EE Forum of Young Legal, Political & Social Theorists

# 6th Central and Eastern European Forum of Young Legal, Political and Social Theorists

- **Important Features of Law**
- **Contemporary State: Functions, Position and Crisis Management**

## Programme

9-10 May 2014
Faculty of Law, University of Zagreb
Zagreb, Croatia

UNIVERSITAS ZAGRABIENSIS 17 76 FACULTAS IURIDICA

## Table of Contents

## Welcome Address

Dear participants,

it is our great pleasure to welcome you to the 6th Central and Eastern European Forum of Young Legal, Political and Social Theorists held in Zagreb.

As was the case with all the previous Forums, the Zagreb CEE Forum consists of three concurrent sections that predominantly deal with two major topics: (1) Important Features of Law and (2) Contemporary State: Functions, Position and Crisis Management. In order to satisfy the diverse interests of the Forum's participants engaging in various disciplines, the (3) Open Section is again open for all interesting topics from the vast area of legal, political and social theory.

We are especially pleased to announce that the 2014 Forum will be opened by such outstanding keynote speakers as prof. Giovanni B. Ratti (University of Genoa), who will deliver the speech "Law from a Logical Point of View", and Michel Troper (University Paris X), who will speak on "The Emergence and Survival of the Modern State".

In this booklet you will find a detailed conference programme and all presentation abstracts as well as some additional information on the Zagreb Faculty of Law and the entertainment programme that will follow the working part of the Conference.

The organisers wish to express their special gratitude to the Zagreb Faculty of Law for its generous financial and organisational support without which this Conference would not be possible. We would also like to thank our conference assistant, Ms. Tena Zgombić, for all the technical help she has given so readily and to all student mentors of the Department for General Theory of Law and State, Zagreb Faculty of Law.

After the conference all participants will be invited to submit their papers for publication in the fifth volume of the Central and Eastern European Forum of Legal, Political, and Social Theory Yearbook. The details about the review process will be published after the Forum in a separate Call for Papers. The deadline will be 31 August 2014.

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

Organising Committee

Luka Burazin
Đorđe Gardašević
Alessio Sardo

## About the CEE Forum

The Central and Eastern European Forum of Young Legal, Political and Social Theorists (CEE Forum) is a loose platform open to legal, political and social theorists who come from, currently study or work in Central and Eastern Europe or who have a research interest in the region. Although there is no specific age limi, most of our participants are young researchers: doctoral students or post-docs. Regional boundaries too are understood in a wide sense. Thus, our target group includes countries ranging from Albania, Armenia, Azerbaijan, Austria, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Cyprus, Estonia, Georgia, Germany, Hungary, Lithuania, Latvia, Macedonia, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Turkey to Ukraine.

The CEE Forum was initiated by a group of young researchers in the above mentioned fields at the University of Silesia in Katowice, Poland. Their aim was to change the currently dominant practice of treading the paths that were for the most part cleared by researchers from other parts of the world and to try to establish a community able to provide a competitive environment for original investigations in the field of legal, political and social theory. They were dissatisfied with the fact that they were unaware of what colleagues from their neighbourhood were working on and wanted to highlight the need for networking that would allow for the exchange of ideas and foster independent and original developments.

The motivating ideas behind the Forum are twofold. The primary one is to provide junior legal scholars and political and social scientists with the opportunity to present their research. The first conference took place at the Silesian University in Katowice, Poland, in May 2009. The following conferences were held at the Pázmány Péter Catholic University in Budapest, Hungary, in May 2010, at the University of Belgrade, Serbia, in March 2011, at the International School for Social and Business Studies in Celje, Slovenia, in March 2012 and at the Alfried Krupp Wissenschaftskolleg/University of Greifswald in Greifswald, Germany, in May 2013. So far half of the papers were theoretical, while the other discussed topical legal, political and socio-economic issues in Central and Eastern Europe. A number of researchers placed special emphasis on the impact of theoretical insights in particular national or regional contexts; others addressed local problems from a comparative viewpoint and within wider theoretical contexts. Since 2011, the Forum has published each year a Yearbook with a selection of the previous year's best conference contributions. So far three volumes of our "Central and Eastern European Forum for Legal, Political, and Social Theory Yearbook" have been published.

The second idea underpinning the Forum is to contribute to the establishment and maintenance of ties and networks for future common projects. As a result of increased academic mobility within Europe, young researchers from Central and Eastern Europe follow different career paths. Some work at universities in their home countries, others study or seek jobs at academic institutions in Western Europe and beyond, still others combine these two. It is not uncommon for them to encounter difficulties of making contacts with scholars with similar interests elsewhere in the world or even in the region. The Forum will contribute to the establishment of a genuine community of young legal, social and political theorists in Europe.

## About the Zagreb Faculty of Law

The Faculty of Law is one of the oldest institutions of the University of Zagreb. The Faculty's roots are related to the beginning of higher education in Croatia. When in 1773 Pope Clement XIV dissolved the Jesuit order, Queen Maria Theresa undertook comprehensive education reforms. By her decree of 1776, the Royal Academy of Sciences (Regia scientiarum) was established as the highest educational institution. The Academy consisted of three faculties: the Faculty of Philosophy, the Faculty of Theology and the Faculty of Law (Facultas iuridica). The earlier Political-Cameral Studies (established in 1769 in the town of Varaždin) for Croatian administrative personnel were merged with the Faculty of Law.

The first professors of legal sciences were elected on the basis of a call for applications, and the Queen officially confirmed their appointment. At the first formal session held on October 11, 1776, it was determined that the academic year would start on November 4, 1776, and therefore this date is regarded as the day the Faculty of Law was established. At the time, the Faculty had four professors appointed to the following Chairs: canon law (ius canonicum), international and universal public law (ius gentium et ius publicum universale), civil and domestic law (institutiones iuris civilis et iuris patrii theoretici) and political-cameral sciences (politia qui accesserit studia cameralia quoque ac aeconomica). In addition, the Faculty had one associate professor (extraordinarius) who substituted for full professors in their absence. The final extensive curriculum (Ratio educatonis) was issued a year later, i.e. in 1777.

In 1850, the educational system in the Habsburg Monarchy was reformed. The reform abolished the Academy in Zagreb, the Faculty of Philosophy was merged with the Principal Grammar School (Archigymnasium) in Zagreb and the Faculty of Law was turned into the Royal Academy of Legal Science (Regia academia iuris) which thus became the only institution of higher education in Croatia until 1874.

Through the efforts of Bishop Strossmayer during the period of Ban Ivan Mažuranić, on October 19, 1874, the Royal University of Franz Joseph I was officially opened in Zagreb. It consisted of three Faculties: the Faculty of Theology, the Faculty of Legal and Administrative Sciences and the Faculty of Philosophy. The current name of the Faculty of Law came into official use in 1926.

During the period between the two World Wars, the Faculty went through four legal systems. Up to the academic year 1926/27 it acted according to the amended University Organisation Act of October 6, 1894. As of mid-1926, the existent government introduced in Croatia the regulations of the Serbian University Act. During the dictatorship the new, uniform Yugoslav University Act was passed on June 28, 1930, which was complemented with the General Regulation on Universities a year and a half later, on December 11, 1931. Despite great difficulties, even under such circumstances the Faculty managed to maintain its identity and the attribute of the leading Faculty in the country. Only in 1940 did the Ban of the Banovina of Croatia through his General Regulation proclaim self-management of the Faculty in terms of its most important

functions, thus enabling the preservation of the distinctive features of the Faculty of Law in Zagreb. In 1968, the College of Administration was integrated with the Faculty of Law, while the integration with the Higher School of Administration and the Inter-Faculty Studies for Social Workers took place in 1983. Consequently, the two-year study programme for administrative lawyers and the four-year study programme for social workers were set up. From the academic year 1996/97 onwards the study of tax law was organised at the Faculty as a programme that was to cater to the needs of the state government. By the decision of the Government of the Republic of Croatia of 21, May 1998, the School of Higher Education in Social Sciences was established and it undertook to organise the studies of administrative law and tax law.

After World War II, the Faculty of Law went through several legal regimes dictated by federal and republic laws on higher education pursuant to which four statutes were adopted. During that time the Faculty of Law in Zagreb remained a scientific institution, acting in accordance with the principles of free scientific work in spite of determined but unsuccessful attempts to introduce ideological uniformity into its work. After the adoption of the Higher Education Act (1993), the new Statute of the Faculty was drafted.

The study at the Faculty had lasted three years until 1868, when it was prolonged to four. From the academic year 2005/2006 the study lasts five years. At the Royal Academy, instruction was primarily conducted in the Latin language. Students wrote and defended their papers for public disputes mainly in Latin, although they could do so in other languages as well. Since 1850, the professors at the Academy of Legal Science had to lecture in Croatian or "possibly in Latin". During Bach's absolutism, when the German language was introduced into studies, Latin ceased to be the language of instruction. With the fall of absolutism, the Croatian language became the only language of teaching. Paragraph 54 of the University Organisation Act of the Sabor of the Kingdom of Dalmatia, Croatia and Slavonia of January 5, 1874, provided that 'all teaching at the University [i.e. the Royal University of Franz Joseph I] shall be conducted in the Croatian language'. This Act of Sabor set the foundations for the award of doctorates by a Croatian institution, although such privilege has its roots in the Diploma of King Leopold of 1669.

The Faculty of Law was originally located in the so-called Temporal House on St. Mark's Square (which does not exist any more) because there was no room in the building of the former Jesuit Academy on St. Catherine's Square. Later on it was relocated to the aforementioned building of the former Jesuit Academy and finally into the building where it is still situated today and which was built in 1856. At present, the Faculty of Law is situated at five locations in Zagreb: 14 and 3 Trg maršala Tita, 4 Ćirilometodska, 10 Gundulićeva and 51 Nazorova.

During its first seventy-five years, i.e. from 1776 to 1850, about two thousand students had been enrolled at the Faculty of Law. Between 1850 and 1874, approximately one thousand and seven hundred students were enrolled at the Academy of Legal Science (on average seventy students per year). Nowadays about four thousand students are enrolled on the Faculty's two courses of study.

Scientific and professional work at the Faculty is organised across six institutes and two study centres: the Institute of International and Comparative Law, The Institute of Administrative and Political Sciences, The Institute of Criminal Law Sciences, Criminology and Victimology, The Institute of Commercial Law and the Law of International Trade, Economics and Finance, the Institute of Civil Law Sciences and Family Law, The Institute of the History of Law and State, the Social Work Study Centre, and the Public Administration and Public Finance Study Centre. The Faculty offers several postgraduate doctoral study programmes: the Postgraduate Study Programme in European Law, the Postgraduate Study Programme in Criminal Law Sciences, the Postgraduate Study Programme in Public and Private International Law, the Postgraduate Study Programme in Civil Law Sciences, the Postgraduate Study Programme in Commercial and Company Law, the Postgraduate Study Programme in Public Law and Public Administration, and the Fiscal System and Fiscal Policy Postgraduate Study Programme.

The Library of the Faculty of Law is particularly valuable for everyone engaging in scientific research. The Library of the Academy of Legal Science contained about 22,000 holdings in 1874. Today it consists of almost 400,000 volumes which cover all fields of law, including numerous rarities, and in terms of their number, variety and quality it is among the best law libraries in this part of Europe. Furthermore, it offers access to numerous international databases and houses the European Documentation Centre.

After the establishment of the Republic of Croatia, the Faculty of Law in Zagreb, the oldest of the four faculties of law in the country, strengthened its international scientific co-operation. Its members participate in the work of foreign scientific institutions and foster co-operation with scientists in other countries. In its third century of existence, the Faculty of Law in Zagreb has proved to be the source of Croatian nation-building spirit and free thought, the guardian of Croatian culture and the representative of the Croatian legal school as one of the centres of the Mid-European legal tradition, and as such it holds a prominent position both in the country and abroad. Its members, being aware of the role which the Faculty had throughout its history, act in the present social environment in the spirit of the rich tradition of the school of law they belong to. They continue to greatly contribute to the creation of the Croatian legal system, establishment of the rule of law and education of new generations of lawyers on the best European legal traditions.

# Conference Programme

## Friday, 9 May 2014

| | |
|---|---|
| 08:00-09:00<br>TMT 14, 2nd floor, Vijećnica | **Registration** |
| 09:00-09:20<br>TMT 14,<br>Vijećnica | **Welcome Address**<br>Luka Burazin, Head of the Department for General Theory of Law and State, University of Zagreb<br>Hrvoje Sikirić, Dean of the Faculty of Law, University of Zagreb |
| 09:20-10:30<br>TMT 14,<br>Vijećnica | **Keynote Speech** 'Law from a logical point of view' by *Giovanni Battista Ratti*, University of Genoa<br>Introduction by Alessio Sardo (Chair), University of Genoa |
| 10:30-11:40<br>TMT 14,<br>Vijećnica | **Keynote Speech** ´The emergence and survival of the modern State´ by *Michel Troper*, University Paris Ouest-Nanterre, French University Institute<br>Introduction by Đorđe Gardašević (Chair), University of Zagreb |
| 11:40-12:00<br>TMT 3, Room III | **Coffee Break** |
| 12:00-13:30<br>TMT 3 | **Section I: Important Features of Law**<br>**Panel 1** (Room II): **Concept of Law and Methodology**<br>Chair: Bojan Spaić<br><br>*Miklós Könczöl* (Budapest), 'The concept of law between history and analysis'<br><br>*Filip Gołba* (Krakow), 'Legal theory, conceptual analysis and reduction'<br><br>*Monika Zalewska* (Łódź), 'Two approaches to the methodology of the theory of law. Hans Kelsen and Jerzy Wróblewski' |
| | **Section III: Open Section**<br>**Panel 1** (Room V): **Boundaries of Constitutent Power and Sovereignty**<br>Chair: Đorđe Gardašević<br><br>*Attila Mráz* (Budapest), 'The inadequacy of a pragmatist account of legitimacy: On the Waldronian assumption of 'legitimacy-free' phases in constitution-making'<br><br>*Michael Hein* (Greifswald), 'Unamendable provisions in modern constitutions'<br><br>*Tina Oršolić Dalessio* (Zagreb), 'The concept of sovereignty in legal theory and constitutional practice' |

| | |
|---|---|
| 13:30-15:00<br>Frankopanska 8 | **Lunch** (Frankopan Restaurant) |
| 15:00-16:30<br>TMT 3 | **Section I: Important Features of Law**<br>**Panel 2** (Room II): **Grounding the Concept of Law**<br>Chair: Miklós Könczöl<br><br>Rafał Mańko (Amsterdam), 'Artur Kozak's 'juriscentrist' concept of law: A critical appraisal'<br><br>Marko Novak (Nova Gorica), 'A four-dimensional theory of law'<br><br>Silvia Salardi (Milan), 'The concept of 'human nature': An attempt to approach law from an essentialist perspective' |
| | **Section II: Contemporary State: Functions, Position and Crisis Management**<br>**Panel 1** (Room IV): **Classical Paradigms and New Challenges**<br>Chair: Michael Hein<br><br>Martin Belov (Sofia), 'Can we still drive the state machine the "old school" way? Structural and functional deficiencies of the modern state'<br><br>*Marion Kühn* (Eichstätt), 'The development and effectiveness of welfare state systems in selected Eastern European countries. A classification, comparison and evaluation of social policy in Poland, Estonia and Bulgaria'<br><br>*Marco Stefano Birtolo* (Campobasso), ''Privatising' law in Western multifaith and multicultural societies' |
| | **Section III: Open Section**<br>**Panel 2** (Room V): **Transnational Judicial Dialogue and Factors Affecting ECHR's Decision-Making**<br>Chair: Peter Cserne<br><br>Tilen Štajnpihler (Ljubljana), 'What does transnational judicial dialogue amount to? An example'<br><br>*Jurij Toplak* (Maribor), 'European Court of Human Rights judges between human rights and governments'<br><br>*Dolores Modic* (Nova Gorica), 'Separate opinions of national judges at the European Court of Human Rights (ECHR)' |
| 16:30-17:00<br>TMT 3, Room III | **Coffee Break** |

| | |
|---|---|
| 17:00-18:30<br>TMT 3 | **Section I: Important Features of Law**<br>**Panel 3** (Room II): **EU Law and National Law Relationship**<br>Chair: Jurij Toplak<br><br>*Maja Lukić* (Belgrade), 'Building the European Union on the shifting sands of legal theory'<br><br>*Domenica Dreyer* (Düsseldorf), 'The substance and effects of EU law and jurisprudence under a social constructivist research agenda' |
| | **Section II: Contemporary State: Functions, Position and Crisis Management**<br>**Panel 2** (Room IV): **Position of the State and International Influences**<br>Chair: Martin Belov<br><br>*Robin Caballero* (Berlin/Paris), 'Crisis management in the construction of a democratic state by supranational organisations in the Balkans'<br><br>*Nikola Beljinac* (Belgrade), 'Patriotic loyalty in multicultural states' |
| | **Section III: Open Section**<br>**Panel 3** (Room V): **Judicial Self-Restraint, Formalism in Judicial Reasoning, and Judicial Conformism**<br>Chair: Tilen Štajnpihler<br><br>*Agnes Kovacs* (Debrecen), 'Judicial self-restraint – A mere rhetorical device?'<br><br>*Peter Cserne* (Hull), 'Formalism and policy arguments in judicial reasoning: Is Central Europe a special case?'<br><br>*Mátyás Bencze* (Debrecen), ''Judicial conformism' – A new phenomenon in the countries of CEE?' |
| 18:30-19:30<br>TMT 14,<br>Teachers' Room | **Open CEE Forum Meeting:** Future Coordinators of the Forum / "Zagreb Yearbook" / 2015 Conference |
| 20:00<br>Mesnička 6 | Dinner (Stari Fijaker Restaurant) |

## Saturday, 10 May 2014

| | |
|---|---|
| 9:00-11:00<br>TMT 3 | Section I: Important Features of Law<br>Panel 4 (Room II): Language of Law<br>Chair: Tobias Müller<br><br>*Silvia Zorzetto* (Milan), 'On impossibility in law'<br><br>*Alessio Sardo* (Genoa), 'Law, speech acts and validity'<br><br>*Izabela Skoczeń* (Krakow), 'Thick concepts, implicatures and the nature of law' |
| | **Section II: Contemporary State: Functions, Position and Crisis Management**<br>**Panel 3** (Room IV): **State and Crisis**<br>Chair: Tina Oršolić Dalessio<br><br>*Axelle Reiter* (Verona), 'States of crisis and crises of the state: Redefining the limits of national sovereignty and state powers in times of emergency'<br><br>Đorđe Gardašević (Zagreb), 'Classical approaches to 'states of emergency' and the challenge of the 'rights revolution''<br><br>*Fruzsina Gárdos-Orosz* (Budapest), 'Internal and external limits on state sovereignty in amending a constitution for crisis management purposes' |
| | **Section III: Open Section**<br>**Panel 4** (Room V): **Interpretation, Logic, and Normativity**<br>Chair: Marko Novak<br><br>*Krisztina Fiscor* (Debrecen), 'The authority of law and legal formalism'<br><br>*Stef Feyen* (Leuven/Maastricht), 'From the context of discovery to 'ought implies can''<br><br>*Bojan Spaić* (Belgrade), 'Institutional control of legal interpretation'<br><br>*Oskar Pogorzelski* (Krakow), 'Opałko and Woleński's non-linguistic concept of norm' |
| 11:00-11:30<br>TMT 3, Room III | **Coffee Break** |

| | |
|---|---|
| 11:30-13:00<br>TMT 3 | **Section I: Important Features of Law**<br>**Panel 5** (Room II): **Authority and Morality**<br>Chair: Alessio Sardo<br><br>Łukasz Necio (Krakow), 'The 'internal morality' of evolutionarily developed law? Some remarks on Hayek's 'true law' notion'<br><br>*Alejandro Daniel Calzetta* (Genoa), 'Bentham. From power of imperation to competence in law' |
| | **Section II: Contemporary State: Functions, Position and Crisis Management**<br>**Panel 4** (Room IV): **Democracy and Equality**<br>Chair: Antonia Geisler<br><br>*Tobias Müller* (Greifswald), 'Reconstructing a populist theory of democracy'<br><br>*Siri Anna Hummel* (Greifswald), 'A Karexic concept of equality? Tocqueville and the question of wealth distribution' |
| | **Section III: Open Section**<br>**Panel 5** (Room V): **Dignity and Cardinalism**<br>Chair: Silvia Salardi<br><br>*Francesco Ferraro* (Milan), 'Expanding dignity: Humans and animals as moral subjects from a utilitarian perspective'<br><br>*Fabrizio Esposito* (Milan), 'The conceptual limits of law and economics: An example of decision-making in negligence cases' |
| 13:00-14:30<br>Frankopanska 8 | **Lunch** (Frankopan Restaurant) |
| 15:30-18:00 | **Optional: Zagreb Sightseeing Tour**<br>starting point: Dubrovnik Hotel (Ljudevita Gaja 1) |
| 20:00 | Optional: Evening Out<br>meeting point: Dubrovnik Hotel (Ljudevita Gaja 1) |

## Keynote Speech Abstracts and Biographical Notes

### Law from a logical point of view

*Giovanni Battista Ratti*, University of Genoa

Due to the fact that the fundamental laws of logic (such as the principles of non-contradiction and the excluded middle) are (necessarily) amongst the foundational principles of law, logic has traditionally been referred to in legal studies to assert the view that law is determinate, in that it has an inner order that can be grasped and applied by means of logical tools and/or that it is a complete and consistent whole.

The author of this paper defends a stance which runs counter to such a view. Logic, far from being intrinsic to law, is a tool which helps one demystify the view that law is logically determinate, that it is a "unified, reasonable, whole" (as some authors would have it).

Within this general compass, the paper explores the role of logic for an analysis of the legal domain by emphasising four points in which the indeterminacy of law is clearly detected (only) by means of logical analysis.

In an ascendant fashion, the paper deals with (1) the logical form of legal conditionals, (2) the defeasibility of legal norms, (3) the notion of logical consequence in the legal domain and, finally, (4) the foundational problems of self-reference which seems to affect law.

Regarding point (1), the paper surveys some current reconstructions of the logical form of norms and points analytically to some of their shortcomings. By doing so, it shows that there is no current view which can accommodate the forms and treatments of legal norms in a logically satisfactory manner. It also suggests that there is possibly no way to deal with the reconstruction of the forms of legal norms in a completely logical fashion.

Concerning point (2), the paper examines the defeasibility of legal norms from a logical perspective. In particular, it is shown that if norms are considered to be defeasible – as they normally are in contemporary jurisprudence and doctrine – they completely lose their "inferential power", rendering law widely indeterminate.

This conclusion leads to point (3): since no clear concept of logical consequence within law and the legal doctrine has been propounded (nor a clear concept of contradiction and implication), the scope and the limits of law are uncertain. In fact, we cannot count on a recursive way of determining which norms are members of legal systems and which are not. This problem is eventually worsened by the fact that the set of norms which belong in a legal system does not constitute the only relevant set for legal application.

In addition, law is also saddled with several conceptual riddles concerning its foundations and interpretations (point 4). This paper presents and discusses some paradoxes of self-reference regarding the identification and the application of legal norms: their import for law cannot be neglected since many of them seem to make law an undefined, if not idle, "object".

**Biographical Note**

Giovanni Battista Ratti is a Professor at the University of Genoa. He has been Government of Canada Research Scholar (University of Toronto, 2004-2005), Government of Spain "Juan de la Cierva" Fellow in Law (University of Girona, 2008-2011), visiting professor at the universities of Girona (Spain, 2006-2008), "Pompeu Fabra" of Barcelona (Spain, 2008-2009), Nacional de Mar del Plata (Argentina, 2011), and Milan "Bocconi" (Italy, 2012 and 2013).

Giovanni Battista Ratti is an acknowledged expert in legal interpretation and deontic logic.

Amongst his main books are: *El gobierno de las normas* (Madrid, Marcial Pons 2013); *Diritto, indeterminatezza, indecidibilità* (Madrid, Marcial Pons 2012); *The Logic of Legal Requirements* (Oxford, OUP 2012, w/ Jordi Ferrer Beltrán); *El realismo jurídico genovés* (Madrid, Marcial Pons 2011, w/ Jordi Ferrer Beltrán); *Norme, principi e logica* (Rome, Aracne 2009); *Sistema giuridico e sistemazione del diritto* (Turin, Giappichelli 2008).

**The emergence and survival of the modern State**

*Michel Troper*, University Paris Ouest-Nanterre

Starting from the observation that legal theory and legal history have had no or few contacts, the author attempts to build bridges between the two disciplines in order to shed some light on two problems.

The first is historical. Historians disagree on the date of the emergence of the modern state, as well as on the various factors accounting for this emergence and its relation to the development of a legal system. Some argue that the State emerged in the 16th century, others find it as early as the 12th century. Obviously, these views depend on various conceptions of the State, but also on different conceptions of centralisation, the hierarchy of norms, general law or sovereignty.

The second problem is a problem of legal theory, which is rarely discussed. While most authors, at least in the European tradition, describe a hierarchy of norms, we do not know whether this hierarchy is a feature present in the law of every society, and, if yes, when and how it appeared.

As it happens, these two problems are closely linked in several ways.

Historians find that similar terms, such as sovereign or law, have been in use at different times, but they cannot guarantee that they refer to the same concept. Furthermore, they also find that different terms have been used at different times and still believe that these terms are synonyms, e.g. *summa potestas* and sovereignty. But how can they know that they really refer to the same concept? Legal theory can provide a series of metaconcepts that can serve as tools to allow for comparisons. The concept of State is one such metaconcept.

The concept that the author uses is drawn from Kelsen's monistic theory of the relation between Law and State. One of the well-known advantages of this theory is that it renders moot the old problem of the supremacy of State over Law or Law over State. Another is that it helps view the State as a specific form of political power, famously defined by Max Weber as "an entity which successfully claims a monopoly on the *legitimate* use of violence". In fact, if the State and the Law are indeed one and the same thing, then the State is organised as the legal system is, i.e. as a hierarchy of norms. It should be viewed as a form of political power exercised by means of a hierarchy of norms.

This can help to address a few questions. First, the question of the emergence of the hierarchy of norms. We can see that there was no such hierarchy earlier than the 16th century, and that the structure described by modern legal theory is not universal, but rooted in history. Second, the question of the date of the emergence of the modern State: the State emerged as a hierarchy of norms and only when there was such a hierarchy, i.e. in the 16th century. A third question concerns the relation between the concept of State and that of sovereignty. Sovereignty is said to be constitutive of the State. If this is true, there is no concept of sovereignty predating the 16th century. Indeed, it is a fact that the State as an organisation or a form of political power, i.e. as a hierarchy of norms, emerged at the same time as the concept of sovereignty, and

we must ask whether there is a causal relationship between these phenomena. The author shows that the form or structure of law has influence on the substance of legal reasoning and, in particular, that the concept of sovereignty is a necessary product of the hierarchy of norms. Finally, if the State and the hierarchy of norms are so closely linked, we must bring into question the widely held belief that the State and sovereignty are obsolete concepts.

**Biographical Note**

Michel Troper is an Emeritus Professor in Public Law at University Paris X. He has been teaching Constitutional Law and Legal Theory since 1969, first at the University of Rouen then at Paris X. In 1993 he was appointed chair at the Institut Universitaire de France.

He held the "chaire Chaim Perelman" at the Université Libre de Bruxelles in 2008-2009 and was a fellow at the Straus Institute for Law and Justice (NYU) in 2011-2012.

He has been a visiting professor or scholar and has given lectures at a number of universities across the world. He has served in several scientific societies and is honorary president of the French Society for Legal and Political Philosophy (SFPJ) and the French Association for Constitutional Law. His views on the epistemology of legal science and on legal interpretation played a part in the revival of legal theory in France. Through the years, he has developed a sophisticated form a legal realism, characterised by the idea that the interpreter is the true creator of legal norms.

His writings include one of the standard French manuals in constitutional law *Droit constitutionnel* (which he wrote with Francis Hamon), (33rd edit. 2012); *Pour une théorie juridique de l'Etat* (Paris, PUF, 1994); *Le droit, la théorie du droit, l'Etat* (Paris, PUF, 2001); *La philosophie du droit* (Paris, PUF, 3rd. Edit. 2011); *Terminer la Révolution: la constitution de 1795* (Paris, Fayard, 2006); *Le droit et la nécessité* (Paris, PUF, 2011); *Traité international de droit constitutionnel* (co-ed.; Paris, Dalloz, 3 vol., 2012). Several of his books and articles have been translated into other languages (English, Italian, Spanish, Russian, Chinese, Japanese, Turkish, Arabic).

# Presentation Abstracts

## Section 1: Important Features of Law

### Panel 1: Concept of Law

**The concept of law between history and analysis**
*Miklós Könczöl*, Pázmány Péter Catholic University

Dealing with legal history presupposes having at least a working concept of law. Moreover, historical research was traditionally meant to provide insights into the conceptual elements of law. After briefly summarising the strengths and weaknesses of 'historical jurisprudence', this paper turns to some current controversies of Greek legal history. The discussion focuses, on the one hand, on the extent to which the different positions of legal historians are determined by their different working concepts of law, and, on the other, on the contribution that the field can make to our identification of the key features of law.

**Legal theory, conceptual analysis and reduction**
*Filip Gołba*, Jagiellonian University

One of the purported hallmarks of positivistic legal theory is its methodological reliance on conceptual analysis. It is against this particular feature of analytic jurisprudence that Ronald Dworkin formulated his famous "semantic sting" argument, which consist in the claim that conceptual analysis might, at most, elucidate the ordinary meaning of the word 'law', rather than offer acute insight into actual legal practice.

The aim of this paper is to consider possible answers to this argument given by modern analytic philosophers of law. One way to rebut Dworkin's allegation is to contend that conceptual analysis is not meant only to reveal the ordinary meaning of the word. This line of reasoning assumes that there is something more to the concept than what ordinary competent speakers understand by it. This assumption is assessed against various understandings of 'analysis' which appear in analytic philosophy.

A different strategy is adopted by Andrei Marmor, who takes the idea that there is no gap between the concept and the ordinary conventional meaning for granted. Instead, he contends that it is a misconception to think that what positivist legal theorists (at least the ones whose work is rooted in Hart's legacy) strive for is a mere conceptual analysis of the concept of law. In his opinion, the actual goal of positivism is to provide a reduction of the concept of law, which makes the "semantic sting" argument be based on a major misunderstanding. In order to assess whether Marmor's counterargument is tenable, the author discusses whether the reduction that Marmor speaks of is not, in fact, a kind of conceptual analysis – reductive analysis.

**Two approaches to the methodology of the theory of law. Hans Kelsen and Jerzy Wróblewski**

*Monika Zalewska*, University of Łódź

One of the most crucial questions to be raised when considering important features of law concerns the kind of methodology to be applied to speak adequately about law. In this paper, the author compares two different approaches to methodology represented by Hans Kelsen and Jerzy Wróblewski.

In Polish legal theory, Jerzy Wróblewski was one of the most important thinkers with a worldwide reputation. One of the research fields he was most interested in was the methodology of law. He wrote much about Kelsen's *Pure Theory of Law* and his approach to methodology. While Kelsen's approach is characterised by radical methodological assumptions postulating that legal science is possible only if one specific method is applied, Wróblewski advocates methodological syncretism. Regardless of such a fundamental difference, both theories have their own set of advantages and disadvantages.

Kelsen names his method normative and claims that cognition of law is possible only if we consider the *ought* sphere, implying that law cannot be explained through facts. If we want to cognise law properly, we need to "close" ourselves into a "box" called normativity and forget about the "is" world. This does not, of course, mean that Kelsen considers the sociological or psychological aspect of law to be worthless. Although these aspects are irrelevant for a true cognition of law, they are useful when we speak about the "sociology of law" or "psychology of law". Such a radical approach may guarantee that we speak adequately about legal norms, but it leaves room for the question of whether this narrows the meaning of law too much.

Wróblewski disagrees with Kelsen's approach. He believes that a true cognition of law is possible only if we apply methodological syncretism. One method is unable to give an adequate picture of law considering that it focuses only on one aspect. The author of this paper focuses on Wróblewski's polemic with Kelsen. In the first part, the basic methodological assumptions of the *Pure Theory of Law* are outlined, which is followed by Wróblewski's criticism of Kelsen's theory. The third part presents Wróblewski's own concept. In conclusion, the advantages and disadvantages of both approaches are analysed.

Panel 2: Grounding the Concept of Law

**Artur Kozak's 'juriscentrist' concept of law: A critical appraisal**

*Rafał Mańko*, University of Amsterdam

The late Professor Artur Kozak (1960-2009) was one of the most original Polish legal theorists and philosophers of law active during the post-Socialist period. By building on Richard Rorty's ethnocentrism, as well as on Berger and Luckmann's sociology of knowledge, he created an original legal theory which he labelled 'juriscentrism'. In

short, 'law' (*ius*), in the juriscentrist sense, refers not to texts enacted by legislature or decisions handed down by courts, but to the unwritten rules governing the social practices of lawyers crystallised over time. Kozak saw law, in this sense, as a guarantee of the foreseeability of interpretive decisions and as a safeguard against arbitrariness.

The aim of the paper is to examine Kozak's juriscentrist concept of law from a critical perspective by analysing its adequacy in today's fragmented societies governed by a democratic rule of law, with a particular emphasis on the post-authoritarian transformation countries of Central and Eastern Europe. From this point of view, the author first identifies those aspects of Kozak's theory which can be useful in overcoming the legacy of extreme textual positivism and formalism ('hyperpositivism') typical of the Socialist legal culture. Juriscentrism is particularly useful here, owing to the fact that it shifts the focus from legislative texts ('law' in the hyperpositivist sense) to practices of legal culture. Secondly, Kozak's theory underlines, *inter alia* by drawing on Richard Rorty's ethnocentrism, the relative character of law as a normative system, one amongst the many (such as politics, religion, economics) in contemporary, multicentric and pluralist societies.

However, juriscentrism also displays a number of features which seem to be inadequate for contemporary, post-transformation societies governed by a democratic rule of law. In particular, Kozak's concept of law does not provide a theory of legal change. By focusing on rules governing legal practices which have crystallised from an ongoing legal tradition, juriscentrism stresses continuity in law, but not change. However, post-transformation societies have been experiencing very profound legal changes which should be accounted for by legal theory. Secondly, the juriscentrist concept of law does not provide a theory of 'hard cases', and indeed tries to escape the problem of judicial law-making by claiming that judicial discretion, inherently limited by juristic culture, is much narrower than commonly thought. Thirdly, the problem of the legitimacy of lawyers' decision-making powers in society is treated in a circular way. This legitimacy is based on a legal method – the 'law' of juriscentrism – but this legal method is, in turn, legitimised by the long-standing tradition of the legal community itself.

In conclusion, the author argues that Artur Kozak's juriscentrism is certainly a very interesting theoretical project. By shifting the focus from legal texts to legal practices and the underlying rules of legal discourse, it can help to overcome the hyperpositivist mindset of an Actually Existing Socialism. However, by focusing on the continuity and tradition of juristic culture, it fails to provide a theoretical account of legal change, judicial law-making and hard cases, and does not confront the issue of the legitimacy of lawyers' decision-making powers in a persuasive way.

**A four-dimensional theory of law**

*Marko Novak*, School of Advanced Social Sciences in Nova Gorica

The three-dimensional (integral) theory of law, the predecessor of the four-dimensional theory of law (hereinafter referred to as the FDTL) presented in this paper, has been quite well-known on the global legal theory market. Its three-dimensionality sees

the essence of law in the intertwining of legal norms, legal values and legal relations, while its integrality refers to the impossibility of understanding only one dimension without simultaneously considering the other two dimensions of the theory.

Such a three-dimensional theory of law could be explained by Jungian psychological typology or, more narrowly, by its four cognitive functions: thinking and feeling (the evaluative functions), and intuition and sensation (the perceptive functions). Within this framework, thinking is reflected in legal norms, intuition in legal values, and sensation in legal interests or legal relations. In the coexistence of these three dimensions, one dimension predominates in certain legal situations or is superior while the others are inferior.

The FDTL follows its three-dimensional predecessor. The fourth element or dimension that it adds to the three-dimensional theory of law refers to the cognitive function of feeling. Within the framework of law, feeling is widely used in the field of ADR as an alternative to classical (logical or thought-oriented) decision-making in law. Furthermore, what is also added to legal norms, values and interests/relations are general social norms that transcend their legal parallels.

The FDTL claims to be general and descriptive. According to this theory, law can be defined as special norms resulting from disputable social interests, relations and values (the perceptive part of the definition) that are applied in a formal or informal manner (the evaluative part of the definition).

**The concept of 'human nature': An attempt to approach law from an essentialist perspective**

*Silvia Salardi*, University of Milano-Bicocca

The concept of 'human nature' has been historically used in different circumstances to ground philosophically criminal and social policies, and consequently justify models of both law and society.

The concept of 'human nature' has been used very often to argue either in favour or against a given social organisation or to promote certain policies and translate them into legal tools, as is the case with Thomas Hobbes's organicist theory, which is the foundation of the modern biological theory of human nature. Over time, the concept of human nature, reinforced by scientific advances in different fields, has assumed the *status* of a scientific concept. In recent history, for instance, the theory of genetic determinism develops the *intuitions* of the previous biological conception by referring to the theory of immutable human nature founding and shaping interpersonal relationships and social organisations.

To understand the role played by the concept of human nature in its relationship to law, we first need to clarify its meaning, then its nature (is it a scientific concept or not?) and finally its relationship to the legal sphere (is it possible to ground law on a univocally shared definition of human nature?).

Pursuing this purpose requires that we examine this widespread and commonly believed to be clear concept, i.e. 'human nature', to see in it what its supporters claim

to see, and find out if the conventional wisdom concerning 'human nature' is justified. This, in turn, significantly impacts the legal approaches to the topic of discriminations.

Panel 3: EU Law and National Law Relationship

**Building the European Union on the shifting sands of legal theory**
*Maja Lukić*, University of Belgrade

The masonic role of the Court of Justice of the EU (CJEU) in relation to the modern-day EU edifice is undisputable. Much of this masonry has been erected on the fine line between community/union law and international law. As any other jurisprudence, EU case law needed to rely on paradigms originating from the realm of legal theory. The paper aims to show how theoretic paradigms relied on by the CJEU have encompassed opposing views on the relationship between international and national law. The first part the paper explains the reasons why the reasoning of the CJEU in its famous judgments of 1960s, which instituted the principles of the direct effect and primacy of community law, may be regarded as having been based on a monistic approach to the rapport between international and national law. The second part presents arguments for the opinion that, five decades later, the same Court seems to be taking a dualistic stance on the same issue of the relationship between EU law and international law. In the third part, a theoretical background for the phenomena analysed in the first two parts is provided, with particular emphasis on the opposing perspectives on the fragmentation and constitutionalisation of international law. Modern-day globalisation, the decline of the nation-state, a crisis of the human rights movement and events reminiscent of the theory of the Clash of Civilizations represent a backdrop against which relevant theoretical approaches are posited and analysed. The constitutionalisation of the EU itself, and not only of its law, has spanned over the times between the two subject phenomena. It appears that the Court's use of opposing theoretical paradigms over the entire timespan has in all instances been motivated by the urge to support and/or promote the different stages of EC/EU constitutionalisation.

**The substance and effects of EU law and jurisprudence under a social constructivist research agenda**
*Domenica Dreyer*

Legislation is an essential mechanism in the constitution of social reality which is complemented by guiding jurisprudence.[1] Law creates political, economic and societal structures, be it via legal frameworks or detailed demands. Regulation plays a key role in building social circumstances, especially in the integration process of the European Union (EU).[2] Jurisprudence controls the application of enacted laws and thereby

1 See Andreas Fischer-Lescano, *Rechtskraft*, August Verlag 2013.
2 See Klaus Dingwerth et al, *Postnationale Demokratie. Eine Einführung am Beispiel von EU, WTO und UNO*, VS Verlag 2010, 84ff.

contributes profoundly to the creation of social reality which is especially visible in the history of jurisprudence of the Court of the EU.[3] The huge significance of European jurisprudence became yet again visible with the entry into force of the Charter of Fundamental Rights of the EU in 2009. Even the most distinguished EU lawyers cannot estimate either the extent to which the Charter will be binding or the extent to which it will be relegated to the upcoming decisions of the Court of Justice that will define the scope of the Charter.[4]

There is significant tension at the European level concerning its jurisprudence. EU treaty law is drafted in intergovernmental procedures with diplomatic staff support. Wordings leave room for interpretation of the terms and conditions codified. Even secondary legislation processes result in specific rules drafted in phrasings which leave considerable scope for translation into national laws and practices.[5]

In the case of the EU though, the law is subject to the jurisprudence of an independent supranational court. The advantage of a sanctioning authority that binds member states to fulfil their obligations under European law at the same time limits the scope of once diplomatically drafted treaties. The moment that the highest judges agree on an understanding of a passage of law, this one interpretation becomes binding for all the member states. In this sense, the Court of the European Union constitutes a very powerful agent in harmonising European law and thereby plays a critical role in constructing social realities.

Challenging something as self-evident as jurisprudence enables the author to uncover underlying mechanisms: What interests and legitimising justifications are used in the legal rhetoric and discourse? How does this contribute to the constitution of social reality through law? What kind of conceptions, perceptions and supremacies are uncovered thereby? These research questions recognise the discourse effect attributed to the institution of jurisprudence and attempt to uncover its social constructivist potential. This agenda is substantiated by the argument that legal norms embody the moral attitudes and values of an existing society – through both their genesis and ap-

---

3 See, for example, the prominent case of Costa v ENEL [1964] ECR 585 (6/64) that led to the supremacy of European law over the domestic law of EU member states.

4 See Hans D. Jarass, "Die Bindung der Mitgliedstaaten an die EU-Grundrechte", in: *Neue Zeitschrift für Verwaltungsrecht*, 2012/8, 457-461, 457f, 459; Christian Calliess, "Art. 1 Charta der Grundrechte der Europäischen Union", in: Christina Calliess, Matthias Ruffert, Hermann-Josef Blanke, *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, Kommentar 4. Aufl., Munich: Beck, Rn 17.

5 Examples are taken from case law decisions of the Court of the European Union. See European Court of Justice: C-71/11 and C-99/11, decided on 5 September 2012: the Court had to clarify what qualifies as a "significant act of persecution" in reference to Art. 9 [1] [c] Council Directive 2004/83/EC; European Court of Justice: C-285/12, decided on 30 January 2014: the Court needed to define the scope of the term "inner-state conflict" according to Art. 15 [c] Council Directive 2004/83/EC; European Court of Justice: C-174/11, decided on 31 January 2013: the Court gave an account of what qualifies as "Court" in regard to Art. 267 TFEU, as well as "effective access to remedy" according to Art. 23 and 39 of Council Directive 2005/85/EC.

plication.[6] In this understanding, law is an expression of settled "ideas, experiences and social relationships" which form "part of the cultural memory" of a society.[7] The outlined research approach is addressed with reference to recent judgments of the European Court of Justice which exemplify the discourse substance and effects.[8]

Panel 4: Language of Law

**On impossibility in law**

*Silvia Zorzetto*, University of Milan

The use of impossibility in the legal domain is a very broad and multifaceted phenomenon. Legal scholars and judges are indeed well acquainted with the many differing cases and situations in which impossibility appears relevant. Laws themselves sometimes give explicit relevance to cases of impossibility. And we all know that, in contemporary legal systems, there are cases of nonsensical norms and/or prescriptions that either seem absurd or bear only a symbolic significance in point of fact. Again, there are norms which either seem impossible to obey because they prescribe something that cannot occur or which are impossible not to be infringed. Besides, the circumstance in which an action is impossible is sometimes the reason for applying or not applying norms, remedies and/or punishments.

The purpose of this paper is to analyse such cases in order to clarify what impossibility in law is. The aim is to outline a typology of the differing kinds of this very general phenomenon and explain the main features of the uses of impossibility that are legally relevant.

In truth, impossibility tends to be neglected in contemporary analytical legal thought and the majority of studies on this issue are – as is well-known – inquiries into the more philosophical question and principle of whether '*ought implies can*'. In fact, this idea often furnishes the implicit general framework of legal discourses on impossibility in law. Such an approach is discussed in order to pinpoint the deficiencies of and misunderstandings in the common view. On a methodological basis, Lewis's notion of strict implication is used to sketch some very useful distinctions for this analysis.

The starting point is the basic distinction between presupposition and implication, and different kinds of relationship between these two (e.g., logical and pragmatic presuppositions, causal or logical implications, etc.). Some criteria for distinction are then proposed based on both the nature of impossibility under consideration and the relevant objects to be investigated.

---

6 See Thomas Cottier, "Das Völkerrecht im Spannungsfeld von Nationalstaatlichkeit und Universalität", in: *Zeitschrift für Politik*, 2010/2, 156-169, 157.

7 Jürgen Bast, "Das Recht als Archiv sozialer Konstruktionen der Migration", in: *Zeitschrift für rechtswissenschaftliche Forschung*, 2012/2, 139-171, 140, translated by the author.

8 See, for example, European Court of Justice: C-285/12, Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides, decided on 30 January 2014.

It is indeed usual to predicate impossibility in relation to norms, obligations, concrete human actions, natural events, etc., while there are many different kinds of impossibility – logical, conceptual, practical, empirical/factual, etc.

Lastly, the paper proposes a typology of paradigmatic cases of impossibility. On the preliminary list, some examples of unbreakable/spurious norms, antinomies, technical gaps, excuses, *error iuris*, etc. are examined in order to explain in what specific sense they represent relevant cases of impossibility in law.

**Law, speech acts and validity**

*Alessio Sardo*, University of Genova

In this paper, the author explores the possibility of conceiving law as a peculiar form of *linguistic interaction*. He argues that all legal phenomena can be profitably understood in terms of *speech acts*. 1) Legal authorities perform *exercitive speech acts*, namely attempts to exercise influence by ordering, urging, advising, warning, etc. (Austin, Sbisà). 2) In legal discourse, the key role is played by *directives* (Ross) and there is little room for *indicative speech*. 3) In this account, *meaning* is considered neither as a communicative intention, nor as a purely abstract entity, but as a *function of actual linguistic practices*. In other words, meaning is *use* (Wittgenstein). 4) There are different kinds of meanings and linguistic games. 6) Against the mainstream (Searle, Bulygin and many others), the author maintains that *illocutionary force* is relevant also from a conceptual point of view (Weinberger, Ross), and that 7) the *acceptance* of an indicative is radically different from the acceptance of a directive. 8) From a different perspective, we can also consider that normative authorities are opposed to epistemic authorities.

Accordingly, *legal competence* is not determined *a priori*, but is the result of certain *ideas of authority* (Ross) that arise from social interaction. By the same token, *legal validity* is not established by an abstract and purely hypothetical *basic norm*, for it is the result of a whole series of *attitude-deciding acts*, which are *non-cognitive* in nature (Ross). Accepting a directive involves ethical considerations that are basically determined by emotional factors, subjective biases and prejudice – and not in the least by objective standards of judgment! Norms are the result of a *deontic negotiation* that takes place through legal interpretation: in opposition to Kelsen, the author considers that law is characterised by a *double normative dynamic*.

From a general and diachronic point of view, the author's proposal is conceived as an attempt to carry on the research project established by the Scandinavian Legal Realists, whose highest expression can be found in Alf Ross's masterpiece *Directives and Norms*. In this enterprise, the author refers to the work of giants such as J. L. Austin, R. M. Hare, Ota Weinberger, Marina Sbisà, Riccardo Guastini and David Kaplan, and also relies on some recent contributions to ethical non-cognitivism.

**Thick concepts, implicatures and the nature of law**

*Izabela Skoczeń*, Jagiellonian University

This paper aims to depict the insufficiency of strictly linguistic theories that attempt to explain the phenomenon of law. The necessity of resorting to moral or political arguments is depicted using the thick concepts theory. Thick concepts are terms whose content is partly evaluative and partly descriptive. There is disagreement amongst scholars on whether the evaluative content of these terms is strictly semantic or pragmatic. Some researchers say that it is a semantic presupposition or a conventional implicature. This is problematic because semantic content is the asserted, truth evaluative content of utterances. It is unclear how evaluative content could be assessed in terms of truth or falsity without breaking the Humean distinction. This is why the author suggests that the evaluative content of thick terms should be located within the implicated content of utterances. This implicated element is strictly pragmatic. The author agrees with the pragmatic character of the normative content of thick terms, but doubts whether this particular content takes the form of a conversational implicature. This is due to the fact that such an account poses problems to the explanation of irony, as well as the structure of thin concepts. Normally, irony conveys the very opposite of what the speaker says; in other words, an opposite assertive content with an implicature. An ironic use of a thick concept would, however, create an implicature negating both the descriptive and evaluative content (for instance, you are not courageous). Accordingly, an ironic implicature is the very opposite of a thick concept (e.g., cowardly as opposed to courageous). The speaker implicates both the opposite descriptive content and the opposite evaluative content, so s/he implicates an opposite implicature. A meta-implicature with regard to evaluative content? This seems methodologically problematic and false. As a result, it is useful to consider evaluative meaning as a pragmatic enrichment rather than a fully-fledged implicature, considering that dual pragmatic theories provide us with the tools to deal with it. Consequently, an implicature is inferred from assertive content and pragmatic factors combined together. If evaluative content is implicated, then thin terms are strictly pragmatic. But they cannot be constituted of an implicature, because an implicature must partly be inferred from semantic content, which is not present here. An implicature is an additional component of meaning and not the meaning itself. So evaluative content is a pragmatic intrusion and not an implicature. The term 'legal' also constitutes a thick term. If evaluative content has a pragmatic character, then the content of the notion 'legal' is partly determined by pragmatic factors. Determining the pragmatic factors that are taken into account is often the result of some moral or political argumentation. This entails that no linguistic theory could provide us with a sufficiently satisfactory explanatory theory of the term 'legal' and, as a result, of law itself. Establishing the scope of relevant pragmatic factors calls for argumentation based on political theory.

Panel 5: Authority and Morality

## The 'internal morality' of evolutionarily developed law? Some remarks on Hayek's 'true law' notion

*Łukasz Necio*, Jagiellonian University

As part of his philosophical system, F. A. Hayek, a great economist and social philosopher, developed his very own philosophy of law. The foundation of this philosophy is the ideal of "freedom under the Rule of Law". This political demand, referring to the tradition of classical liberalism, was also part of his evolutionary social philosophy. Law, as both a language and money, has developed in an evolutionary manner, as a result of "human action, but not of human design".

Referring to the old English (Anglo-Saxon) doctrine of the Rule of Law, where "not people, but law rules", in his *Constitution of Liberty* Hayek lists the features of "true law". He develops this conception in his *Law, Legislation and Liberty*, in which he also discusses the problem of legislation, the issue of judicial tasks and the position of the individual in a legal system.

The features of "true law" are: 1) generality, which means that laws must be applicable to all individuals; 2) abstraction, which means that laws must not mention the name of any individual or any group of individuals; 3) equality under the law; and 4) stability, which, according to Hayek, refers to common understanding of law. These features make laws resemble the laws of nature, which means that they are not arbitrary – one of the primary demands of classical liberalism.

Once he developed his conception, Hayek declared himself to be in favour of the common law system, which should guarantee a spontaneous development of law by judges and, in his opinion, a greater level of stability. Law should respond to our expectations, which should harmonise with the moral tradition of our society. Once this happens, individuals do not have to know all the written laws because they are familiar with the regulations in force through an unconscious sense of justice.

Hayek was not a natural law philosopher, although he respected it and drew much from it. In fact, he was a political thinker of evolutionary liberalism, who called the Rule of Law a "political ideal" and a "metalegal doctrine", i.e. a doctrine of "what law should be like". His formalistic approach is also connected with his opinion that the Rule of Law should be understood as an attempt to apply the Kantian categorical imperative to the political and social levels of life.

However, Hayek's formalistic and the "Kantian" Rule of Law conception have much in common with Lon Fuller's approach. Both authors tried to formulate only the formal requirements of law putting aside all specific content. They were not certain whether such laws would be morally good given that their aim was to minimise the probability of unjust laws by means of formal features. Furthermore, the perspective of the "ordinary citizen" was very important for both. Can "internal morality" in Fuller's sense be discussed in Hayek's philosophy? Taking into account the features of Hayek's evolutionary, "dynamic" social philosophy as opposed to Fuller's "static" philosophy of law, this paper tries to provide an answer to the above question.

**Bentham. From power of imperation to competence in law**
*Alejandro Daniel Calzetta*, University of Genoa

The present work aims to reconstruct some of Jeremy Bentham's theoretical concepts, namely the concepts of 'power of imperation' and 'power of concrectation'. For that purpose, the author first explains the reason why we may still look to Bentham (section I) and then clarifies a number of terminological problems related to Bentham's work with regard to the time in which he worked (section II). Following this prolegomenon, the author provides a general explanation of Bentham's notion of a sovereign (section III) in order to then address the notion of imperation or what Bentham understands to be normative production, i.e. the issuing of laws, etc. (sections IV and V). Sections III to V form the crux of the paper, and, through the concepts (sovereign – power of imperation – delegation – adoption and preadoption) expounded in them, it aims to reconstruct what, for lack of a better term, Bentham understands to be legal competence. In the said reconstruction, special consideration is given to two different ways of explaining the phenomenon of norm creation in the Benthamian theory of law, namely *de classibus* and *de singulis*. These two ways of norm creation are highly relevant to the explanation of the role of delegate authorities, such as the judiciary, within the framework of what Bentham would call a complete law or legal norm. This not only provides a clearer picture of the exercise of legal competence, but also has important consequences for theories of legal interpretation and adjudication, approximating Bentham's position to legal realism, which may have at first been suspected. This, furthermore, leads to the conclusion that legal realism and legal positivism are not as apart as some authors believe. The author reaches this conclusion by analysing what may anachronistically be called Bentham's theory of legal competence.

## Section II: Contemporary State: Functions, Position and Crisis Management

### Panel 1: Classical Paradigms and New Challenges

**Can we still drive the state machine the "old school" way? Structural and functional deficiencies of the modern state**
*Martin Belov*, University of Sofia "St. Kliment Ohridski"

Western societies are governed by constitutional models that have been inherited by the constitutional tradition established predominantly in the 19th and the 20th century. Several key ideologies, principles and concepts have been developed by pioneers and champions of constitutional democracy. Today, the principle of a representative, limited, responsible, responsive and transparent government is engraved with golden letters in the national constitutions of the countries that really or formally belong to the realm of western constitutionalism.

Since the late 20th century, however, important political, social, economic and mentality changes have occurred which have not been adequately met by either the constitutional law or the constitutional theory of nation states. The principle of political process transparency and openness has proven to be upgraded by the new technologies, the new media, i.e. Internet blogs and social networks, and the altered activist attitude of citizens towards the state and public power in general. These very same phenomena have dramatically increased the frequency of political cycles and have turned the responsiveness of state institutions into demagogic symbolic politics. Policy making in the new virtual and global world presupposes new institutional devices and political methods that can reconcile today's perils and demands with the constitutional infrastructure of public power and the system of human rights.

The principle of responsible government is also undermined in several ways. Politicians have come under a significant amount of pressure from the mobilised public without being able to present to the public sustainable and minimally mid-term substantial decisions on pending social problems. The shift from national decision-making levels to supranational institutions or even to invisible, but highly influential transnational socio-economic elites enhances dramatically the non-governability of the state and society which are supposed to be politically framed by it. Globalisation and Europeanisation have created both new opportunities for a coordinated response to current supranational issues and new escape routes for politicians from democratic control established by the people either directly or by virtue of national parliaments and other institutions. Hence, the "supranationalisation" of politics and decision-making limits the ability of formal political players to take responsible decisions and undermines limited representative governments without being able to establish an adequate supranational institutional design that could reinforce some form of regional or global democracy and rule of law. The factual leadership scheme does not necessarily match its presumed legal model enshrined in the constitution. The radical and complete democratisation of societies dilutes the lines of responsibility and destroys the principle of representation and representative government.

This paper aims to explore the issues outlined above by presenting the core content of fundamental constitutional ideologies, concepts and principles, by discussing the current threats to constitutional democracy, and by attempting to provide answers or at least pose important questions that might help to reconsider our common constitutional tradition in a democratic way.

**The development and effectiveness of welfare state systems in selected Eastern European countries. A classification, comparison and evaluation of social policy in Poland, Estonia and Bulgaria**

*Marion Kühn*, Catholic University Eichstätt-Ingolstadt

Welfare states started developing at the beginning of the 20th century. Different phases of consolidation followed, especially in the western states, after which there came phases of constraint, retrenchment and reform. Accordingly, the 1960s and 1970s are described as the *"golden age" of the welfare state.* In the Eastern Europe-

an countries, democratisation and the development of social policy began after the collapse of the USSR. The transformation of these nations into welfare state systems started in the 1990s.

This paper examines the social policies in three Eastern European countries. It looks at the kind of social policy offered, the provisions served and the extent to which these social policies are effective. It also raises the more general question of whether social policy is still needed in modern liberal democracies.

To answer these questions, a theoretical concept that describes the welfare state – consisting of four dimensions – is developed. The comparison of the three countries is based on data provided by Eurostat and the European Commission. The MISSOC database in particular offers extensive information about social policy arrangements. In other words, this data forms the basis for the comparison and classification, as well as for the testing of the effectiveness of these welfare states. The countries selected are three Eastern European countries, namely Poland, Estonia and Bulgaria. This selection is based on the assumption that these countries have different societal traditions and political developments, which is why it is assumed that a comparative analysis of these three countries may yield interesting results.

The basis of this comparative study is a theoretical concept. More specifically, the author uses Gøsta Esping-Andersen's definition and the three-model concept of the welfare state. The author also refers to the ideas of Castles, Wendt and Leibfried, based on which the author designs a new concept of the welfare state.

The paper aims to illustrate the principles of social policy in Poland, Estonia and Bulgaria. It focuses on matters of family policy, healthcare policy, labour market policy and retirement policy. These four dimensions are also used to create a new concept of the welfare state. The effectiveness of social policy in the said three countries can be judged by the number and variations of provisions, and by the costs and spending involved. It can be measured, for example, by healthy life years at birth, employment rates or infant mortality rates.

**'Privatising' law in Western multifaith and multicultural societies**

*Marco Stefano Birtolo*, University of Molise

If we acknowledge that the concept of secularism arises and develops under the influence of Western culture and Christianity, we must rethink the distinction between politics, religion and law in Western multicultural and multireligious democratic states. The aim of this paper is to question the Western neutralist conception of secularism, which is characterised by the belief that the exclusion of religious elements from the political sphere and law guarantees equality in a religiously pluralist context.

For this purpose, the paper analyses the ideas of multiculturalist theorists Bhikhu Parekh and Tariq Modood, who criticise the neutralist view of secularism recommending that we abandon the rhetoric of neutrality in the construction of the spheres of politics and law, and that we pay more attention to the demands coming from individuals belonging to religious and cultural minorities.

As a matter of fact, they argue that the channels of participation used by democratic states to integrate diversity do not seem to be able to deal with the requests made by individuals who do not fully identify themselves with the majority culture, which means that democratic states need to think about new strategies of inclusion so as to ensure the very value assumptions promoted by democracy, i.e. pluralism and equal liberties. This is particularly evident when these issues involve important areas of human life in which the cultural influence of some institutions is more visible, such as family, marriage and inheritance related matters. Whether the above can be regulated in a different way is also taken into account.

In particular, the paper focuses on a proposal to include religious diversity in political order introducing systems based on legal pluralism, with special attention given to an experiment started in the United Kingdom, which allows members of religious communities to be tried by religious arbitration tribunals operating under the indirect control of UK family (law) courts. The proposal aims to limit the state's traditional control of matters of family law, promoting "privatisation" in justice through alternative dispute resolution processes permitting parties to move their disputes from public courthouses to the domain of religious or customary sources of law and authority. Starting from this proposal and with particular attention to the thought of Ayelet Shachar, the objective is to analyse both the proponent and opponent positions on the use of legal pluralism as a vehicle promoting religious and cultural inclusion in multicultural contexts.

The above proposal emphasises the need to rethink the traditional role of the state in responding to the problems of multicultural democracies, moving away from the idea that a neutral political and legal sphere is not theoretically possible, and that it is necessary to seek new legal and political means which would guarantee both equality between individuals and the inclusion of diversity.

## Panel 2: Position of the State and International Influences

### Crisis management in the construction of a democratic state by supranational organisations in the Balkans

*Robin Caballero*, Humboldt zu Berlin/Paris I Panthéon-Sorbonne

The events during the elections in November 2013 in Kosovo, the riots and the abstention of the Serbian minority seem to stress the failures of the international mission in Kosovo to bring peace and build a democratic state. Almost fifteen years after the intervention of the NATO (North Atlantic Treaty Organization) and the deployment of the UNMIK (United Nations Interim Administration Mission in Kosovo), the construction of a viable entity trough democratic institutions and the integration of all communities seem to have failed. After the discourse focused on the individual to ground humanitarian interventions developed after the end of the Cold War, the concept of state-building focuses now on the State, its sovereignty and responsibility to protect individuals. Thus, humanitarian interventions insisted on the necessity to limit the sov-

ereignty of states, while the responsibility to protect insists more on the requirement of a strong state to guarantee human rights through democratic institutions.

This paper aims to discuss the concept of state-building after a conflict and its application in the case of Kosovo. The concept of state-building jeopardises the traditional relationships between international organisations and the state, as well as between them and individuals. This paper explains the lack of democracy and of legitimacy of the institutions in Kosovo, as well as the negative perception of the UNMIK by parts of the population, and attempts to identify the underlying reasons. The fail of Kosovo challenges the concept of state-building in international law, as well as its efficiency, and questions the relationship of individuals to international missions of peace, such as the UNMIK and the international organisations it represents.

The policy of privatisation led after 1999 appeared for some authors as a contradiction with respect to the goals of the international mission, i.e. to build a strong and democratic state of Kosovo. The policy of the UNMIK and especially of the Special Representative of the Secretary-General (SRSG) for Kosovo have been perceived as too authoritative. The provision of public services such as social security, healthcare or education could have helped to legitimise the new institutions. Thus, a better participation of the institutions in the national economy could have helped to bring legitimacy to the UNMIK. The author does not claim that privatisations are in all cases a bad policy, but in the case of Kosovo it had been extremely unpopular. The lack of legitimacy of the SRSG through elections and the concentration of power in his hands have been widely criticised contributing to their unpopularity in civil society and their boycott by parts of the population, which has been stressed by the weak participation of the Serbian community of Kosovo in the elections.

Furthermore, the total immunity of UNMIK's agents contributed to their bad perception by the population, eventually excluded civil society from decision-making processes, and gave a very bad example of the idea of democracy, although it aimed to build a state respectful of human rights.

**Patriotic loyalty in multicultural states**

*Nikola Beljinac*, University of Belgrade

States whose population is divided according to ethnic and/or religious affiliation face a highly demanding task: needing to deal with the challenge of political integration and social cohesion, having to establish a solid constitutional democracy, and encouraging citizen loyalty, solidarity and allegiance – all at the same time. In brief, each state should be a true home (*patria*) for everyone who lives in it. Several schools of contemporary political theory have tried to offer a solution to this problem, the most influential of which are the following three: liberal nationalism, neo-republicanism, and constitutional patriotism. Each of the three has aimed to find an answer to the following question: What should be the object of the patriotic loyalty of citizens in plural societies, and in what way should this loyalty be realised in practice? The first part of the above question refers to the object of patriotic loyalty, while the second to

its nature. The author believes that the theoretical positions of liberal nationalism and neo-republicanism suffer from the same drawback: they relate patriotism to a fixed object of loyalty, which leads to the essentialisation of a single substantive concept of the good. Consequently, individuals and groups whose conceptions of the good do not correspond to the proclaimed object of patriotic loyalty are subject to condemnation and exclusion, and, in the most extreme cases, to various forms of assimilation. The author argues that constitutional patriotism is normatively superior to any version of liberal nationalism and neo-republicanism because constitutional patriotism does not look for justification in a fixed object of loyalty. Furthermore, the author's thesis is that constitutional patriotism should be understood as a theoretical perspective which radically reshapes the anatomy of patriotic loyalty by *superimposing* the nature of this loyalty onto the issue of its object in contrast to liberal nationalism and new republicanism, according to which the nature of patriotic loyalty is derived from a fixed object – the nation or republic. In other words, the issue of the object of patriotic loyalty in constitutional patriotism results from earlier considerations of the way in which patriotism should be practised, which could lead to more appropriate political outcomes concerning the encouragement of patriotic emotions in citizens who do not share the same conception of the good. This does not mean that constitutional patriotism cannot or does not consider resolving the issue of the object of patriotic loyalty necessary as is claimed by both the critics and some proponents of this concept. What constitutional patriotism represents is a reversal of the hierarchy of normative justification in favour of the nature of patriotic loyalty. Accordingly, patriotism is separated from the comprehensive objects of loyalty and is placed in the domain of political legitimacy, which reduces the need for citizens to relinquish their particular identities. It is important to point out here that the reference point of patriotic loyalty lies neither in liberal-democratic procedures nor in a particular political environment which embodies universal morality as suggested by Habermas's conception of constitutional patriotism. It rather lies in the context of communal life which is created when constitutional patriotism is practised.

## Panel 3: State and Crisis

### States of crisis and crises of the state: Redefining the limits of national sovereignty and state powers in times of emergency

*Axelle Reiter*, Verona University

The contemporary evolution of the notion of state and legitimate state powers is the result of a double process of the internationalisation of sovereignty and the normalisation of exceptional circumstances. On the one hand, the adoption of universal norms has revolutionised the notion of sovereignty at the international level. The Charter of the United Nations endorses a complete shift in paradigm, from the traditional Westphalian to a universalistic conception of international law. The system it introduces relies on the existence of an international community beyond and above the state. It

did not merely create one more legal order, but established novel institutions and conferred a supranational constitutional status to basic international norms and principles. Fundamentally, the Charter constitutes a radical change of perspective in international relations, going from a state-centric to a truly cosmopolitan world order and passing from unconstrained national sovereignty to a new international sovereignty.

On the other hand, since September 11, governments have implemented counter-terrorism laws and policies, born from reinterpreting domestic and international norms, including the law of armed conflict, and the balance between human rights and national security. This second shift in paradigm is grounded in the idea that the uniqueness of contemporary terrorism, the ensuing perils and the responses of numerous national authorities justify a thorough transformation of the global system. This more general trend chiefly affects the interpretation of the legal principle of gravity or exceptionality of the circumstances that generate states of emergency. Similarly, attacks are mounted against the existence of core human rights which not even in the direst situations can be suspended.

The paper critically examines these two conflicting phenomena, the resulting judicial and doctrinal revolutions, and the impossibility of reconciling their contradictory premises in a coherent legal or theoretical framework. It analyses the dangers that the 'war' on terror paradigm creates for private individuals, the societal structures of affected countries and the international legal order (by entrenching in the law a practice of illegality likely to outgrow its original anti-terrorist purpose and contaminate the handling of public matters as a whole), as well as the opposition that this trend has met in international forums. Finally, it argues that an effective response to the abuses witnessed since the beginning of the 'war' on terror calls for a stricter adherence to the rule of law and the international obligations of states than is generally put forward, including respect for the integrity and prevalence of core individual rights.

This is the reason why international norms regulating states of emergency are indexing the suspension of fundamental rights in extreme situations in favour of strict conditions relative to the aims, motives and objects of the derogations. The simple fact that terrorism might strike anywhere and at any time cannot legitimise the implementation of extraordinary regimes. The endorsement of the contrary assumption is conducive to extend states of emergency to the world's limits, making the exception the norm in a Schmittian fashion. Besides, there is no room for a balancing between legal rights and consequentialist considerations since law itself is the balance.

**Classical approaches to 'states of emergency' and the challenge of the 'rights revolution'**

*Đorđe Gardašević,* University of Zagreb

Seen from both a historical and doctrinal perspective, a classical discourse on the notion of 'a state of emergency' develops around several crucial assumptions.

The first one is that emergencies, by definition, cannot be defined *ex ante* by legislature or reviewed *ex post* by the judiciary because, in the extreme, there always

appears some sort of *sui generis* threat to a constitutional system that cannot in itself be properly predicted (such, for instance, is an understanding of the modern terrorism paradigm which, it has been stressed, cannot be regulated under either the category of 'war' or the category of 'crime').

The second assumption is that this results in a concomitant "necessity" of introducing original and eventually unrestrained executive emergency powers. At the same time, this presupposes the classical "deficiencies" of both the legislative and judicial branches of government when they operate in the context of emergencies (e.g., arguments that they are devoid of crucial information and expert knowledge, that they are slow, too transparent, that they always operate *ex post facto*, that they typically "rally round the flag", that they defer to the executive branch, etc.).

The third assumption is that all this, sooner or later, leads to a consequent necessity of "suspending" the constitution either in part (e.g., in the field of the separation of powers or the protection of fundamental rights) or in whole.

In sum, sharing J. Locke, J. J. Rousseau, A. Hamilton and C. Schmitt's common premise that both the causes and consequences of crises are unpredictable and relying on the general idea of executive primacy, such approaches all too often tend to result in some sort of "extra-legal models" of crisis management or at least in various attempts at interpreting constitution as a flexible document subject primarily to political emergency interpretations. Moreover, a direct influence of these approaches is clearly seen in broad contemporary (constitutional and international) definitions of emergency which necessarily function as standards.

However, it should also be clear that modern institutions operate on premises which normatively differ from the ones operated on in the past (e.g., the strong protection of fundamental rights in international and domestic documents, the constitutionally entrenched principle of the separation of powers, historically rich comparative emergency experiences, the growing influence of other actors, such as civil society).

The author, therefore, argues that the classical discourse relying upon the assumption that the causes and consequences of crises are "unpredictable" is conservative and that it produces unacceptable costs to the modern substantive conception of the rights which are protected by a constitution understood as a legally-binding document, which are covered by a judicial review "mechanism" and which are to be understood as rules. Moreover, the author intends to show that balancing rights against security cannot result in a denial that rights have at least some constitutionally protected "core" (functional argument), that courts are best situated to "measure" and protect them (institutional argument) and that, therefore, they should not be approached from a historically limited perspective (historical argument).

Empirically, the author's research focuses on the experiences of the United States, France, Germany and Croatia.

**Internal and external limits on state sovereignty in amending a constitution for crisis management purposes**

*Fruzsina Gárdos-Orosz*, Social Research Center of the Hungarian Academy of Sciences, Insitute for Legal Studies/Constitutional Court of Hungary

The Commissioner for Fundamental Rights in Hungary filed a petition with the Constitutional Court in 2013 for a declaration of unconstitutionality of certain provisions of the Fourth Amendment to the Fundamental Law partly because internal contradiction was created within the Fundamental Law as a result of the amendment, and partly because some of the amendments were in contradiction with EU and international law norms. In his opinion, the unity of the Fundamental Law was clearly broken in those places in which the Fourth Amendment was in direct contradiction to previous Constitutional Court decisions.

The 12/2013. (V. 24.) decision of the Hungarian Constitutional Court declared that, in exercising its powers, the Court, as the principal organ of the protection of the Fundamental Law, continues to interpret and apply the Fundamental Law as a coherent system, and will consider and measure against one another every provision of the Fundamental Law relevant to the decision of a given matter. The Court will also take into consideration the obligations that Hungary has accepted in its international treaties or those that follow from EU membership, along with the generally acknowledged rules of international law, and the basic principles and values reflected in them.

In the opinion of the Constitutional Court, these rules constitute a unified system of values which are not to be disregarded in the course of framing the Constitution or legislation or in the course of constitutional review.

The paper aims to examine whether the above-mentioned limits on constitutional amendments apply to crisis management situations as well. Is there really something outside the sphere of state power that sets limits to crisis management measures in constitutional law as well? How are international and regional jurisdictions binding in such situations? Does this influence depend only on national constitutional provisions, such as Sections E) and Q) of the Fundamental Law of Hungary stating that, in order to establish and maintain peace and security and to achieve a sustainable development of humanity, Hungary shall strive to cooperate with all the peoples and countries of the world? Hungarian law is in conformity with international law. Hungary accepts the generally recognised rules of international law. In order to participate in the European Union as a member state and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other member states through the institutions of the European Union.

But what if these provisions did not exist – would it mean that constitutive power is free to amend the constitution in order to fulfil its crisis management purposes? Are there any good explanations besides the argument based on the written constitutional text? Is there a kind of invisible European constitutionalism that provides standards to crisis management situations as well? To what extent is a state free to respond with constitutional amendments?

Panel 4: Democracy and Equality

**Reconstructing a populist theory of democracy**

*Tobias Müller*, University of Greifswald

Within the European political discourse, the terms 'populism' and 'democracy' can be understood as two extremes on a scale of political terms. While 'democracy' is considered positively to be a valuable feature of societies and political systems, 'populism' is used to defame political opponents as 'irresponsible', as 'unserious' and as not being able to take on the responsibility of government. Accordingly, political actors in public debates tend to portray themselves as democrats trying, at the same time, to avoid being labelled as populists. Thus, any positive synthesis of 'democracy' and 'populism' is quite improbable within the European political discourse.

In contrast to the above, a farmers' movement in the South and West of the US about a 150 years ago explicitly used the term 'populist' to relate to the American democratic tradition. This tradition has its roots in such diverse – and, at first sight, even contradictory – sources as the Federalists and the Anti-Federalists, the Jeffersonians and the Jacksonians. From the Populists' point of view, a reinvention of this tradition was deemed necessary because the US had lost its democratic path and had turned into something that would today probably be called 'post-democracy' ruled by political and economic elites through class legislation, while, at the same time, formal democratic structures were maintained without there being a way for the "common man" to change the course of political action – for example, through periodical elections, not to mention any other form of more direct political participation. Paradoxically, the Populists died succeeding. While the People's Party – the party that sprang from the Populist movement – disappeared in 1908, the Populists' political claims were absorbed by the established parties, most of all by the Democrats, and their economic reform proposals were carried on by the Progressives before they became governmental policy makers under F. D. Roosevelt during the 1930s.

Although Populist politics was, without question, interest-based, the author assumes that it was also based on certain theoretical conceptions about the relationship between market-based economy and democratic institutions. The research project presented in this paper aims to reconstruct precisely these theoretical conceptions with the purpose of compiling a populist theory of democracy. Given that the project is at its developmental stage, the author focuses on methodological and questions of structure. Considering that the research project also aims to gain a theoretical insight into the Populist understanding of a proper relationship between democratic institutions and marked-based economy, methodological questions are of utmost importance. This is due to the classical objections to such undertakings articulated by the Cambridge School with Quentin Skinner as its best known representative. Finally, the author also presents a number of initial insights into the Populists' political and social thought.

**A Karexic concept of equality? Tocqueville and the question of wealth distribution**
*Siri Anna Hummel*, University of Greifswald

Alexis de Tocqueville (1805-1859), a 19th-century liberalist, is one of the canon thinkers in the history of political thought. He admonished a crisis of democracy, where non-politicised masses would rule unrestrained or where even a new sort of (industrial) aristocracy would lead into a dark age of despotism. As a remedy for this kind of despotism, he advocated – besides other things – a strong community spirit which is based on mutual empathy amongst members of a society.

The basic idea of this paper is to investigate a different approach to the issue of equality in the work of Alexis de Tocqueville. If traditionally read without any reference to wealth distribution, the term includes a legal and behavioural aspect of equality between members of a society. Considering that equality is the core component of Tocqueville's analysis of democracy, an interpretative loss or reduction of the term's content – which is what the author argues here – would be problematic. The author claims that there are two reasons for the "downsizing" of the term 'equality'. The first is grounded in Tocqueville's work itself. So is the younger Tocqueville, under the impression of his journey to America, more enthusiastic about democracy and the pursuit of happiness for everyone than the older Tocqueville who is, disenchanted by several upheavals and revolutions in his homeland, much more reluctant about the project of democracy and the then ongoing introduction of equality. The second reason is due to the fact that Tocqueville was, after he had sunk into oblivion shortly after his death, re-established in the 1950s as a liberal thinker who strongly opposed socialism. As a possible ideological counterpart to Karl Marx, his assumptions about the necessity of broad distribution of wealth for democracies – which are part of his perception of equality – got soft-pedalled. The paper aims to restore this lost part of equality.

## Section III: Open Section

### Panel 1: Boundaries of Constitutent Power and Sovereignty

**The inadequacy of a pragmatist account of legitimacy: On the Waldronian assumption of 'legitimacy-free' phases in constitution-making**
*Attila Mráz*, Central European University (Budapest)

What makes constitution-making procedures legitimate? In this paper, the author presents a methodological constraint on theories of the legitimacy of constitution-making, and argues against a particular, influential pragmatist account of constitutional legitimacy on the grounds that it fails to meet that constraint. This pragmatist account, represented by Jeremy Waldron, claims that the procedure for drafting and enacting constitutions is a "legitimacy-free zone" in political decision-making (Waldron 1999, pp. 300-301): we may disagree about the morally right procedure, but we must

make a decision somehow, so we have reason to accept a given procedure even if we disagree about its moral rightness.

The pragmatist account, the author argues, is an attempt to solve the "too much / too little" dilemma that theories of constitutional legitimacy must resolve. The dilemma arises between substantive and procedural theories of legitimacy. The first horn of the dilemma is the following: if an account of legitimacy is based on moral principles which constrain the substantive content of the constitution (i.e. the outcome of the procedure), then the account fails to provide a solution for the problem that we disagree about; namely, the morally substantive constraints. Hence, the account provides a substantive view of what makes a constitution legitimate which is too strong to yield public justification.

The second horn of the dilemma is represented by an account of legitimacy which relies on intrinsic facts about some procedure which we use to choose a constitution with a particular content. However, the choice of the procedure is justified either by another contentious moral principle or by another procedure – but then the account faces the threat of infinite regress. In other words, the account says too little about what makes a constitution-making procedure legitimate. Any viable theory of legitimacy must either prove the dilemma to be false or show why neither of the two horns is a desirable outcome.

The pragmatist account attempts to show the dilemma to be false. It denies the assumption underlying the "too much / too little" dilemma about legitimacy evaluations applying to political decision-making procedures 'all the way down'. Instead, Waldron (ibid.) argues, the sheer necessity of collective decision-making is sufficient to make constitutional procedures morally justified for reasonable (or even unreasonable) citizens. Full-blown legitimacy evaluations apply only to decisions made once a constitution is in place.

However, as the author argues, the pragmatist solution is unsound: there is no logical room for denying the assumption that legitimacy evaluations apply to political decision-making procedures 'all the way down'. If a constitution-making procedure is morally justified for all (reasonable) citizens, then it follows by conceptual necessity that it is legitimate. Hence, the pragmatist account collapses into the second horn of the dilemma: it offers a contentiously low baseline for evaluating constitution-making procedures. Namely, it maintains that *any* procedure is legitimate and should be accepted because it is better than no procedure at all.

Finally, the author addresses and rebuts a potential objection to his argument. The objection claims that there is logical room for Waldron's "legitimacy-free zone". The moral requirement to establish political institutions provides, according to the objection, some moral reasons in favour of a constitution-making procedure even if it is insufficient to make the procedure fully legitimate (cf. Buchanan 2002). In reply, the author shows that, given this assumption and the fact about moral disagreement, there is nothing to confer legitimacy on substantive political decisions even when a constitution is already in place.

The author's conclusion is twofold. On the one hand, the pragmatist account of the legitimacy of constitution-making usefully points to a methodological constraint: any theory of constitutional legitimacy must resolve the "too much / too little" dilemma. On the other hand, the pragmatist account cannot resolve this dilemma, and hence fails.

**Unamendable provisions in modern constitutions**

*Michael Hein*, University of Greifswald

Unamendable provisions (or "eternity clauses") are constitutional norms that cannot be legally amended or are extremely difficult to amend. Such provisions can be found in many constitutional texts of contemporary states. According to the data of the Constitute Project (http://www.constituteproject.org), no less than 75 of the 189 listed and currently effective constitutions (i.e. about 40 percent) contain unamendable provisions. They are common not only in literally every region of the world, but also in all types of governmental systems: they are found in democratic republics (such as Germany, France, Romania or the USA), constitutional monarchies (such as Australia, Belgium, Norway or Thailand), and in hybrid regimes and autocratic systems (such as Afghanistan, Chad, Cuba or Turkmenistan). Furthermore, manifold regulatory fields fall within the scope of unamendable provisions such as basic rights (e.g., in Germany), the type of governmental system (e.g., in Italy), specific institutional regulations (e.g., in Portugal), but also regulations such as state religion (e.g., in Afghanistan) or the guarantee (!) of slavery (in the USA until 1808).

In sum, unamendable provisions are a typical (but not necessary) feature of constitutional law. Despite this obvious relevance, however, this topic has been widely neglected in both political and legal sciences. Individual important "eternity clauses" – such as Art. 79, Para. 3 of the German *Grundgesetz* ("Amendments to this Basic Law affecting the division of the Federation into *Länder,* their participation on principle in the legislative process or the principles laid down in Articles 1 and 20 shall be inadmissible.") – are studied in some measure, but are rarely compared to other countries.

Against this background, the author presents an interdisciplinary research project which deals with unamendable constitutional provisions in a comprehensive way. It seeks the origins of the very idea of unamendable provisions, and researches their historical and geographical distribution, their contents, their normative justifications and, last but not least, their empirical effects in the constitutions of modern states since 1789. The paper first gives an overview of the topic of unamendable provisions, and then presents the research design and research questions. Particular attention is given to some preliminary hypotheses on the origins and the empirical effects of unamendable provisions.

**The concept of sovereignty in legal theory and constitutional practice**

*Tina Oršolić Dalessio*, University of Zagreb

Ever since Bodin first introduced his theoretical elaboration of sovereignty, this concept has been widely interpreted by both legal and political theory. The resulting, gradual and open-ended evolution continues quite visibly even today.

Following Hart and Raz's line of reasoning, nearly all contemporary political and legal philosophers now agree that sovereignty cannot be accurately defined in either Bodin or Austin's terms as an absolute and unlimited power of law-making. Yet, a few do seem to agree on what a proper account of sovereignty is. Moreover, there even seems to be a lack of agreement on whether sovereignty matters as a legal construct or whether it represents an "outdated" concept.

The aim of this paper is to provide some clarity concerning the above from a practical and theoretical point of view. By focusing on the European integration context, this paper seeks to answer: 1) whether, for whom and when sovereignty still matters, and 2) how sovereignty is understood in practice today and how the legal practice correlates to the theoretical underpinnings of this concept.

In order to uncover whether sovereignty matters in Europe today or not, the author analyses national constitutional laws and case laws related to the concept of sovereignty. She shows that the principle of sovereignty in Europe still plays an important role not only on paper (in national constitutions), but also in practice (in the jurisprudence of national constitutional courts). The best example of this can be found in national case laws dealing with the constitutionality review of primary EU law amendments. In these judgments, highest national tribunals have repeatedly affirmed the utmost importance of the principle of sovereignty from their national constitutional perspective. Moreover, they have strictly conditioned any EU law developments upon the preservation of the core of the member states' sovereign powers.

After showing that sovereignty still matters from a practical point of view, the paper examines current interpretations of this concept by highest national courts responsible for its safeguarding. A closer look at the above-mentioned national constitutional case laws shows that this principle remains a highly ambiguous one, which even the constitutional actors responsible for its protection are reluctant to address in a straightforward manner. Specifically, it is shown that, much like legal theoreticians, legal practitioners also seem to agree that the 'traditional' account of sovereignty understood as the absolute and indivisible power of law-making no longer seems appropriate in today's context. Thus, as in legal theory, in legal practice too there seems to be an agreement on what sovereignty is not. There is, however, an obvious lack of agreement on what sovereignty actually is.

Following an analysis of the relationship between national courts' vague attempts to explain the meaning of the term 'sovereignty' and its various theoretical underpinnings, the author concludes that constitutional actors have not managed to establish order where legal theoreticians have created chaos. Thus, while sovereignty still seems to matter, this *essentially contested* concept continues to generate confusion in both legal theory and practice.

Panel 2: Transnational Judicial Dialogue and Factors Affecting ECHR's Decision-Making

**What does transnational judicial dialogue amount to? An example**
*Tilen Štajnpihler*, University of Ljubljana

When legal theorists and sociologists attempt to capture the essence of the complex and multi-layered process of the way in which one national legal system and its cultural context are shaped under the influence of another (and vice versa), their writings are rich with colourful metaphors. Amongst these are also concepts such as *transnational judicial dialogue* or *judicial cross-fertilisation* which shift our focus from legislative change to (constitutional) courts and their role in the development of law – with one eye on the concerns of the national legal and cultural context, and the other on the legal development abroad. The claim that courts from different legal systems interrelate with one another and are therefore (partly) responsible for the travelling of legal ideas across national borders can have implications for our understanding of the way in which a legal system functions and changes. It affects, for example, our theory of (legal) interpretation or our theory and doctrine of the sources of law. It also suggests potential tendencies of future legal development, such as the idea of an emerging global constitutional jurisprudence. This claim is, however, not free of theoretical and empirical considerations that need to be addressed before we declare (constitutional) courts to be agents of legal import/export and try to evaluate the consequences of this role we assigned to them.

The aim of this paper is to make a number of qualifying observations about the use of concepts such as *transnational judicial dialogue* and the actual practices of courts that this kind of illustrative, metaphorical language is meant to express. Building on an empirical analysis of the citation practices of the Slovenian Constitutional Court which serves as an exemplary context for this discussion, it is argued that unequivocally connecting the use of foreign precedents in (constitutional) litigation to the logic of legal transplants might prove overambitious for the purpose of describing what courts do when they look to their counterparts beyond their own national legal context.

**European Court of Human Rights judges between human rights and governments**
*Jurij Toplak*, University of Maribor

Research shows that various factors affect judicial decision-making. It was proven that decisions by judges are affected by their background, education, religion, political opinions, race, family status and many other factors. It was even shown that the decisions that judges make before lunching differ from the ones they make after lunching.

This paper analyses the behaviour of individual European Court of Human Rights (ECHR) judges. Cases before the ECHR involve conflicts between governments and individual freedoms. One of the parties is an individual claiming that an EU member state violated one of the individual's rights guaranteed by the Convention, and the other par-

ty is an EU member state alleged to have violated that right, and it is the Court which decides whether a member state violated the individual's right or not. The panels' decisions are often not unanimous. Some judges tend to often defend governments, while others are more frequently on the side of individuals. This paper analyses over 1500 court decisions and answers the following question: which ECHR judges were most likely to vote in favour of governments and which were most likely to vote in favour of individuals and their rights? It then ranks the judges from the most rights-oriented to the most government-oriented. The paper shows that there are great differences amongst the ECHR judges. The paper also shows that judges coming from the older Council of Europe member states tend to favour human rights, while those from younger democracies tend to vote more often in favour of governments.

**Separate opinions of national judges at the European Court of Human Rights (ECHR)**
*Dolores Modic*, School of Advanced Social Studies in Nova Gorica

In recent years, real developments and structural changes in the human rights law have arisen from the transformed role of international bodies that have implementation power. In this regard, special emphasis must be given to regional human rights courts and, amongst them, to the European Court of Human Rights (ECHR) (see Modic, 2008; Modic, 2010). Since the 1980s – or, more specifically, since the era of the "explosion of activity under the Convention" (Janis, 1995, p. 28) or "activation" (Greer, 2006, p. 36) – the development of jurisdiction, procedures and the general *modus operandi* of the ECHR is of particular relevance to the level of human rights protection achieved in Europe (and also beyond due to the general influence of ECHR judgments on other regional and/or constitutional courts).

The paper deals with separate opinions of judges at the ECHR, with an emphasis on separate opinions of so-called national judges. The research so far shows that a high percentage of ECHR judgments include at least one separate opinion (see, for example, Letsas, 2011; Epstein et al, 2011; White and Bousikiew, 2009). Furthermore, some research has been conducted on the different characteristics of separate opinions and the judges that write them (see, for example, Bruinsma, 2008; Voeten, 2008; White, 2009).

The author uses the term 'national judge' to refer to judges whose opinions are separate in cases involving the country that they come from. States are usually keen on having judges of their own nationality on the bench, although today they can hardly expect them to act as 'defence lawyers' (Tomuschat, 2005). However, their independence and impartiality (at the ECHR, as well as other courts) is heavily criticised (see, for example, Suh, 1964; Mackenzy and Sandz, 2003; Smith, 2005; Voeten, 2008; von Bachten, 2012). The very *ratio* which allows national judges to participate in 'national cases' – providing a link to the national law in question and an understanding of the embeddedness of the case – may deprive them of their impartiality (see Hernandez, 2012, p. 188).

This paper brings a short theoretical discussion of the importance and type of separate opinions, and their positive *versus* negative impact (with an emphasis on sepa-

rate opinions of national judges at the ECHR), as well as a quantitative analysis of the incidence and characteristics of separate opinions of national judges, thus providing insight into the way that national judges utilise separate opinions at the ECHR.

Panel 3: Judicial Self-Restraint, Formalism in Judicial Reasoning, and Judicial Conformism

**Judicial self-restraint – A mere rhetorical device?**

*Agnes Kovacs*, University of Debrecen

Courts play an increasingly major role in collective decision-making considering that issues having delicate political ramifications are brought before them much more frequently. Judges settle conflicts which once arguably fell within the jurisdiction of parliaments, and the expansion of the political role of the judiciary has brought about a salient shift in the distribution of political authority between legislature and courts. Under these circumstances, judicial decisions require heightened justification as growing scepticism is shown towards the legitimacy of courts in fields previously pre-empted by legislative choices.

Owing to this legitimacy problem of the judiciary, judicial self-restraint has become a fashionable judicial strategy, and has attracted a lot of support in both judicial practice and academic discourse. Judicial self-restraint refers to the way in which courts should interpret legal texts and review legislative acts. It favours a practice characterised either by judicial deference to interpretations by the legislature or by "minimalist" judgments.

In contemporary constitutional theory, we are witness to the revival of James Bradley Thayer's approach who, in the late nineteenth century, established the so-called clear-mistake rule which requires judges to defer to the legislative interpretation of the constitution and uphold the challenged law unless it proves to be so clearly erroneous that no reasonable person could endorse it as a decision which is in accordance with the constitution. Thayer's standard of reasonableness and judicial restraint as a corollary of his concept seem to be an approach which appeals to scholars, and judges frequently rely on judicial restraint when they seek to account for the method of reasoning or interpretation they have chosen while adjudicating sensitive political issues.

The author first illuminates the theoretical background of judicial self-restraint and reveals the political principles which can justify this kind of judicial strategy at a normative level. She then seeks to answer the question of whether judicial self-restraint is a theory which can provide clear guidance for judges when deciding legal cases and whether it can correspondingly explain the way judicial reasoning is carried out. The author is mostly concerned with the problem of whether decisions presented as having been rendered in a deferential way are genuinely decided on a narrow ground by judges deferring to the text of the law or to legislative judgment on the issue at hand. Or, if we look at some recent decisions in different constitutional jurisprudences, do we have to concede that judicial self-restraint is nothing more than a mere rhetorical device for courts to conceal judicial activism and mitigate the political character of their rulings,

as well as to fend off the challenges that the legitimacy of judicial decisions heavily determined by political and moral considerations is currently exposed to?

**Formalism and policy arguments in judicial reasoning: Is Central Europe a special case?**
*Peter Cserne*, Hull Law School

In both practitioners' comments and academic literature on the Europeanisation of Central and Eastern European legal culture, there has been a general understanding and much lament about the persistence of certain features of Socialist legal thinking in the judiciary after 1989 and even 2004. Compared to fundamental changes in substantive law, judicial practices and cultures seem to resist all change and remain "formalistic, magisterial, terse and deductive".

While this issue has been widely discussed in literature[1] causing much controversy, it is not clear whether and in what sense formalism can be seen as a distinctive feature of CEE judicial style. In the sense of strict rule-following by judges, the meaning of formalism seems relatively straightforward, but the term is associated with many value-laden connotations.[2] On the semantic and conceptual level, there is some confusion, e.g. when formalism is taken as synonymous with passivism, (hyper)positivism or textualism. On the normative level, the evaluation of this perceived formalism of the CEE judiciary is ambivalent. Some condemn it as a sign of conservatism, incompetence or lack of transparency, while others defend and praise it as an embodiment of courts' commitment to the rule of law and a source of national/regional pride. Most participants in this discussion adopt a culturalist comparative perspective and look at CEE judicial styles in terms of legal culture, *mentalité*s and institutional history.[3] Though informative and worth pursuing, this perspective alone is unlikely to produce ultimately satisfactory results. The author's hypothesis is that much of the heat of the debate disappears if we look at formalism not as an overall feature of the CEE judicial culture, but at a lower level of abstraction. This paper suggests that we should (1) do more conceptual and normative work on the category of judicial formalism and (2) look at legal cultures as heterogeneous and dynamic entities susceptible to social scientific analysis. As a result, it might turn out that, although judicial styles are closely linked to the general culture of the society in which they are practised, talking about formalism as a characteristic of the Central European judiciary is misleading.

---

1 See, e.g., Zdeněk Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (2011), and a recent review by Jan Komárek, "The Struggle for Legal Reform after Communism", *LSE Law, Society and Economy Working Papers* 10/2014, http://ssrn.com/abstract=2388783.

2 See, e.g., Paul Craig's use of the term: "This is, with respect, legal formalism." in Paul P. Craig, "Pringle: Legal Reasoning, Text, Purpose and Teleology", *Maastricht Journal of European and Comparative* Law 20 (2013) 1, 5. In his recent guest editorial, Craig, one of the leading authorities on EU law, implicitly criticises the CJEU for "legal formalism". What he means is not that the judges have seen or have presented themselves as having no alternative or that they have used terse quasi-deductive styles, but that they do not want to look beyond the text and argue teleologically or take responsibility.

3 Some are less reflective and end up being "interesting exhibit[s] in the gallery of post-communist legal culture, rather than an accomplished study thereof.", in Komárek, footnote 1, 1.

As far as the notion of formalism is concerned, a cursory overview of relevant literature allows for the conclusion that the term itself is – if not essentially contested – very broadly and vaguely used. 25 years after Frederick Schauer's seminal article that noticed and attempted to remedy this,[4] the landscape is not much clearer. Formalism is, of course, sometimes used in a transactional sense[5] or with reference to a methodology in legal theory instead of adjudication.[6] However, it is this latter sense that it is used here. What the author, following Schauer, argues is that formalism is, when properly understood, often unavoidable and in many cases desirable. This, however, relates to certain features of adjudication and is, in itself, little reason for national pride.

As to the relation of judicial style to legal culture, the paper argues along the following lines. Judicial styles are surely culture specific, i.e. national culture specific, but this is a very crude and partial characterisation. Crude because there are many finer details and differences internal to a national legal system. Partial because culture is considered to be a "black box" of self-standing explanans. Macro-level comparisons are misleading because they convey a false impression that national legal cultures are homogeneous and static. In fact, the canon of acceptable arguments, insofar as the canon reflects judicial styles, is context-specific and dynamic. Moreover, the style of one court is likely to differ significantly and systematically depending on what it aims to achieve or considers acceptable in particular types of cases. This can differ across legal fields, types of courts, and even in whether certain outcomes are likely to be politically or socially important.

A formalistic style is not a culturally fixed feature of national or regional judiciaries, but a variable one whose strength can be analysed in social scientific terms. In particular, confidence and self-confidence, legitimacy and high political profile seem to correlate with the degree of formalism. Formalism is usefully contrasted with consequence-based or policy-based reasoning. The soundness and legitimacy of consequence-based arguments depend both on empirical (including institutional) facts about courts' capacity for evidence-based policymaking, and on normative ideas and ideals about courts' legitimacy to get involved in evidence-based policymaking. As long as legal systems differ in both dimensions considerably, substantial differences are likely to persist.

While some national differences do persist, other developments are likely to generate dynamic changes in judicial styles. First, new transnational legal fields emerge and create their own cultures not closely linked to national laws. As organisational cultures (with their own characteristic attitudes, know-how, etc.), they develop their own style along functional rather than national lines, and this dynamic is likely to

---

4 Frederick Schauer, "Formalism", *Yale Law Journal* 97 (1988) 4, 509-548.

5 Whether, for instance, contracts require formalism to be enforceable is the sense in which formalism is used in Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 3rd ed., Oxford University Press (1998), 71.

6 Ernest J. Weinrib, *The Idea of Private Law*, 2nd ed., Oxford University Press (2012), xiii-xiv.

have repercussions on domestic patterns of justification. Another way that national judicial styles are likely to change is through judicial networks as "educational interlocutors".

In conclusion, the paper suggests that, from a broader social scientific perspective, the alleged formalism of CEE courts is not more special than any other court formalism. However, most of the above empirical claims are theoretical hypotheses that need to be tested and either confirmed or rejected. Together with some normative arguments, they, thus, only provide a first step in what is likely to be a complex and lengthy study. Yet it is important to get the basics right, and disentangle political agendas and academic research in the discourse on CEE legal cultures.

**'Judicial conformism' – A new phenomenon in the countries of CEE?**
*Mátyás Bencze*, University of Debrecen

The author's theoretical interest focuses mostly on exploring and explaining the sociological problems of judicial practice. The author is currently working on a relatively broad topic which concerns the phenomenon of 'judicial conformism' in Central Eastern Europe (CEE).

According to the underlying assumption of the theory, there is a difference between the judicial attitude in more established democracies and the judicial attitude in the countries of CEE. In the former the dividing line lies between 'judicial activism' and 'judicial self-restrain', while in the latter there is a more fundamental difference. In the countries of CEE, many judges have the tendency to decide cases in a way which they consider popular amongst the people even if the decision can barely be supported by any serious legal reasoning. However, some judges do remain loyal to the letter of the law and stick to established judicial practices even if that makes them unpopular to the point where they receive threatening letters or heavy criticism from politicians and/or journalists.

The above-mentioned attitudes of judges deeply influence the way in which these judges use the various methods of interpretation and legal argumentation. Under such circumstances, judges referring frequently to fundamental rights or principles is not necessarily a good sign. They may use them for the purpose of constructing a seemingly legally grounded argument while actually violating the principle of the rule of law or, in other words, abusing fundamental rights and principles.

The author's scientific goal is to verify the existence of the phenomenon of 'judicial conformism' which seriously threatens the enforcement of the rule of law in CEE.

The paper analyses a special segment of adjudication where the negative impact of 'judicial conformism' is, the author believes, clearly detectable. It examines Hungarian legal cases in which judges dealt with hate crimes. The Hungarian experience shows that judicial decisions in such cases are heavily influenced by pressure from the mass media and the (emotional) reactions of the public. Consequently, many judges tend to sentence perpetrators coming from ethnic minorities severely while showing more leniency towards perpetrators coming from an ethnic majority who committed crimes against ethnic minorities.

The paper also focuses on exploring and analysing the sociological conditions which facilitate the emergence of the 'judicial conformist' approach.

Panel 4: Interpretation, Logic, and Normativity

**The authority of law and legal formalism**

*Krisztina Ficsor*, University of Debrecen

The paper concentrates on the relationship between the problem of judicial formalism and the theory of the nature of law. It sets off from Joseph Raz's theory about the authority of law. According to his theory's central claim, one of the most important features of law is that it claims to have legitimate authority. The author aims to analyse the implications of this idea for the theory of judicial reasoning in general, and the theory of legal formalism in particular.

Being in the position of legitimate authority means that the authority provides reasons for action, and those who are subject to authority are bound to obey. The reasons provided by the authority are preemptive and exclusionary reasons, they exclude reliance on reasons which conflict with the authoritative directive. "Those subject to the authority are not allowed to second-guess the wisdom or advisability of the authority's directives."[1]

What are the implications of these notions for the requirements of judicial reasoning? Does the authority of law require a judge to engage in a formalist kind of reasoning when deciding legal cases? According to the author, the problem of formalism lies in the way in which judges should justify legal decisions. The central claim of formalism is that judges should justify their decisions with reasons stemming from the limited domain of law or so-called source-based law. The idea that law is an authoritative social practice plays an important role in the theory of judicial formalism: the fundamental basis of legal decisions should be authoritative source-based law, and judges should refuse to rely on reasons that are not elements of source-based law. However, formalism has its limits. There are cases (so-called hard cases or very complex practical problems) in which formalist reasoning is insufficient to justify a correct legal decision. Sometimes judges have to take extra-legal reasons into consideration. The author looks to analyse the theoretical limits of judicial formalism posing the following question: Does the theory of authority provide an adequate answer to the problem of legal reasoning? The theory of judicial formalism concerns the way in which law's claim to legitimate authority (and the duty of judges to decide cases according to source-based law) should be reconciled with the need to incorporate extra-legal considerations into legal reasoning when necessary. There are cases in which formalist reasoning is justifiable and there are cases in which it is not. This paper aims to find out whether an answer to this issue is provided by the theory of authority or not.

[1] Joseph Raz, *Between Authority and Interpretation. On the Theory of Law and Practical Reason*, Oxford University Press, Oxford 2009, pp. 140-141.

**From the context of discovery to 'ought implies can'**
*Stef Feyen*, KU Leuven/Maastricht University

Law is a normative order, the realisation of which at times requires adjudication. What judges say is of particular interest to legal scholars, who often reflect upon what the law requires. Such reflection is guided by theories, thoughts or presuppositions about interpretation, legal doctrines and legal principles, all of which are viewed from a normative perspective. Discussions of legal decision-making also envision the practice from a normative, i.e. justificatory, perspective. The "context of discovery" is often underemphasised or relegated to "sociological" or more broadly "empirical" inquiries (which are deemed only "tangentially" relevant to "legal scholarship"). The author intends to properly re-emphasise this context of discovery by probing how "reality" can and does "constrain" judges, and how this bears on accounts of legal decision-making.

The author first offers some thoughts on the relationship between the "justificatory ideal(s)" and the "reality" of legal decision-making. Keeping Kant's adage that "ought implies can" in mind, the author seeks to re-evaluate this relationship and examine what the implications thereof could or should be for our justificatory conceptualisation of legal decision-making. Second, the author analyses the extent to which this insight has been incorporated into some accounts of legal decision-making: observing that many contentions by legal realists, pragmatists and critical legal scholars have emerged as criticisms of the overbearing of normativity, the author investigates whether they have incorporated this insight adequately into their accounts of legal reasoning. After exploring what might be an adequate way to think about the tension between the real and the ideal in legal decision-making, the author emphasises the need to bring these thoughts to bear on more colloquial legal debates about interpretation, doctrines and legal principles, and, finally, tentatively formulates some thoughts on how to do this.

**Institutional control of legal interpretation**
*Bojan Spaić*, University of Belgrade

Theoretical jurisprudence has gone to great lengths to exploit philosophical theories of meaning yielding varying results in quest of an adequate description of the process of legal interpretation and an adequate normative theory of interpretation. In this paper, the author challenges the view that the meaning of legal texts is/can be determined or adequately described by philosophical theories of meaning.

The author shows that the majority of norms understood as results of interpretations of legal texts are, in fact, ascertained within the dynamics of what can be called *institutional control of interpretation* – an idea developed in literary and theological hermeneutics that has not been fruitfully used in the field of jurisprudence. The elaboration of this idea could potentially lead us to a better description of interpretative practices in law.

The author argues that the idea of institutional control of interpretation is not only pertinent to legal practice and important for its understanding, but also crucial for a

fair analysis of debates in theoretical jurisprudence. This is done by elaborating institutional control of interpretation in relation to the pseudo-Kuhnian concepts of *community of jurists*, *normal legal practice*, *normal legal philosophy* and *shifts in institutional control of interpretation*.

Finally, the author attempts to sketch the possible implications of this thesis on the position of interpretation in legal practice and legal theory by arguing that the analysis of institutional control of interpretation may lead us to reconsider interpretation as a part of legal reasoning, and persuade us to give interpretation a much more important role in both legal theory and legal practice.

**Opałko and Woleński's non-linguistic concept of norm**

*Oskar Pogorzelski*, Jagiellonian University

The aim of the paper is to present the relationship between the non-linguistic concept of norm formulated by K. Opałko and J. Woleński and the problems of interpretation of law and the ontology of norms. The paper seeks to answer the following question: Does the non-linguistic concept of norm have to be improved to demonstrate the problems of interpretation of law and ontology of norms while retaining its fundamental theses on the latter? The main result of this analysis is that norms are certain and specific types of decisions by lawmakers. These reflections have resulted in the proposed thesis that the non-linguistic concept of norm may be compatible with the levelled concept of interpretation of law pursued in Polish literature and not with the integrated (derivative) concept of interpretation of law.

Panel 5: Dignity, Justice, and Cardinalism

**Expanding dignity: Humans and animals as moral subjects from a utilitarian perspective**

*Francesco Ferraro*, State University of Milan

While the Kantian tradition sees human dignity as stemming from autonomy and moral law, hedonistic utilitarians do not presuppose autonomy and rather see humans as "containers of value": they are "perceiving units" of pleasure (positive value) and pain (negative value). Utilitarianism is monistic and it seems to cut out from the basic level of moral justification everything that is not either just pleasure or pain: in this sense, rights might be seen as simple "appendages" (R. Frey) and the same holds true for concepts such as dignity. However, another way to look at the matter is to view utilitarianism as simply requiring that every moral concept be translatable into pleasure or pain. This will also be applicable to dignity.

Utilitarianism can then make place for dignity in at least two ways. Firstly, humans possess dignity insofar as their pleasures/pains are taken into account by the maximising "felicific calculus": dignity amounts to being treated as a member of the same moral community. In this *external* sense, we can justify our actions, rules, etc., in moral

argumentation by showing that all the relevant units of value have been taken into account and maximised. Secondly, dignity can be seen from an *internal* point of view as the feeling that humans experience when they perceive other agents' consideration towards them. Such a feeling can be seen as a pleasure in itself, while the opposite feeling – that of humiliation – as a specific pain.

This two-folded view of dignity also applies to the moral status of non-human animals. It is unlikely that non-humans suffer a psychological feeling of pain issuing from a patent disregard of their interests on the part of moral agents (a *speciesist* attitude). They can suffer, of course, but they do not experience the specific pain (humiliation) of not being treated with due consideration. The internal aspect of utilitarian dignity does not then apply to them.

Things are different with respect to the external aspect, which is essential in moral argumentation because of the sympathetic ties that bind humans. Sympathy – in Hume and A. Smith's sense – allows us to take part in the pleasures and pains of fellow humans, with a sense of participation stemming from our recognition of the fact that we are all, biologically speaking, very similar. Moral argumentation excluding equal treatment of the pleasures/pains of all humans would be rejected by reasonable human beings because it would violate this sense of sympathetic participation.

This external aspect allows us to make room for animal dignity. In granting a place to animal pleasures/pains in the utilitarian calculation, we need to take into account their biological differences with respect to humans, but also all the relevant similarities. On the one hand, this grants, at least to higher species, the dignity of being treated as worthy of moral consideration and not merely as things. On the other hand, utilitarian dignity is not ascribed equally to all non-human animals since the lowest species are granted only very limited moral consideration.

**The conceptual limits of law and economics: An example of decision-making in negligence cases**

*Fabrizio Esposito*, Bocconi University/State University of Milan

The scholarship field known as Law and Economics (LaE) has momentum. Its popularity and diffusion have continuously been increasing. However, its theoretical foundations appear to be increasingly opaque over time.

The defended claim is the following: LaE has lost sight of fundamental aspects of liability assessment.

The claim is discussed with reference to LaE having made use of cardinalism and mathematics in the description of the *Hand Formula*, an algorithm used by some US courts in negligence cases. The judicial version of the Formula prescribes to confront the burden of prevention (B), loss (L) and the probability of loss (P). If, in a given case, $B<PL$, the defendant is liable. Otherwise he is not.

Cardinalism assumes that the utility an agent enjoys is *measurable* by others. Hence, utilities associated by different individuals to the same preference (for example, for consuming the same good) may be compared. Notably, cardinalism is necessary if – as LaE scholars claim – one wants to make a claim about *total welfare*.

At first glance, an analysis of the Hand Formula in practice shows that it is considered as a *guideline* more than a "quantitative straitjacket" (R. Posner). Besides, any assessment of the conduct of an agent requires that he owes a *duty* to others according to the law governing the interaction.

What LaE offers instead is an account of the Formula inconsistent with practice. First, LaE assessment ignores the necessity of establishing a duty on the defendant as a requirement for the application of the Formula. Instead, hinging on a strong cardinalist assumption, LaE substitutes rights and duties with the criterion of the minimisation of *social costs*. Second, LaE describes B and PL in *marginal terms*. However, this mathematical sophistication changes the *content* of the norm.

In sum, LaE's general claim that the key features of law are grasped by its economic account, at least in this particular body of law, is not grounded in facts. Therefore, what LaE offers is an *idiosyncratic conception* of negligence.

Interestingly, B=PL allows, at most, for the following claim on the concept of duty: by prescribing to invest resources in the defence of the interest of others *equal* to the expected loss, common law embodies a claim of equality. However, the "crude estimate" (R. Posner) of B, P and L in practice suggests caution in drawing conclusions regarding the ethical foundations of the Hand Formula.

## Entertainment Programme

*Saturday, 10 May 2014*

**Zagreb Sightseeing Tour**

After the official close of the conference, we invite you to participate in the Zagreb Sightseeing Tour. The Tour begins at 3:30 pm in front of Dubrovnik Hotel, 1 Ljudevita Gaja Street. It will last for two and a half hours and is free of charge. The Tour is sponsored and organised by the Zagreb Tourist Board.

**Evening Out**

If you would like to spend an evening out in Zagreb, we invite you to join us at the caffee bar Pod starim krovovima (Under the Old Roofs), 9 Basaričekova Street. The meeting place is in front of Dubrovnik Hotel, 1 Ljudevita Gaja Street, at 8:00 pm. Food and drinks have to be paid individually.

## List of Participants

1) Giovanni Battista Ratti, University of Genoa, giovannibattistaratti@gmail.com
2) Martin Belov, University of Sofia «St. Kliment Ohridski», martinbelov@yahoo.com
3) Nikola Beljinac, University of Belgrade, nikola_beljinac@yahoo.co.uk
4) Mátyás Bencze, University of Debrecen, bencze.matyas@law.unideb.hu
5) Marco Stefano Birtolo, University of Molise, marcostefano84@libero.it
6) Robin Caballero, Humboldt zu Berlin/Paris I Panthéon-Sorbonne, robinpm.caballero@gmail.com
7) Alejandro Daniel Calzetta, University of Genoa, calzetta2009@gmail.com
8) Peter Cserne, Hull Law School, P.Cserne@hull.ac.uk
9) Goran Dajović, University of Belgrade, gorand@ius.bg.ac.rs
10) Domenica Dreyer, University of Düsseldorf/University of Bonn, Domenica.Dreyer@uni-duesseldorf.de
11) Fabrizio Esposito, Bocconi University/State University of Milan, fabrizio.esposito@unibocconi.it
12) Francesco Ferraro, State University of Milan, francesco.ferraro@unimi.it
13) Stef Feyen, KU Leuven/Maastricht University, feyenstef@outlook.com
14) Krisztina Ficsor, University of Debrecen, ficsor.krisztina@law.unideb.hu
15) Đorđe Gardašević, University of Zagreb, gardasevic_99@yahoo.com
16) Fruzsina Gárdos-Orosz, Social Research Center of the Hungarian Academy of Sciences, Insitute for Legal Studies/Constitutional Court of Hungary, fruzsina.orosz@gmail.com
17) Antonia Geisler, University of Greifswald, antonia.geisler@uni-greifswald.de
18) Filip Gołba, Jagiellonian University, filip.golba@uj.edu.pl
19) Michael Hein, University of Greifswald, michael.hein@uni-greifswald.de
20) Siri Anna Hummel, University of Greifswald, sirihummel@yahoo.de
21) Miodrag Jovanović, University of Belgrade, miodrag@ius.bg.ac.rs
22) Miklós Könczöl, Pázmány Péter Catholic Unviersity, konczol.miklos@jak.ppke.hu
23) Agnes Kovacs, University of Debrecen, kvcsagnes@gmail.com
24) Marion Kühn, Catholic University Eichstätt-Ingolstadt, Marion.Kuehn@ku.de
25) Maja Lukić, University of Belgrade, majalukic77@gmail.com
26) Rafał Mańko, University of Amsterdam, R.T.Manko@uva.nl
27) Dolores Modic, School of Advanced Social Studies in Nova Gorica, dollymod@gmail.com
28) Attila Mráz, Central European University (Budapest), mraz_attila@cebudapest.edu
29) Tobias Mueller, University of Greifswald, muellert@unigreifswald.de
30) Łukasz Necio, Jagiellonian University, lukasz.necio@uj.edu.pl
31) Marko Novak, School of Advanced Social Studies in Nova Gorica, mnovak153@gmail.com
32) Tina Oršolić Dalessio, University of Zagreb, tinaorsolic@gmail.com
33) Oskar Pogorzelski, Jagiellonian University, oskar.pogorzelski@gmail.com

34) Axelle Reiter, Verona University, Axelle.Reiter@EUI.eu
35) Silvia Salardi, University of Milano-Bicocca, silvia.salardi@unimib.it
36) Alessio Sardo, University of Genova, alessiosardo@ymail.com
37) Izabela Skoczeń, Jagiellonian University, izabela.skoczen@uj.edu.pl
38) Bojan Spaić, University of Belgrade, bojan.spaic@ius.bg.ac.rs
39) Tilen Štajnpihler, University of Ljubljana, tilen.stajnpihler@pf.uni-lj.si
40) Michel Troper, University Paris Ouest-Nanterre, troper@u-paris10.fr
41) Jurij Toplak, University of Maribor, jurij.toplak@gmail.com
42) Monika Zalewska, University of Łódź, Mzalewska@wpia.uni.lodz.pl
43) Silvia Zorzetto, University of Milan, silvzorzetto@gmail.com

## CEE Forum Coordinators and Conference Organisers

***CEE Forum Coordinators***

Dr. Luka Burazin, Assistant Professor, University of Zagreb, Croatia

Mag. Jürgen Busch, LL.M. D.E.A., Researcher, University of Vienna, Austria

Dr. Michael Hein, Research Associate, University of Greifswald, Germany

Miklós Könczöl, M.A., LIM, Assistant Lecturer, Pázmány Péter Catholic University, Budapest, Hungary

Dr. Marta Soniewicka, Assistant Professor, Jagiellonian University, Krakow, Poland

Dr. Bojan Spaić, Senior Lecturer, University of Belgrade, Serbia

***CEE Forum 2014 Conference Organisers***

Dr. Luka Burazin, Assistant Professor, University of Zagreb, Croatia

Dr. Đorđe Gardašević, Assistant Professor, University of Zagreb, Croatia

Alessio Sardo, PhD student, University of Genoa, Italy

Conference assistant: Tena Zgombić, University of Zagreb, Croatia

## Sponsor of the 6th CEE Forum's Conference

The 6th Central and Eastern European Forum of Young Legal, Political and Social Theorists is financially and organisationally supported by the Faculty of Law, University of Zagreb.

*Edited by*

Luka Burazin, Đorđe Gardašević and Alessio Sardo

*Abstracts proofread by*

Ana Janković Čikos

*Published by*

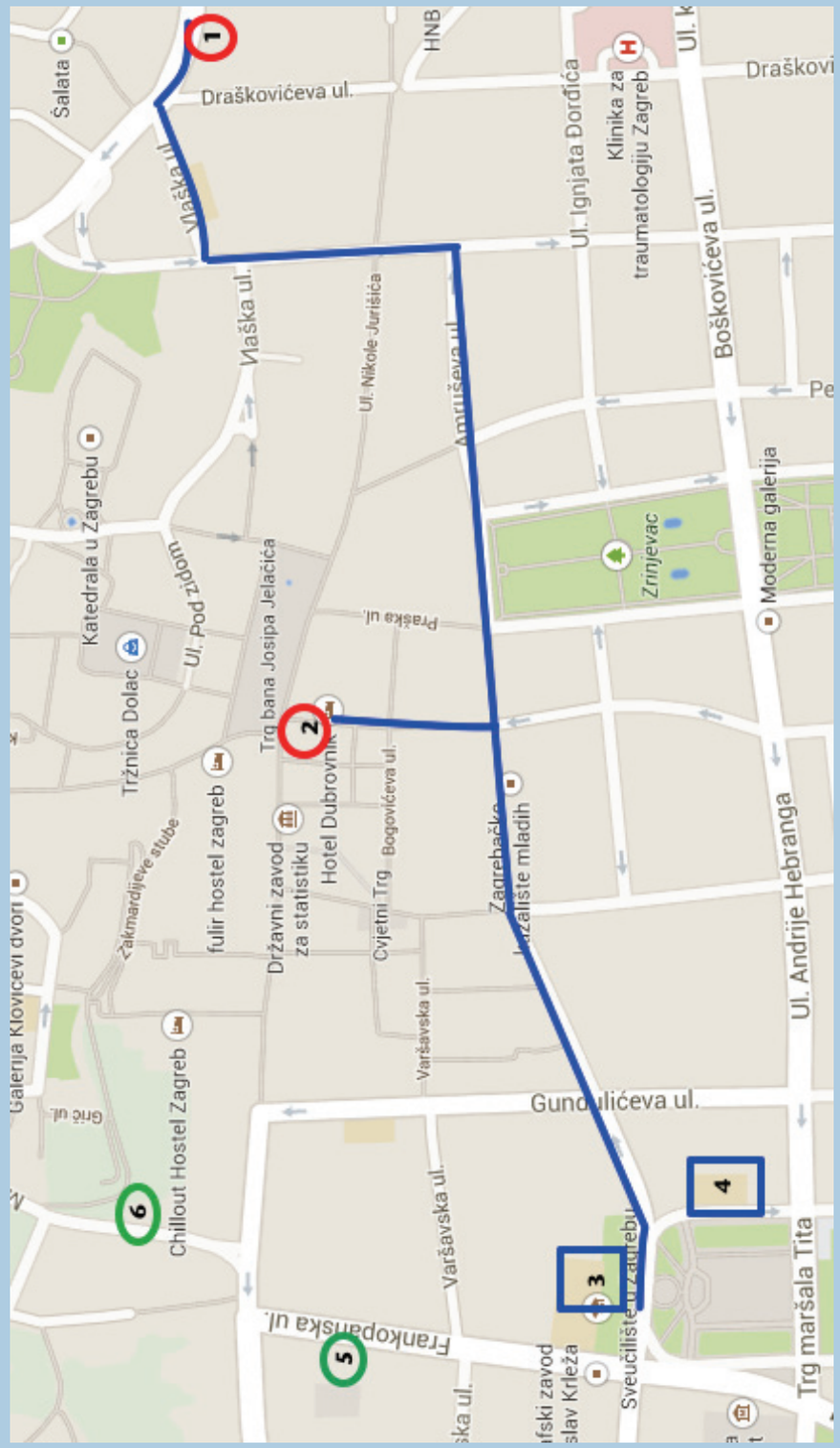
Faculty of Law, University of Zagreb
Trg maršala Tita 14, 10000 Zagreb, Croatia

*Graphic design by*

Gordana Vinter, Sveučilišna tiskara d.o.o., Zagreb

*Printed by*

Sveučilišna tiskara d.o.o., Zagreb




1) Jadran Hotel
2) Dubrovnik Hotel
3) Zagreb Faculty of Law, Marshall Tito Square 14 (TMT 14)
4) Zagreb Faculty of Law, Marshall Tito Square 3 (TMT 3)
5) Frankopan Restaurant
6) Stari Fijaker Restaurant