of governance in the EU.
The role of European civil society in the process of Europeanization "from below", in building" an integrated European society", in generating a democratic political culture, in developing a European public and genuine European media, as well as in generating European citizenship and a genuine European democratic polity will be in the focus of analysis.
The rebirth of civil society belongs to the trend of the liberal-democratic tradition which interprets constitutional democracy in the most deliberative, participatory, republican way, and connects deliberative, communicative and repub-

lican inspirations with citizens` civil society activism.
The concept of European civil society will be considered starting from the (republican) understanding of the essential interrelationship of liberal-democratic political order/constitutional democracy, universal human rights and civil society. Empirical manifestations of a European civil society will be analyzed in their multiple forms, starting from the groups of non-governmental organizations and networks, which have been involved into the "social dialogue" with EU officials, then through huge European civic protests, European countersummits and social forums, and up to continually reappearing grassroots initiatives, protests, movements, NGOs and networks (especially in regard of actual civic responses to the current global economic crisis).

Session 2

9.

Noam Gur (Lincoln College, University of Oxford / UK)

Are Legal Rules Content-Independent Reasons?

Abstract:
Since HLA Hart introduced them and Joseph Raz espoused them, content-independent reasons have occupied a central place in the discourse about legal normativity. There is, however, a crucial ambiguity in the notion, which has tended to hinder clarity in discussions concerning its bearing and soundness. In this paper, I suggest that the question of whether legal rules provide content-independent reasons turns, in part, on how content-independence is understood. I contrast two different understandings, which I call weak and strong content-independence: weak content-independent reasons are reasons that do not depend on the nature and merit of the action that law requires. Strong content-independent reasons are reasons that do not depend on the nature and merit of the action law requires or on any other substantive law-following value; this notion implies that the mere fact that law requires an action must itself count in the practical reasoning of its subjects. I argue that, while legal rules do (or at least can) give rise to content-independent reasons in the weak sense, whether they can be said to generate strong content-independent reasons turns on some further distinctions: (1) a distinction between statements about reasons which focus on what Hart entitled the internal point of view and statements about reasons which focus on the external point of view; (2) a distinction between reasons for action and reasons for adopting certain attitudes. Strong content-independence, I argue, is a sound notion only when it figures in internally focused reason-statements (as opposed to externally focused reason-statements) with regard to actions (as opposed to attitudes). Finally, I uncover what I consider to be a deeper dimension of the answer by drawing attention to an underlying connection between the different senses in which law provides content-independent reasons, and, as part of this, between the internal and external points of view.

10.

Zeynep Ispir Toprak (Ankara University Faculty of Law, Ankara / Turkey)

Dworkin's Criticism to Hart's Open Texture Theory

Abstract:
H.L.A. Hart – Ronald Dworkin debate is a very well-known debate in Philosophy of Law literature. Hart, who is one of the most important figure and a cornerstone in legal positivism, has been criticized by Dworkin. Some parts of these critics are related to Hart's open texture theory and its consequences. Hart explains law by means of a model of rules in general while Dworkin proposes a comprehensive explanation of law that contains principles and policies together with rules. It is possible to find "right answers" for hard cases in such kind of a legal system includes principles as a key concept in Dworkin's theory. Hart indicates that in some cases legal rules can not determinate legal consequences because of the open texture of law. Judges have to use their discretion and have to act as a law maker to reach a decision in these "penumbral cases". As Hart said in Concept of Law, Dworkin criticizes Hart's open texture theory and especially judicial discretion approach. He mentions some disadvantages such that it may cause a form of law making process which is "undemocratic" and he also asserts another complaint about the theory that it causes "retrospective or ex post facto lawmaking". He also thinks that open texture is not the only reason to explain the hard cases.In this paper while mentioning to Hart's open texture concept briefly and try to present Dworkin's criticism on this theory with its consequences, it is aimed to try to put forth the importance of this debate in both theory and practice of law.

11.

Miklós Könczöl (Pázmány Péter Catholic University, Budapest / Hungary + Durham University / UK)

As Heads of Families: Rawlsian Perspectives on Future Generations

Abstract:
The Rawlsian notion that parties to the original contract should be conceived of as heads of families has met vigorous criticism from several directions. Part of this criticism was developed by scholars working on the problem of future generations. Alongside those reproaching Rawls' 'psychological assumption' as impermissible, some argued that principles of justice as reciprocity have nothing to say about intergenerational justice. Others again tried to establish reciprocity outside of a contractarian context.It is the contention of this paper that Rawls' conception of the original position may provide a useful starting point for addressing the problems raised by the apparent lack of inter-generational reciprocity. In the first part, a brief reconstruction of the Rawlsian framework isfollowed by a summary of the main points of Liberal and Communitarian critique in terms of future generations. The second part of the paper discusses, on the one hand,

some alternatives aimed at furnishing sufficient grounds for inter- and transgenerational obligations and, on the other, the limits of conceptualising such obligations. Finally, the third part seeks to highlight the virtues of the Rawlsian approach by showing the answers it provides to at least certain questions related to present decisions with a potential impact on the life circumstances of future generations.

12.

Luka Breneselvoic (Institut für Rechtsvergleichung, Belgrad / Serbia + Frankfurt am Main / Germany)

Über ein mögliches Rudiment der Radbruch´schen Formel im 19. Jahrhundert

Abstract:
Im großen Streit zwischen den Kelsenianern, auf der einen, und Eugen Ehrlich auf der anderen Seite, warf man dem Ehrlich aus Wien vor, er solle den südslawischen Kodifikator Valtazar Bogišic als seinen rechtssoziologischen Vorgänger verschwiegen haben. Der Name von Bogišic taucht sonst in der europäischen Rechtsdebatte nach dem 1. Weltkrieg nur selten auf. Nach Bogišic´ Auffassung war das Recht das bonum et aequum selbst. Die Rechtsregeln (Normen) seien allein die nach dem Tatbestand-Folge-Schema gestraftes Recht. Die Regeln kommen entweder durch die ausprofilierte Tätigkeit der Gesetzgebung (Gesetzregeln) oder durch Einwöhnen (Gewohnheitsregeln) zu Stande. Wird eine Regel des Gesetzes als „offensichtlich ungerecht" bewertet, so müsse man diese Regel bei Seite lassen, und die passende Regel des Gewohnheitsrechtes aufsuchen und anwenden. Gibt es eine solche gewohnheitsrechtliche Regel nicht, oder komme man zur Meinung, dass sie ebenso „offensichtlich ungerecht" sei, so müsse man im Einzelfall nach der Gerechtigkeit, also dem Rechten und Gerechten selbst entscheiden. Diese Rechts- und Rechtsanwendungsauffassung hat Bogišic auch in dem von ihm ganz abgefassten Bürgerlichen Gesetzbuch für das Fürstenturm Montenegro aus dem Jahr 1888 vertreten. Der Sache nach ist dies eine zivilistische Vollversion des Radbruch´schen Formel. Der Rechtswissenschaft ist ein Streit um die letzte oder eben die erste Urheberschaft in der Sache fremd. Bogišic konnte seine Auffassung auch in der Haltung der Bevölkerung in Montenegro und des dortigen Fürsten bekräftigen. Man dürfe, auch im Hinsicht der anderen „ethnogenen" Rechtstraditionen, wie der römischen, nur behaupten, dass auch historisch das Recht durch die Radbruch´sche Formel nach dem 2. Weltkriege in sein „Naturzustand" wiederversetzt wird. Dort ist das Recht eben das rechte und Rechte; das was recht und Recht ist.

13.

Chia-Yin Chang (Faculty of Law, Shih-Hsin University / Taiwan)

Two Paradigms of Legal Theory and their Relationships: A system theoretical observation

Abstract:
H. L. A. Hart thought that a theory of law can be purely descriptive and called his theory a "descriptive sociology". One of his great contributions to the modern legal theory is his emphasis of internal aspect of social rules. According to him, a theory of law can be built on the basis of the description of the participants' view without sharing with it. This descriptivism is totally rejected by Dworkin, who propagates a theory that denies a sharp separation between a legal theory and its implications for adjudication. For Dworkin is a legal theory only possible as a theory with "the internal, participants' point of view". Dworkin's position implies a radicalization of legal theory that will necessarily transform the statement of external point of view to be that of internal. For Dworkin based legal positivist view of law on the sociological concept of law, which is an "imprecise criterial concept" and is "not sufficiently precise to yield philosophically interesting essential features." We take up the challenge of Dworkin. Hart's position is vulnerable because it takes an impure form of Descriptivism that still draws a categorical distinction between fact and norm. This theoretical impurity results from the ambiguity by interpreting the internal aspect of rules. A strategy to rescue the Hartian project is to radicalize his Descriptivism with Luhmannian system theory. Adapting the system theoretical distinction between internal and external observing of law with all its implications for the explanation of the legal system and legal communications, the Hartian Descriptivism attains finally its pure form, which is not only a distinctive paradigm of legal theory, but possesses the potentialities to clarify its relationship to the Dworkinian Theory.

WORKING GROUP

WG 30 Philosophy of Law 19th century and before	
Date	FRI 19 Aug 2011
Time	15.30 h – 18 h
Location	HOF E.21 / Paris
Chair	Städtler, Michael (Münster / Germany)

Lectures:

1.

Pawel Banas (Jagiellonian University / Poland)

Akrasia – status of weak willed actions in philosophy of law

Abstract:
Akrasia, or weak-will, is a term describing a phenomenon when one acts freely and intentionally contrary to his or her better judgment. Discussion on the possibility of akrasia originates in the Plato's Protagoras where he states that "No one who either knows or believes that there is another possible course of action, better than the one he is following, will ever continue on his present course". However, in his influential article from 1970, Donald Davidson argued that akrasia is theoretically possible yet irrational. Some other critics of Plato's stance point out that phenomenon of akrasia is com-

mon in our everyday experience, therefore it must be possible.
These two arguments in favour of akrasia existance – theoretical and empirical – will be discussed from both – philosophical and psychological points of view. Especially, George Ainslie's argument that akrasia results from hyperbolic discounting will be taken into consideration to show how it affects traditional thinking about weak-willed actions.
Finally, the paper will discuss how may the contemporary notion of akrasia affect the idea of responsibility and free will. Implications for the philosophy of law will be shown, i.a. to which measure it is possible to claim that a given example of a weak-willed action was indeed free and intentional and one should be hold responsible for its results.

2.

Ki-Won Hong (City University of Seoul / Republic of Korea)
Social Capacity of the Aged People Reconsidered: A Reading of Cicero's Cato Major de Senectute
Abstract:
Law has treated the aged people as the socio-economically incapable. Retirement as well as social security system can only be justified on this legal principle. By the way, the growth in aged populations, a phenomenon witnessed all over the world, is undermining the foundations of such social institutions, and we are facing thus the need to restructure the whole set of institutions related to the aged. Many of the OECD member countries are undergoing huge governmental deficit due to "this aging society" (William C. Cockerham). Japanese government recently admitted that its failure to recover the formerly largest economy next to US partly resulted from the lack of appropriate policies for gerontic society.
My paper purports that, with the increased proportion of the aged in demographic constitution, the traditional legal principles related to the aged persons' capacity are no more valid, that we must set ourselves a task to rebuild the legal systems on new foundations, and that Cicero's Cato Major de Senectute will provide philosophical explanations for the possibility of the aged people's active participation in social, economical and political activities. By refuting the conventional view on the aged people's capacity, Cicero argues that, in spite of old age, we can pursue various activities, that we can keep our intelligence normal, that deprivation of physical pleasures contributes to a right development of this intelligence, and that even death cannot hinder us in true happiness.

3.

Miriam Madureira (Universidad Autónoma Metropolitana – Cuajimalpa, Mexico City / Mexico)
Hegels Rechts- als Sozialphilosophie
Abstract:
Die Auffassung des Rechtes in Hegels Rechtsphilosophie weicht bekanntlich von dem ab, was üblicherweise unter Recht verstanden wird: Für Hegel geht es ja um die Idee des Rechtes, und diese, seiner Auffassung des objektiven Geistes gemäss, bezieht sich nicht nur auf den Begriff des Rechtes, sondern auch auf dessen Verwirklichung. Schon deshalb ist das Werk Grundlinien der Philosophie des Rechtes nicht einfach neben anderen Werken zur Rechtstheorie einzustufen. Hier möchte ich diskutieren, inwiefern Hegels Rechtphilosophie gerade insofern als Sozialphilosophie interpretiert werden kann, als sie die philosophische Reflexion einer Gesellschaft darstellt, die sich selbst als durch das Recht bestimmt versteht. Die Philosophie des Rechtes wäre dann nicht bloss als genitivus objectivus, sondern auch subjectivus zu verstehen.

4.

Badescu Mihai (Police Academy / Romania)
Spirit and Law in the view of the Romanian Thinker Eugene Sperantia
Abstract:
Eugeniu Sperantia was a leading figure of the Romanian legal thinking in the interwar period, especially from the perspective of the philosophy of law. Based on the Kantian conception regarding the categorical imperative and the a priori elements, Sperantia based his beliefs on legal imperatives arising from the very structure of our minds, which are definitely imposed to us.
Sperantia conceives the social order or social normativity, as resulting from the logical consistency of the self with itself. Thus, the commitments are only one form of another imperative, namely the need for logical consistency to us.
Positive legal order, in turn, forms a whole in relation to which legal rule is just a tool and does not have its own purpose. The ideal positive legal order is absolute justice, an ideal never reached, and that of the legal norm is positive legal order. Both the positive legal rule and the legal norm in order to be fair must be consistent with, as far as possible, with the universal principles of absolute justice. Sociality is a fundamental principle, but it tells us nothing by itself, because it must be a simple way to achieve a higher goal, namely that of spiritual imperative. True imperatives of social life are two: the spirit must exist to affirm itself, as the ultimate progressive value, and I must exist to affirm myself as a progressive value. Hence it is inferred that the supreme imperative is the need for compliance with the human person in general, individuals regarded as a real center of values.

5.

Michael Städtler (Exzellenzcluster 'Religion und Politik', Philosophisches Seminar, Westfälische Wilhelms-Universität Münster / Germany)
Technische und gesellschaftliche Entwicklung als Herausforderung fürs Recht bei Hegel
Abstract:
Hegels Rechtsphilosophie reagiert wohl als erste auf die technische Modernisierung der Gesellschaft. Obwohl Hegel entsprechend vage bleibt, lassen sich doch Konsequenzen für den modernen rechtsphilosophischen Umgang mit derartigen Problemen ziehen.
In den Abschnitten über die bürgerliche Gesellschaft und ihre Institutionen

notiert Hegel die Koinzidenz technisch gesteigerter Produktivität mit zunehmender Armut in der Bevölkerung. Dieser Zusammenhang, der in den späteren Vorlesungen immer größeren Raum einnimmt, war kurz zuvor von Malthus und Ricardo beschrieben worden. Hegels Darstellung mündet in widersprüchliche Formulierungen zur Gesellschaftsstruktur (‚übermäßig reich aber nicht reich genug' u.ä.), die innerhalb der Gesellschaft nicht aufgelöst, sondern bloß kompensiert werden durch institutionelle Fürsorge oder durch Kolonisation. Die grundsätzlichen Konflikte partikularer Interessen in der Gesellschaft sollen schließlich auf der Ebene des Staates ideell vermittelt werden.

Es ist, auch mit Blick auf den Stand technischer und gesellschaftlicher Entwicklung damals und heute, zu prüfen, wie weit Hegels Gesellschaftsbegriff trägt und wo seine Grenzen liegen. Vor allem aber ist die Möglichkeit zu prüfen, diese Grenzen staatsphilosophisch bzw. staatsrechtlich zu überwinden.

Diese Überlegungen, die mit der Frage der Selbstbestimmung zusammenhängen, dürften Impulse für die Diskussion moderner sozialstaatlicher Regulierung technisch induzierter gesellschaftlicher Probleme geben.

WORKING GROUP

WG 31 General Theory of Law, General Theory of Norms	
Session 1	
Date	THU 18 Aug 2011
Time	14.30 h – 18.30 h
Location	RUW 3.101
Chair	Kim, Marie Seong-Hak (Minnesota / USA)
Session 2	
Date	FRI 19 Aug 2011
Time	15.30 h – 18 h
Location	RUW 3.101
Chair	Guibourg, Ricardo A. (Buenos Aires / Argentina)

Lectures:
Session 1

1.

Emine Irem Aki (Ankara University / Turkey)

Examination of Fuller's Generality Principle and Its Relation to His 'view of man'

Abstract:
Lon L. Fuller offers eight principles as necessity of the inner morality of law. These principles are generality, publicity, clarity, consistency, applicability, constancy, prospectivity, congruence. According to Fuller "a total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all." Fuller says that what he called the inner morality of law is in this sense a procedural version of natural law and that these principles do not pertain to the substantive aim of law, but to the procedural aspect of it. So it can be said that the inner morality of law is neutral towards ethical, political or moral issues. At this point the foremost question is whether these principles are procedural or substantive. In this paper my aim is to discuss whether it is possible to think of the principle of generality regardless of its substantive aim. Secondly, I argue that the 'view of man' Fuller describes as implicit in the inner morality of law needs to be thoroughly examined. I will try to address these issues by first dwelling on the meaning of generality, secondly of generality in relation to equality, and third on the relationship between general rules and Fuller's 'view of man'.

2.

Luka Burazin (Faculty of Law, University of Zagreb / Croatia)

Reply to Criticism of the Thesis about the Means of Execution as a Kind of Legal Sanction

Abstract:
The paper first introduces the thesis about the means of execution as a kind of legal sanction. It then sets forth basic theoretical arguments for rejecting the view according to which the legal sanction in the case of damage causation is a legal duty of repair. This is followed by a presentation of the viewpoints of several legal theorists (Bucher, MacCormick, Padjen, Pokrovac) who criticize the thesis about the means of execution as a kind of legal sanction. Finally, the paper critically analyses the said viewpoints and seeks to strengthen the said thesis.

3.

Andre Santos Campos (Faculty of Law, Lusiad University of Lisbon / Portugal)

New dimensions of legal validity

Abstract:
Robert Alexy, in his Begriff und Geltung des Rechts, identifies a threefold division of the idea of validity in legal theory: the moral concept of validity; the juridical concept of validity; and the sociological concept of validity.
In fact, however, there are several different approaches to the problem of validity in jurisprudence:
(1) The ontological approach ('in what way can a normative pronouncement be considered law?);
(2) The axiological approach ('in what way can a normative pronouncement be said to posit a value that was not there before?);
(3) The analytical approach ('in what way can a normative pronouncement fit into the conceptual framework generally named law?);
(4) The systematic approach ('in what way can a normative pronouncement be considered part of a whole recognizable as a legal system?);
(5) The productive approach ('in what way can a normative pronouncement be enforceable?);
(6) The political approach ('in what way can the enforcement of a normative pronouncement be justified?).

Overall, these different approaches consistently deal with legal validity in response not simply to the doubtful determination of what can fit into the concept of law, but mostly to the identification of what rules are backed up by a sufficient belief of obligation that ultimately justifies their enforcement. Hence, the problem of validity is usually dealt with in search for the discovery of what is justifiably obligatory ('is this legal rule obligatory or not?') and of what is justifiably enforceable ('is this legal rule enforceable or not?'). In legal theory, then, the problem of validity is always treated in an all-or-nothing fashion.

This position, however, is more and more faced with additional challenges. In the first place, because legal systems in a multicultural and globalized world can no longer be traced exclusively to their state-like form, since there is an increasing pluralism of legal sources coexisting (and often conflicting) in the public sphere. Hence, quite often the problem can no longer be reduced to the questions 'is this rule obligatory or not', 'is this rule enforceable or not', but rather to the questions 'which of these legal rules is more valid than the other', or 'which of these legal sources is more justifiably enforceable in this situation'. In the second place, because all of Alexy's identified concepts of legal validity are hierarchical in kind, which means that there are moral values more determinant than others in the ethical realm, that there are competence rules higher than others, and that there are legal rules more accepted and followed as such than others. In the third place, because efficacy is usually accepted as an important criterion for valid law, even by those theorists that present their preference for the moral and the juridical concepts of validity (such as John Finnis in the first case, and Hans Kelsen in the second – a just law, or a law that conforms to the Grundnorm, that are continually neglected or violated without a general belief in their obligatory force cannot usually be simply accepted as valid law). And efficacy, insofar as it requires sociological analysis that is ultimately statistical without measuring unanimous compliances or violations but rather majoritarian beliefs of obligation, cannot be shaped in an all-or-nothing fashion. These three different challenges to legal validity are enough to induce a consideration of a concept of validity that is mostly dealt with in a matter of degrees.

In this sense, besides those three concepts of validity identified by Alexy in contemporary legal theory, there should be at least two others that, more generally, are above those three and determinant of them (applicable to whoever has preferences for the moral, the juridical or the sociological concept of validity). I shall call them the political concept of validity and the metaphysical concept of validity.

The political concept of validity involves the element of efficiency and makes the problem of legal validity to be necessarily bound to the problem of political legitimacy. A legal source is valid insofar as it is justified as legitimate in a given political community – which means that its acceptance can be measured sociologically, but must be constructed normativelly in the political realm. But how can a source be measured as politically legitimate? The answer must lie in the actual processes of political decision-making (whether institutional or extra-institutional) and in their effectiveness – the law accepted by a political community is that normative expression immanently resulting from the interplay of the equilibrium of consensus and conflict taking place between political actors.

There are several consequences to this idea. Firstly, it means that the law, insofar as it is politically valid, is made out of the beliefs of what should be considered necessary by the several agents in a collectively organized community, and not simply by those that are officials of the law in that community. Secondly, it means that a legal system is neither something transcendent nor independent to the actual political interplay of forces between productive agents in a community – it is not an object by itself simply observable in nature, but rather something made. It seems much like Norbert Elias's notion of figuration in sociology. Thirdly, it means that legal officials (whether judges, lawyers, jurisprudents, etc.) must be considered active political agents, and that the results of their performances function as the unfolding of a political process for the validation of legal normative pronouncements – they do not simply describe what is already valid, but rather engage in a new stage of the political decision-making determining what constitutes valid beliefs on what should be necessary for a given community. Fourthly, it means that the law and its officials are constantly engaged in a process of self-justification towards a supporting political process – courts, for instance, can no longer be considered institutions whose legitimacy is given by an idea of sovereignty, since the latter is traditionally attached to an exclusive state-like form. Instead, they should be regarded as the embodiment of the most visible part of the life of the law, insofar as they apply the law and, while doing it, engage in a process of self-justification that is also a process for the validation of the law they intend to apply (sovereignty is only one of those possible self-justifications). Finally, it means that the concept of validity is not necessarily bound to a liberal idea of (constitutional) democracy, since all political processes coming out of that equilibrium of consensus and conflict end up being valid, whether in a democratic, aristocratic, or even tyrannical form. However, it also means that validity is best achieved the more stable is the political community between consensus and conflict – and, in this sense, since there can be degrees of political effectiveness in this regard, so there are also degrees of legal validity, in which the democratic regime with the highest active participation by all actors is the one with the most valid law.

The metaphysical concept of validity, on the other hand, requires the fusion of the search for a fundamental groundwork of the law with the search for the element of efficiency in the law. Typically,

it is possible to distinguish between the fundamental and the foundational. The former intends to identify an element that stops the continuous regression of justifiable arguments (a is so because b, b is so because c, ad infinitum) for being self-justified, such as Aristotle's unmovable mover, the Scholastics's causa sui, the political concept of sovereignty, Kelsen's Grundnorm, etc; the latter engages in a justification of things by their actual existential procedures. Hence, the problem here in legal validity is how to stop the continuous regression of justifiable arguments (the fundamental) while simultaneously stressing the importance of efficiency and self-making for the actual existence of the law (the foundational). Ultimately, what matters is to find a concept of validity that is self-justificatory and non-exclusive, that has its groundwork in a conception of Nature involving causation and efficiency. In this sense, the valid law is any given normative realm that invokes any given justifiable criterion for being integrated into an enforceable concept of law – that is, any given normative pronouncement that endeavors to solve the problem of its own capacity for demanding compliance. Consequently, in this mixture between the traditions of the fundamental and of the foundational, the idea of validity is inherent to the very concept of law. The metaphysical concept of legal validity implies then that the law is a process for the evaluation of the normative efficiency in play. The legal rule is a valid rule insofar as it is supposed in its own making, which is achieved by general acceptance – much like Wittgenstein's explanation of the rule in his writings On Certainty. This implies that one should speak more of validation in legal theory, rather than in validity, and also that there is no opposition validity-invalidity but rather distinct degrees of validity (it is more valid the law that is the greatest expression of a permanent natural efficiency – and ultimately, this will connect it with an intrinsic rationality and some requirement of democracy).

4.

Petr Cechák (The University of Finance and Administration, Prague / Czech Republic)

Values, Value Judgments and Effectiveness of Law

Abstract:
Values or more precisely value judgment play a significant role in relation to effectiveness of law. Judgment relating to question of realization of formal justice could be used as an example. Realization of formal justice as a value is probable to be demanded no matter whether there would exist altruism as an anthropologically based tendency of human behavior. In case of other values and value judgments relating to these values altruism can play a significant role as a motive of human conduct. As good or desirable there is probable to be judged such a conduct that is supposed to be an effective means in relation to reaching of purpose of preservation and reproduction of information that is shared by members of concrete community but also in a society as a whole.
Above mentioned relates to aspects of effectiveness of law that is at least to some measure dependent on existence of shared values and value judgment. Multiculturalism, value relativism and diminishing of core of shared values represent therefore a challenge for effectiveness of law and for law and legal science as a whole. The very law at the same time represents an instrument of creation and maintenance of a core of shared values. Effectiveness of law in this sense could be grasped as self-replicating.

5.

Samir Chopra (Brooklyn College of the City University of New York / USA)

Pragmatist Humanism and the Law

Abstract:
I argue that armed with a 'humanist' metaphysics, we can understand how law creates, promulgates, and reifies, the central concepts by which we organize human and social interaction. In this picture, law is not a set of rules, but a set of evolving behavioral co-ordination strategies, which require for their success the belief in a certain set of entities. Without the concept of a person possessing agency and free-will and committing acts for which he can ascribed responsibility and held to be the cause of, this set of co-ordination strategies that binds us together fails to exercise traction. These metaphysical concepts are inter-related; 'person' get its traction from responsibility, agency and blame, and not the other way around, for it is only a 'legal' society, which needs concepts like these; 'person' is parasitic on social/moral concepts and there is thus an unavoidable historicity in any talk of personhood. When debate about the meaning of these metaphysical concepts is divorced from the conceptual scheme dependent on them and an attempt is made to ground them wholly naturalistically, incoherence results. The law, by its practices, emergent legal theory, and its larger expressive impact, the intuitive grounding for a cluster of metaphysical concepts. In enacting positive legislation, in rulings on case-law, in undertaking statutory interpretation, the law gives rise to a set of practices, a language which anchors these concepts and is the repository for our intuitions about them. I will argue therefore, that the pragmatist humanist's argument that legal reality is socially constructed enables an understanding of the grounding, traction, and plasticity of crucial metaphysical concepts in the moral domain.

6.

Marie Seong-Hak Kim (St. Cloud State University / USA)

Custom and Reason: A Comparative Discussion of Sources of Law in Europe and East Asia

Abstract:
This paper aims to discuss the evolution of sources of law in a comparative perspective, focusing on modern East Asian law. Emphasis will be placed on examining how Japan and other East Asian countries in the late nineteenth and twentieth centuries adopted the notions of custom and reason–fundamentally European concepts–and thereby

transformed their law and legal systems in the framework of the civil law tradition. The establishment of the hierarchy of legal norms in Meiji Japan bore powerful imprints of European legal science but it also revealed a distinctive force of acculturation at work. In 1875, Japan declared custom and reason to be supplementary sources of law, almost thirty years before the Swiss Civil Code. This led to active jurisprudential interpretations that denied the validity of custom which lacked conformity to reason. It was something akin to the development in the late Middle Ages in Europe: the medieval canonists subjected the authority of jus consuetudinis to strict ethical criteria, equating custom with usus rationabilis. The emerging royal courts in England and France contributed to the centralization of the realm by exercising the royal prerogative of determining the reasonable character of custom. Likewise, the Meiji courts actively resorted to the notion of reasonable custom and created a legal hierarchy controlled by the state. In Japan, custom and reason played the role of key machinery in the process of adjusting imported European law to the indigenous legal tradition. The civil codes of China and Korea, modeled on Japanese law, both enshrined custom and reason as sources of law. A historical and comparative examination of the sources of law can help understand the development of civil law on the global level.

7.

Shi-Tung Chuang (Department of Law, Fu Jen Catholic University / Taiwan)

The Picture of Law: A Humanistic Analysis and Interpretation

Abstract:
Raffaello Santi, the great artist in the era of the Renaissance, endeavored to complete his renowned fresco "The Cardinal and Theological Virtues" with a strong attempt to revive the classical legal thoughts of Greek and Rome. For Raffaello, human beings share a common rational character with Law and Nature. They can establish a good legal system only if they fully develop their intrinsic rational nature and pursue the moral excellence of human virtues. In this way, the fresco apparently reveals a human-centered, humanistic legal thought. By contrast, contemporary mainstream legal thoughts not only deny any connection between the moral excellence of human virtues and the investigation of the nature of law, but also see the law as some independent entity whose nature can only be surveyed from an observer's or a participant's point of view. As such, contemporary legal scholarships are inclined to a law-centered, legalistic legal thought.The development of analytical legal philosophy mainly revolves around the debate on the central issue 'what is law', which gives rise to the antinomy of legal positivism and anti-legal positivism. Nevertheless, behind this antinomy lies a common intellectual foundation, namely, the legalistic legal thought that characterizes law as an independent object (social fact or moral value) and as the pivotal case in normative human orders. Accordingly, in light of Raffaello's brilliant artistic expression of personification, this essay attempts to argue that the seven virtues (fortitude, charity, temperance, faith, prudence, hope, and justice) presented in the fresco are aptly correspondent to the three different aspects of law, that is, the authoritativeness of law, the normativity of law, and the legitimacy of law. Through the critical reflection on the legal theories of John Austin, Joseph Raz, H.L.A. Hart, and Ronald Dworkin, the essay tries to analyze and interpret the humanistic implication in these aspects of law.

8.

Bizina Savaneli (St. Grigol Peradze University / Georgia)

General Plan of Mutual Transition, Spiral and Evolutionary Development of Positive Law and Normative Order

Abstract:
In contemporary world we have three levels of Single Positive Law: single international law of all states (common international law), single international law of group of states (for example, the European Union law, Organization of American States and African Union law) and single laws of nation states (laws of UN member states).
In contemporary world we correspondently have three levels of Plural Normative Order: plural transnational normative order of all states (common international order), plural transnational normative order of group of states (for example, the European Union normative order, Organization of American States and African Union normative order) and plural normative order of each nation states (normative orders of UN member states).
II. Single Positive Law or Legal Monism (Public Positive Law and Private Positive Law) indicates how public bodies and private persons ought to act.
Plural Normative Order or Normative Pluralism (Public Normative Order and Private Normative Order) shows how public bodies and private persons acts, based on giant Goethe's formula: "Im Aufang war die Tat".
Legal Monism (what ought to be) and Normative Pluralism (what is) never coincide. Generally, my theory of dialectical jurisprudence is founded on the laws of dialectics of Hegel. They are: the law of the unity and conflict of opposites; the law of the passage of quantitative changes into qualitative changes; the law of the negation of the negation. Dialectical Jurisprudence is a sphere of science, which explore dialectics of law and order separately and together, and propose a model of dialectics of law and order separately and together.
III. The "legal families" theory or Comparative Law ignores the phenomenon of normative order. Almost all scientists operating in comparative law and legal theory ignore any role of practice of individual normative acts of public bodies and private persons in formation of normative order. However, the state and certain combination of practice of individual normative acts of public bodies and private persons construct individual

legal face of country, which is always different from normative orders of other countries, disregard that both could be even entered in the same legal family. So it is necessary to introduce a new branch of legal science: Comparative Normative Orders Study, which at the beginning should not be investigating in the frameworks of Comparative Law Study. In this sense I put forward an idea of practical jurisprudence. Comparative Law is the part of Comparative Jurisprudence. Another part of Comparative Jurisprudence is the Comparative Normative Order.

IV. It is a deep mistake to consider positive law as decisive factor of conflict prevention and resolution, because unjust law of legislative power could be factor of conflicts. Important factor of conflict prevention and resolution is the formula: "Making just law makes a dry tree green", as Shota Rustaveli - the famous Georgian philosopher and poet of the XII Century - proclaimed. The Idea of Just Law suggest what sort and kind of law legislators (in Roman-Germanic legal space) or judges (in Anglo-American) should make, so that any laws would be just from the Universal Human Rights Law.

V. The Mutual-Transition of Legal Monism, Normative Pluralism and Idea of Just Law must be based on the Universal Human Rights Law as Basic Norms' System, and this process must be repeated dialectically, i.e. spirally, evolutionary and endlessly. Therefore, we the people of the world need a New Human Philosophy under the auspice of Universal Human Rights Law, which links the East and West, North and South, ethics and religions, public and private life, technologies and environment, and the myriad problems, which have never been exist in the history of Humankind in widespread aspect.

Session 2

9.

Hanna Debska (Jagiellonian University Institute Sociology of Law / Poland)

The apparent dilemma – dangerous consequences. Between the legal and ethical standards.

Abstract:
Democratic rule of law has been struggling with the occurring problem of pluralism of values. It is therefore still faced with the dilemma of ordering the relationship of law and ethics, namely with the question whether in the issue of legal solutions the priority is granted to ethics or to law. In the case of dominance of the positivist paradigm, it is all the more important because the ethical issue is marginalized in it. It turns out that the same authority, deciding on similar issues, at the junction of two areas: ethics and law, can make mutually contradictory decisions: once giving priority to ethics, whereas – at different times – to positive law. On a closer analysis, this contradiction proves illusory because under the guise of protection of a positive paradigm, the hidden fact is that the axiological decision underlies the resolution concerning law. This decision protects the values that have priority in the scale of preferential value of decision-making body.The example considered in the article concerns the interface between ethical and legal norms against selected rulings of the Constitutional Court. The doubts that arise in this context may be in future avoided or perhaps, if necessary, resolved by adopting a two-aspect model of legal norm. This model in its vertical approach has an evaluative element.

10.

Adam Dyrda (Jagiellonian University / Poland)

The Banality of Law? – Some Remarks on Legal Conventionalism

Abstract:
Many legal philosophers are convinced that no legal system is conceivable without substantial conventional elements at its foundations. The idea of convention is however of great ambiguity. The paper discusses the idea of convention as a resolution to coordination problem, proposed by Lewis and applied within legal theory by Postema and Coleman. This approach (as one possible explication of „the conventionality thesis") has been developed as the crucial one for legal positivism, but also for some non-positivistic accounts. In those theories the notion of convention (or coordination) seems to be a junction between desriptive nature of socio-legal facts and their normative force (resp. with appriopriate emphasis on its descriptive or normative layer). Positivistic rule of recognition is pervasively perceived as a profoundly convenional rule. It is useful to examine all strenghts and vices of such approach, which consumes in idea of convention as social interaction, understood as either coordination equlibrium or shared cooperative activity. Recently J. Dickson challenged once again the idea of conventionality of hartian power-conferring rule, arguing that the conventionalist approach in positivism is characteristic for Hart's Postscript only, and is not essential to his original approach. Thus, the paper discusses her account in opposition to Marmor's idea of rules of recognition understood as the constitutive conventions of partly autonomous social practices, which stands in some opposition to coordination approach. The intrinsic contestation points in indicated debates show clearly that no notion of convention, as well as the idea of legal conventionalism, is trivial enough for law to be seen as a banality.

11.

Ricardo A. Guibourg (University of Buenos Aires / Argentina)

On the Knowledge and the Use of Law

Abstract:
Most of the theoretical discourse on law deals with this question: is it possible to reach a definition of law which enables us to describe and explain legal reality as it results from practice and at the same time ensure the function of law as a protective element for mankind?This can be seen as a set of two functions: we want a description of law as a specific social phenomenon, able to explain and predict legal facts or decisions, and a set of argumentative rules, able to justify the acceptance, rejecting or balancing of le-

gal opinions and arguments. None of the current theories of law satisfy these two purposes, and each one of such purposes makes difficult the fulfilment of the other. The result is a chaotic practice, where methods of interpretation and, in a less intense way, general theories of law are used by each observer in the measure they allow a justification for her own opinions or interests in a determined individual case or general issue.

A description of law able to reach the goals of empirical sciences, like explanation and prediction, could only be a realistic theory, which includes prevailing ideologies and psychological dispositions, such as the idea of a hierarchical structure of law and certain moral or political preferences, but is not built into those ideologies or dispositions nor depend on them. Instead, a set of rules for argumentation seems similar to a set of game rules: several argumentative games are played at the same time, within a same field, and each player feels free to change her game at any moment. Within this chaotic situation, the positivistic game provides more general and permanent (though imperfect) rules, while other games seem more incomplete and act as detractions or exceptions for the principal game. If we want to ensure rationality within legal discourse, two actions are to be undertaken. The first is to separate description from ambition. The second is to redefine ambition on the basis of description, but without trying to get a justification from it. The first is theoretically easy, though contrary to a customary practice in the field of law. The second requires a strong, courageous introspection in order to review and order the personal preferences of each one facing the facts as they are, and then an open, sincere, permanent debate to negotiate a common set of resulting preferences, which could be agreed to as rules, legislated or interpretative. The ideal of democracy is very close to this last attitude.

12.

Marcin Jakub Weisbrot (University of Silesia in Katowice / Poland)

Legal certainty, objectivity of law in view of Von Hayek's concept of non-articulated rules

Abstract:

The purpose of the speech is not merely to describe the concept of non-articulated rules and Von Hayek's well known criticism of legal certainty, legislative method of law-making and formalistic approach to the legal reasoning. I would like to go beyond in order to set up an alternative approach to the concept of legal certainty and objectivity of law. The theoretical assumptions of Von Hayek theory relates to the foundation of modern science founded by Descartes.Firstly, I will endeavor to develop the basics and distinct features of non-articulated rules and its place in Von Hayek theory of spontaneous order and in particular, a concept of "a third class of phenomena", which is the result of human actions but not of human design, in addition to the nature-convention distinction. Secondly, I will try to link typology of knowledge offered by Gilbert Ryle between 'knowing how' and 'knowing that' in order to ascertain Von Hayek non-articulated rules as a form of "knowing how" knowledge and to which extend such a knowledge can guarantee the predictability of legal decision. Thirdly, I will compare Von Hayek non articulated rules with Dworkin's principles. The main purpose of this passage will be to evaluate the objections of Hart about dworkinian principles, as if principles increases the unpredictability within the system of law. The third way offered by Von Hayek gives the opportunity for legal theory to asses in a critical manner the disadvantages of formal approach to the problem of legal certainty. It will lead to better understanding of evolutionary, dynamic conception of law, where the value of legal certainty can provide for an equivalent between the value of predictability and (moral) acceptability of a legal decision.

WORKING GROUP

WG 32 Positivism, The Normativity of Law	
Session 1	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 0.454
Chair	Sousa Brito, José (Lisbon / Portugal)
Session 2	
Date	TUE 16 Aug 2011
Time	14.30 h – 18.30 h
Location	IG 0.254
Chair	Sellers, Mortimer N.S. (Maryland + Washington, D.C. / USA)

Lectures:
Session 1

1.

João Maurício Adeodato (Faculdade de Direito – Universidade Federal de Pernambuco / Brazil)

Answers Of Legal Dogmatics To Two Important Problems Of The Philosophy Of Law

Abstract:

Philosophy of law has had many questions to handle. Concerning universalistic all-encompassing theories, the first one would be what law "is". To rhetoricians this "ontological question" does not make sense, but we may try to figure out which problems come to light when the word is used.

The thesis here is that, if the ontologi-

cal approach is left aside, there remain two traditional questions: one concerns knowledge (epistemological) and the other addresses ethics (axiology).
First question: what would be the limits, if there are any, for the decision of a concrete case, that is, if the general law expressed by the constitution and other legal texts can play this limiting role, be it by means of Kelsen's frame theory, the rational postulates from Alexy or the Judge Hercules suggested by Dworkin. In other words: is all law really created by legislatures or are their texts only random input data for the effective creation of law in the casuistic decision-making process?
Second question: if there are any and which are the limits for the choices of the original constitutional power, that is, if there are subjective rights that are valid in themselves, above positive law, which has to recognize them. Moreover, when social groups do not agree about these rights, what would be the available criteria to decide between incompatible ethical positions that also have to hover above positive law. Even if we could speak of an universal ethical consensus, which would already be problematic – like the rejection of genocide – there are many more controvertible themes, even inside the same culture, like the death penalty, fidelity in marriage or the existence of professional politicians. The question always is to decide which decision would be "the correct one".

2.

Carlos Costa (Faculdade de Direito de São Bernardo do Campo- Faculdade de Direito da Fundação Armando Alvares Penteado - FAAP / Brazil)

Legal technologies or interpretive approaches? 2 ways to discuss the relation between law and reason

Abstract:
The debates about the interrelations between reason and law have undergone a change after the eighteenth century. References to the recta ratio of jusnaturalistic tradition have not disappeared, but other comprehensions of legal reason have developed. The European debate over legal positivist science has contributed to this in a peculiar way. It has created conditions for legal dogmatics to be taken, de per se, as one manifestation of the rationality of law. This transformation may be considered the basis for the development of true "legal technologies" throughout the twentieth century. On the other hand, in the context of theories of positive law which have taken the relation between ethics and legal reason as a problem, the formation of discourses on coercion (Austin and Holmes), on validity (Kelsen and Hart) and on justification (Alexy and Dworkin) has also contributed to the emergence of new models of legal rationality. In this paper, it is highlighted that the construction of these models is linked to the "points of view" which theories have proposed as legitimate for the interpretation of legal phenomenon. Finally, it is suggested that the discussion over points of view (defined as "focuses", term which is close to the notion of "attitude" or "place of speech") may aid in the identification of limits of technological rationality in legal discourse.

3.

Juan Alberto Del Real Alcalá (University of Jaen / Spain)

The Ideal of the Certainty in Law

Abstract:
The doubt about certainty like an absolute value in law and as an ideal full in legal system (argument about impossibility) is a controversial fact in contemporary legal theory. I examine some contemporary doctrines about the classic understanding (in critical sense) of this ideal. I have selected the most representative doctrines: doctrine about "open texture of Law" (H.L.A. HART), starting point in this discussion; doctrine about "Il Diritto mitte" (G. ZAGREBELSKY), from the continental European legal tradition at present; and doctrine about "vagueness in Law" (T.A.O. ENDICOTT), this doctrine is the most recent, from the Anglo-Saxon legal tradition. Finally, in Conclusions, I analyze if this doubt (argument about impossibility) contaminates (in some sense) to the concept of law or to the characteristics that describe law, and therefore, if this doubt constitutes a bigger thesis: a "conceptual thesis" about contemporary law or, on the contrary, if this doubt constitutes a smaller thesis: a "linguistic thesis" about language in law.

4.

Andrzej Grabowski (Chair of Legal Theory Faculty of Law and Administration, Jagiellonian University, Cracow/Poland)

Postpositivist Theory of Law – Genesis and Programme

Abstract:
The paper consists of four parts:
The concise classification of the contemporary positivist and non-positivist conceptions of law, based on the relations between law and morals.
The historical remarks concerning the beginning of postpositivist legal theory, with special attention to the proposals made by Neil MacCormick, Albert Calsamiglia, Manuel Atienza and Juan Ruiz Manero.
The outline of the programme of postpositivist legal theory:
3 A. Methodology of postpositivist legal theory
3 B. Substantial claims of postpositivism.
Conclusions – the rise and fall of the Separability Thesis.

Session 2

5.

Luis Lloredo (Universidad Carlos III de Madrid / Spain)

Die Frage des Rechtspositivismus unter dem Gesichtspunkt der Wissenschaftsphilosophie Thomas S. Kuhns

Abstract:
Der Ausdruck „Rechtspositivismus" ist seit seinem Ursprung in Frage gestellt worden. Die Frage lautet: Was sollen wir unter Rechtspositivismus verstehen? Ein neues Paradigma oder eine bloße konjunkturelle Bewegung? Außerdem, wie sollen wir ihn bezeichnen? Als ein wissenschaftliches Programm oder als eine

Strömung politischer Art? Alle diese Fragen – und gewiß noch andere – sind seit Ende des 19. Jahrhunderts mit der Frage des Wertes (oder der Wertlosigkeit) der Rechtswissenschaft verbunden. In den letzten Jahren ist auch die Frage in der rechtsphilosophischen Debatte stark aufgetaucht, ob der Rechtspositivismus durch den sogenannten Neukonstitutionalismus überwunden sei. Das Ziel dieses Referats ist, diese vermeinte Überwindung zu überprüfen, indem man den Rechtspositivismus als ein Paradigma im Sinne der Wissenschaftsphilosophie Thomas S. Kuhns darstellt. Demgemäß wären alle die Versuche, aus dem Rechtspositivismus zu fliehen, nur innere Bewegungen innerhalb des Paradigmas. So verlieren wir ja einerseits die Präzision des Ausdruckes „Rechtspositivismus", gewinnen wir jedoch andererseits eine umfangreichere geschichtliche Perspektive, die uns hilft, die grundsätzliche Fundamente des Rechtspositivismus – sowohl wissenschaftlicher als politischer Art – in seinem Kern zu begreifen. Kurzum: es wird sich zeigen, wie der Rechtspositivismus noch die unvermeidliche Rechtsauffassung unserer Zeit bleibt – wenigstens für die westliche Kultur. Dabei wird das Referat versuchen, die Angemessenheit der Wissenschaftsphilosophie Thomas S. Kuhns für die Erklärung der rechtshistorischen und rechtsphilosophischen Fragen zu prüfen.

6.

Amélia do Carmo Sampaio Rossi + Danielle Anne Pamplona (Pontifícia Universidade Católica do Paraná/ Brazil)

The needed conection between morality and Law and the consequential overdue of Legal Positivism: The face of new constitucionalism.

Abstract:
The theme of this paper is one of the most intriguing and fundamental, discussed for a long time on legal theory and one which divides contemporary doctrine in three major trends:
The theories which understand the relationship between Law and morality as contingent or circumstantial, within a positivist paradigm in the understanding of the legal phenomenon, as stated in Herbert Hart's soft positivism theory or in its improved version, Will Waluchow's inclusive positivism.
The theories which state an absolute separation between morality and Law, even without sharing Hans Kelsen's view of the science of law, as is the case of the Joseph Raz' so called exclusive positivism or hard positivism, a kind of understanding about the legal phenomenon, in which the Law can relate to morality, but the last do not define its existence and validity, since its validity and identification can only be defined by the social sources thesis.
And finally, those theories that consider that between morality and law there is a needed and conceptual relation in the sense that morality plays an important role in the identification and validity of the law. These theories are inserted in the context of the so called post-positivism, in which the thesis of Law's separability and, therefore, its neutrality, is overdue by the contemporary paradigm of Constitutional and Democratic Rule of Law.

7.

Mortimer N.S. Sellers (University System of Maryland and Visiting Professor, Georgetown University School of Law / USA)

The Science of International Law

Abstract:
The founders of modern international law understood law as a science, arising from the study of "those rules of conduct which reason deduces as consonant to justice and common good from the nature of the society existing among independent nations" (Henry Wheaton). Each word in this tightly packed definition is worthy of study, but the underlying understanding, shared by Grotius, Vattel, Puffendorf and all the first great publicists in the field was that international law arises from the social imperative in human nature, applied to humanity as a whole. I propose to take this first proposition seriously, as the basis of modern international law. Seeking to understand the social requirements of international community, in the absence of universal political authority, generates a few obvious questions: first, how to establish the fundamental requirements of just human society as law; second, how to implement this law in a world of diffuse and deeply unjust political power; third, how to separate the province of international law from the jurisdiction of local politics. All three problems concern the application of a "science" (as the early publicists understood it) of human nature or politics to the "science" (as they saw it) of justice, to create a "science" of law. This paper will apply these early insights to contemporary doctrine and argue that international law cannot be understood or effective without recourse to the early conception of law as a "science" that undergirds the most basic rules and assumptions of modern international law.

8.

José Sousa Brito (Lisbon / Portugal)

Legal positivism: a self-effacing theory

Abstract:
Legal positivism should be defined by the two theses of the conceptual separation of law and morals and of the social sources of law, the second implying the first. The thesis of judicial discretion by fulfilling the gaps of the law whenever they are not coverable by analogy or by existing legal principles, that Hart defended as essential, and the thesis that there is no objective morality, that Alf Ross considered as essential, should not be retained for the definition of legal positivism.It is argued that Coleman's attempt to dispense with the separation thesis, because legal positivism can accept that governance by law has a moral value, will not do.The separations thesis stays and falls with the social sources thesis. According to inclusive legal positivism in a rule of law state the validity of a law may depend on its compatibility with critical morality or ethics. Ethics may be critical of a law, despite all social facts relevant to the validity of such a

law. In such a case legal positivism must retire the social sources thesis, because of the way the law is socially understood as ethically justified. So legal positivism remains coherent. It is not self-defeated, but in this case it is self-effacing.

9.

Rossen Tashev (Sofia University St. Kliment Ohridski / Bulgaria)

Forms of Validity of the Legal Norms

Abstract:

The paper accepts the existence of three forms of validity of the legal norms: factual, juridical and logical. H. Hart admits the possibility of existence of a factual validity because the result of the recognition of a rule (its validation) is that this rule obtains factual binding force. Secondly, H. Hart connects the "internal" statement concerning the validity of a particular rule of a system with the "external" statement of fact that the system is generally efficacious. To the group of norms binding upon acceptance three other kinds of norms ought to be added: accepted primary rules, for which no explicit rule of recognition exists; secondary rules "other" than those enlisted by H. Hart (i.e. the competence rules, which determine the validity of the legal actions); and most importantly legal principles. In conclusion, the factual outlook of the legal system reveals at least three binding normative species: valid primarily rules for behavior, binding secondary rules upon validity of rules and actions, binding legal principles. The juridical validity takes place in the realm of the controversial application of the legal rules. It means application of the legal sanction of a certain rule to a certain case. That is why the juridical validity is always concrete and specific. In this sense, a rule is juridically valid if its sanction is applicable in case of non-compliance with the behavior prescribed as binding by this rule. It is obvious, that not all legal rules possess juridical validity. Non-compliance with the secondary rules, binding upon acceptance does not create legal sanction. Because it is determined on the basis of the momentary status of the legal system (so-called "momentary legal system") the applicability of a certain legal rule to certain case, the juridical validity of this rule could be named "momentary validity". In opposition, the factual validity could be named "general (or abstract) validity". The juridical validity of the rules is determined on the basis of their factual validity and (in case of conflict) by the application of a set of special conflict rules. The legal principles, which are binding upon acceptance within the legal system, do not possess factual validity. They do not possess juridical validity as well, since they do not prescribe a certain behavior and do not provide legal sanctions in case of non-compliance with this behavior. The logical validity of the norms should be carefully distinguished from the more broad area of the logical justification of the judicial decision. The judge must first prove that a particular norm is logically valid and only after that he can use it as a logical argument for his decision. The logical validity of the rules and principles has completely different characteristics. The logical validity of a certain rule means that its obligation for behavior is substantially compatible with the obligations for behavior of other norms from the same legal system. The logical compatibility includes not only lack of contradictions, but as well existence of coordination, coherence or symmetry between two behaviors, prescribed by two rules. The logical validity of a principle means that the judge may use it as a starting point for the following logical proceedings: selection of one of two juridically contradicting or logically incompatible legal rules; creation by the way of deduction of a new rule; formulation by the way of analogy and induction of an individual right or obligation with regard to the factual situation.

Conference Contributors

The Conference Organizers respectfully acknowledge all partners, supporters, sponsors and all other contributors for providing financial support and services to the 25th World Congress of Philosophy of Law and Social Philosophy.

In cooperation with:	
Internationale Vereinigung für Rechts- und Sozialphilosophie. Deutsche Sektion www.rechtsphilosophie.de	
Goethe University Frankfurt am Main www.vff.uni-frankfurt.de	GOETHE UNIVERSITÄT FRANKFURT AM MAIN
Cluster of Excellence "The Formation of Normative Orders", Frankfurt University www.normativeorders.net	NORMATIVE ORDERS Exzellenzcluster an der Goethe-Universität Frankfurt am Main
Supported by:	
Deutsche Forschungsgemeinschaft www.dfg.de	DFG
Robert Bosch Stiftung www.bosch-stiftung.de	Robert Bosch Stiftung
Kulturamt der Stadt Frankfurt am Main www.kultur-frankfurt.de	Stadt Kulturamt Frankfurt am Main
Vereinigung von Freunden und Förderern der Johann Wolfgang Goethe-Universität www.vff.uni-frankfurt.de	FREUNDE DER UNIVERSITÄT
Sponsored by:	
Roxin Rechtsanwälte LLP, München	ROXIN RECHTSANWÄLTE | LLP
Rechtsanwalt Stefan Heinemann, Dresden	HEINEMANN Rechtsanwalt

Kanzlei kipper & durth, Darmstadt	kipper durth
Kanzlei Knierim & Wißmann, Mainz	Knierim & Kollegen Rechtsanwälte
Nomos Verlagsgesellschaft, Baden-Baden	Nomos
Franz Steiner Verlag, Stuttgart	
C.F. Müller, Heidelberg	C.F. Müller
Duncker & Humblot, Berlin	Duncker & Humblot · Berlin
Hart Publishing Ltd., Oxford	HART PUBLISHING
Springer, Dordrecht	Springer the language of science
Oxford University Press, Oxford	OXFORD UNIVERSITY PRESS
Ashgate Publishing, Farnham, Surrey	ASHGATE
Mohr Siebeck GmbH & Co. KG, Tübingen	Mohr Siebeck

The 25th World Congress of Philosophy of Law and Social Philosophy is organized on behalf of the International Association for Philosophy of Law und Social Philosophy (IVR)

Conference Organizers:
- Professor Dr. Dr. h.c. Ulfrid Neumann, Goethe University, Frankfurt/Main
- Professor Dr. Klaus Günther, Goethe University, Frankfurt/Main; Speaker of the Cluster of Excellence "The Formation of Normarive Orders"
- Professor Dr. Lorenz Schulz M.A., Goethe University, Frankfurt/Main

Assistants to Professor Neumann:
Dr. Sascha Ziemann
Ass. jur. Diana Goldau LL.M.

Dr. Denis Basak
Dr. Malte Gruber
Dr. Marc Reiß

Program Committee:
- Professor Dr. Dr. h.c. Ulfrid Neumann, Goethe University, Frankfurt/Main
- Professor Dr. Klaus Günther, Goethe University, Frankfurt/Main; Speaker of the Cluster of Excellence "The Formation of Normarive Orders"
- Professor Dr. Lorenz Schulz M.A., Goethe University, Frankfurt/Main
- Professor Dr. Dr. h.c. mult. Robert Alexy, Christian-Albrechts-University of Kiel
- Professor Dr. Rainer Forst, Goethe University, Frankfurt/Main
- Professor Dr. Axel Honneth, Goethe University, Frankfurt/Main
- Professor Dr. Stephan Kirste, Andrássy University of Budapest / Ruprecht-Karls University of Heidelberg
- Professor Dr. Frank Saliger, Bucerius Law School Hamburg

Technical Support:
Mrs Petra Boßhammer
Ms Linda Degen
Ms Shereen Salehi

Design/Print:
Wuttke Design + Kommunikation, Mühltal

Contact:
Professor Dr. Dr. h.c. Ulfrid Neumann
Goethe University, Frankfurt/Main
Department of Law
Grüneburgplatz 1
60629 Frankfurt am Main
Tel.: [+49] (0)69 - 798 34341
Fax: [+49] (0)69 - 798 34523
E-Mail: ivr2011@jura.uni-frankfurt.de

Website World Congress 2011:
www.ivr2011.org
Website IVR:
www.ivronline.org

Index of Lecturers and Organizers