The 20th International Roundtable for the Semiotics of Law (IRSL 2019)

The Limits of Law

23rd-25th May 2019
University of Coimbra Institute for Legal Research (UCILeR)
Faculty of Law – University of Coimbra

PROGRAMME AND BOOK OF ABSTRACTS

Organizational Committee: J M Aroso Linhares, M.A. Reis Marques, Ana M. Gaudêncio, Inês F. Godinho

Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra (Área de investigação «O Direito e o Tempo»)

ATFD-Associação Portuguesa de Teoria do Direito, Filosofia do Direito e Filosofia Social (Portuguese Section of the IVR)

FCT-Fundação para a Ciência e a Tecnologia
Event partly funded in the ambit of the Project «Societal Challenges, Uncertainty and Law: Plurality | Vulnerability |Undecidability » (UCILeR, Coimbra, Project I&D, *UID/DIR/04643/2019*)

International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique (Springer-Verlag)
Editor-in-Chief: Anne Wagner

INTRODUCTORY NOTE

In a time of plurality and difference which is also, significantly, a time of aproblematic (if not *naif) panjuridism,* the discussion of the limits of law is not a frequent or obvious explicit *topos*. On the one hand, the diagnosis of plurality and difference favours the conclusion-claim that «the sense of the expression the "law" is constructed internally, and separately, within the system of semantic values of each [semiotic] group» (B.F. Jackson) – which means arguing that only «the signifier» is common, not the «signified», as well as admitting an implacable diversity of interpretative communities (involving incommensurable cultural-civilizational, political, ethical and professional codes or canons). On the other hand, the celebration of *panjuridism*, successfully corroborated by the relentless emergence of ultra-specialized dogmatic fields (from health law to biolaw, from robotics law to geo-law), justifies a passive assimilation of hetero-referentially constructed interpretations of *social need,* reducing law to a mere conventional order (with contingently settled frontiers) or even to an ensemble of institutionally effective coactive resources — which in any case means depriving *juridicity* or *juridicalness* of any practical-cultural specific or intrinsic (non-contingent) sense claim. However, do our present circumstances condemn us to this complacent nominalism, preventing us from attributing any effective relevance to the problem of the limits of law? Even without departing from the "semio-narrative" ground (and its *external point of view*), it may be said that plurality and difference do not exclude a productive exploration of *inter-semiotic aspirations* (if not *inter-semiocity*) — relating differently contextualized claims of *juridicity* and paving the way for the reconstruction of plausible *arguments of continuity*. These arguments may, in turn, justify a return to the well-known questions on the *concept* and/or the *nature* of law (in the sense in which, in an *all or nothing approach,* Hart and Raz have taught us to understand this), and may also, conversely, lead to the reinvention of an *archetypal* or *aspirational* perspective (Fuller, Simmonds), in relation to which the reconstituted *features* of the autonomy and the limits of law do not represent characteristics but rather *guiding intentions* or constitutive *aspirations* or *promises* (if not *desiderata*), with reference to which past or present expressions and their institutional instances should permanently be judged. Following this path in fact means acknowledging how the problem of *limits* becomes an indispensable thematic core whenever the reflexive agenda involves rethinking law's *autonomy* (or rethinking this autonomy beyond the possibilities of *legal formalism*), as an autonomy or claim to autonomy which should be seriously considered in terms of its cultural-civilizational specific (non-universal) base, as a decisive manifestation of European identity and European heritage (Castanheira Neves). It is precisely this critical-reflexive connection between issues of *sense* and *limits* (*aspirations* and *borders*) which, in terms of law, as well as considering the challenges of a *société post-juridique* (F. Ost), our

roundtable aims to explore. This means discussing the growing weight of hetero-referential elements (invoking philosophy and economics, literary criticism and sociology, epistemology and ethics, politics, political morality and social engineering as plausible key arenas), which not only interfere (as contextual conditions) with juridical discursive practices but also *wound* these practices (and their autonomous intelligibility) by functionalizing them (diluting their specificity in a new practical holism), or at least condemning them to permanent «boundary disputes» (David Howarth). However, this discussion also leads directly to the consideration of specific (real, hypothetical and even fictionalized) case-*exempla*, including the so-called «tragic cases» (Atienza), which enable us to experience the limits of law's responsivity or even the impossibility of obtaining plausible correct legal answers. The roundtable will, as usual, favour a practical-cultural context open to multiple perspectives and involving the productive intertwining of juridical and non-juridical approaches.

José Manuel Aroso Linhares

Respecting the tradition, the roundtable languages will be English and French.

Thursday, 23rd. May

Faculty of Law Auditorium
REGISTRATION (9.30)

OUVERTURE (10.00)

RUI DE FIGUEIREDO MARCOS (Director da Faculdade de Direito da Universidade de Coimbra)
ANNE WAGNER (International Journal for the Semiotics of Law: Editor-in-Chief)
JOÃO NUNO CALVÃO DA SILVA (Vice-Reitor da Universidade de Coimbra)

PLENARY SESSION I (10.15-12.00)
Chair: Anne Wagner

J.M. AROSO LINHARES (Universidade de Coimbra): *The four doors to* panjuridism *and the question about the* limits *of Law: introducing a rarely frequented* topos

This *Introduction* is a deliberate extension of the *call for papers* (reproduced *supra,* see the *Introductory Note*) and its diagnosis. It endeavours however proposing an interpretive grid and this one as an opportunity to distinguish different contemporary manifestations of *panjuridism* (being certain that these manifestations are less determined by different *factors* or *clusters of factors* than by heterogenous *concepts* or conceptions of Law). The reflexive challenge is in fact understanding the progressive displacement of Law, losing the status of an autonomously self-subsistent rationality pattern (if not renouncing the condition of an ultimate integrative horizon) in favour of a voracious omni-presence, a presence which offers its relentless regulative potential to every problem, whilst growing capillary and limitless in every direction. Whereas the point of departure (triggered in the last quarter of the nineteen century by the slow erosion of a dominant *formalist* paradigm) and the *point of arrival* (favouring a *nominalist* approach of legal relevant practices and discourses) seem significantly transparent, the range of factors and the heterogeneity of conceptions which influence the intermediate stage or stages wound us, at the very least, as disconcerting contributions. The grid in question distinguishes four plausible doors to *panjuridism,* as well as the opposing pathways which these unmistakably different doors open: the first one privileging instrumentalism (and hyper-specialization), the second celebrating plurality and difference (if not the deconstructive overcoming of comparability), the third defending a communitarian particularism (and this one as a passive coercive objectivation of conventional or positive morality), the fourth transforming the detersive effects of globalization (and uniformity) into new opportunities to claim *universality* (if not an a-cultural or culturally neutral *universalism*). The reconstitution of this grid opens up in turn the possibility of a reactive answer (seriously taken as a specific *view of the cathedral*), this one emphasizing that the possibility of successfully considering the problem of limits depends today on the rejection of each and every one of the pathways which those four doors impose. This means in fact submitting the *problem of limits* and the *claim to autonomy* (and their plausible integrated whole) to the potentialities of an *alternative idiom*, precisely the one which, demanding the full historical-cultural contextualization of law's acquisitions, treats it as an explicit cultural artefact, significantly *inscribed* in the deployment of what may be called the *Idea of Europe* (or the *possibilities* of the

Western Text) —i.e. as a *non universal* (culturally plausible and civilizationally molded) answer to the *universal* (anthropologically necessary) problem of the institutionalization of a *social order*. Identifying law's institutionalising response as a cultural-practical one does not in fact only mean celebrating its integrative (communitarian) vocation but, in particular, recognising a specific way of constituting and performing substantive communitarian meaning (irreducible, as such, to other plausible constructions of *praxis* and practical rationality and certainly to other forms of collective identity).

PIERRE MOOR (Université de Lausanne): *Le droit et ses limites: le juridique et le non-juridique*

1. Tout système juridique est production d'une histoire et d'une culture politiques déterminée, qui lui ont donné une organisation spécifique. Parler des limites de telles organisations peut s'entendre en deux sens, qui interagissent : premièrement, elles peuvent servir à différencier ces systèmes par rapport à d'autres ordres normatifs. Secondement, elles désignent ce que, par sa texture, le droit est hors d'état de réussir.
2. On comprend le concept de système comme une organisation aux structures différenciées de textes, de normes, d'acteurs. Ce qui caractérise un système est son autoréférentialité et ses modes de clôture (qui lui permettent de rester identique à lui-même) et ses modes d'ouverture (qui permettent les échanges avec son environnement).
3. Concernant la limite dans le second sens, on observera que la normativité comme mode d'action propre au droit le met souvent dans l'incapacité d'assumer pleinement les tâches de régulation qui lui sont confiées. Il s'agit d'une part d'une limite factuelle : celle de la technicité et du volume de ces tâches. D'autre part, la nécessité de plus en plus fréquente de prendre en compte les circonstances individuelles concrètes de l'application entraîne une légistique de diminution de la densité normative et, par conséquent, de déplacer une épistémologie fondée sur la répétition en direction de l'innovation.
4. Ces deux facteurs notamment font du droit un univers qui ne peut plus prétendre à une complétude cohérente : c'est un univers en constante évolution, qui exige pour sa mise en œuvre, de manière continue, l'apport d'informations provenant de son environnement. Ces apports circulent dans les modes d'ouverture du droit — la diminution de la densité normative et le recours à des expertises, des savoirs, des déontologies extérieures.
Cependant, en vertu de l'autoréférentialité du droit, ces apports doivent être sélectionnés et juridicisés pour être intégrés dans le système juridique et préserver ainsi sa clôture. Il y a là une double programmation à respecter : la sélection doit d'une part respecter le cadre normatif du droit et de l'autre porter sur un choix correspondant aux attentes sociales qu'il s'agit de convaincre de son bien-fondé.
Les limites du droit par rapport à d'autres ordres normatifs est ainsi définie par l'ordre juridique lui-même, dans le respect de cette double programmation.
5. Ce système a des présupposés politiques, culturels et historiques qui empêchent d'élaborer sans autre une essence du droit, valable *urbi et orbi* : notamment séparation des pouvoirs et liberté d'expression. Il n'est même pas certain qu'il puisse perdurer. En particulier, l'internalisation croissante du droit n'est guère conciliable avec son organisation telle que l'Occident l'a conçue. En outre, de plus en plus le droit devient l'objet d'une normativité supérieure, au nom de laquelle il est lui-même jugé : c'est le phénomène de l'économisation du droit.

PLENARY SESSION II (12.15-13.15)
Chair: François Ost

FERNANDO J. BRONZE (Universidade de Coimbra): *Les cas*-ornithorynque*: présupposés d'intelligibilité, caractérisation sommaire, solution de base proposée*

Exposé à l'érosion du temps, le droit est permanentement fouetté par ce même temps et se reconstitue intentionnellement et problématiquement (grâce à une corrélation dialectique) *au compas* de l'*effet modulateur* que le temps y provoque. Un effet qui se manifeste exemplairement dans l'émergence des problèmes : beaucoup de ces problèmes sont routiniers ; d'autres problèmes s'ouvrent sur la frontière de la préalable objectivation institutionalisée de la normativité juridique ; il y a cependant encore d'autres qui déterminent (qui provoquent) un élargissement de cette frontière, en la révélant (en la dévoilant) irrémédiablement oscillante. Ce sont ces derniers que je veux considérer aujourd'hui. Je les dirai les cas-*ornytorynque*. Le noyau dur du droit (en l'autonomisant comme droit) trouve, en effet, dans ses propres *limites* (dans les manifestations problématiques qui émergent comme *périphéries*) son viabilisant pôle central, c'est-à-dire, l' étymon fondant de sa permanente reconstitution historique (une reconstitution qui va du remaniement le plus léger à la supération la plus frappante!). C'est ainsi grâce à la dialectique qui implique les deux côtés de la mentionnée frontière ou limite : le côté du *dehors* (qui exclut) et le coté du *dedans* (qui inclut). Ce qui sépare *le dehors* e *le dedans* (l'extérieur et l'intérieur) n' est cependant pas une couture rigoureuse, c'est plutôt une ligne sinueuse imparfaitement esquissée, que le sismographe enregistre en connexion directe avec la pulsation (inquiète et inconstante, puisque ouverte au devenir) de la *praxis juridiquement signifiante*.

LUNCH

WORKSHOPS (14.45-19.45)
Trindade College

WS 1
Room 1.01
Chair: Valerio Nitrato Izzo

14.45-15.15 | Brisa Paim (Universidade de Coimbra): *New(?) textuality(ies)(?) and the autonomy claim: rethinking law's identitarian quest for convergence under law & aesthetics' «heterodoxy»*

The expansion, subversion, and recreation of law's familiar institutional universe taken forward by (neo) artistic-aesthetic humanisms seem to undermine orthodox identitarian ambitions based on "traditional" claims of legalism and formalism, as well as the theoretic/methodological assumptions that insure those claims – without giving in, however, to uncompromised centrifugal aspirations, such as those of pure pragmatism, technicality, and economism. Behind that manifold rejection lies an overall refusal to reinforce a monolithic "top-down" textualism, in order to embrace life's complexity in its pure (singular)

form instead of reducing it for the sake of the artificial lives pursued by the means of either abstract or instrumental forms of reason. In such a context, then, a sensorial and enriched legal experience could be fulfilled through narrative, rhetorical, performative, and emotional practical rationalities, once fed up by the classical inputs of phronesis, poiesis, and aisthesis, and leaving behind monolithic views on legal textuality and judgment perceived in both constative-descriptive and declarative-communicative strands. However, simply reproduce aesthetic heterodoxy as a given attribute or selfclaim – without first discussing the vision(s) on orthodoxy it implies – would mean first to undermine important methodological questions, such as those of the latitude of law's aspirations for convergence and the related issues of law's systematicity, sources, and interpretation. Starting from the assumption that the debate about law's limits must surpass the common ground of the orthodox-heterodox binomial, my goal is to discuss the possibility of law's autonomy – and what it can and cannot possibly mean – in the context of aesthetic approaches.

15.15-15.45 | Lung-Lung Hu (Dalarna University): *The Butcher's Wife – Two Limits of Law regarding a "Husband-Killing" Case*

In the 80's, Li Ang, a Taiwanese female writer, adopted a murder case in Shanghai in 1945 into a novel "The Butcher's Wife," that depicts a woman, due to her traumatized childhood and psychological condition caused by her husband and neighbours, kills her husband, a butcher, and dismembers the body like the way he does to pigs.

The woman who killed her husband in the real case in 1945 was sentenced to death. The intellectuals criticized that the reason why the law put her to death was because she was a woman, and a wife should not kill her husband no matter what. This sentence shows two limits of law: The first, It is hard for law to deal with a new situation. Like a female offender who killed her husband, according to the Chinese traditional law and culture, would definitely be sentenced to death. In 1945, a new era, female offender should not be punished as severe as it used to be, however, law was a residue from the past, it still made a very traditional legal decision. The second is about what law cannot do. Does law have to punish someone who is legally culpable but is not irresponsible for his or her action? Does law have nothing to do with those who are really responsible for a crime, like the neighbours in the novel?

Li Ang's novel tries to criticize the law and offer a legal explanation to exonerate the butcher's wife with a plea of insanity. However, it strengthens a stereotypical image of female offenders which is also a limit that Li Ang also tried to solve in her novel. Therefore, my paper is using this novel and the real case as an example to illustrate what literature will do when law meets its limit.

15.45-16.15 | Sérgio Mascarenhas (Researcher at CEDIS, Universidade Nova de Lisboa): *Composition, Representation, Improvisation. Law, Music and the Type/Token Divide*

Music has been theorized in terms of the type/token divide: A *musical work* (a composition) is a *type* of which the *performances* (the representations) are the *tokens*. The criticism of such theorization highlights that it is unable to adequately theorize musical improvisation, among other things. What if we look at Law along the lines of this theoretical debate about music? We can take a statute or any other normative (sub)system as the equivalent of a composition, hence as a juridical type; and we can take the instances of

application/ concretization of that juridical type – the juridical cases decided according to it – as the equivalents of the representations, in other words, as juridical tokens.

Starting from this basic insight, we may reframe in juridical terms the music theory's debate on the adequacy of the type/token divide, in particular on what concerns the theorization of improvised music. The expectation is that this comparative look at music and Law will provide insights useful to the theory and methodology of Law by addressing questions such as:

- Does the type/token divide have explanatory power in Law?
- In music, the discussion of the type/token divide is framed in ontological terms. If we can emulate that discussion in Law, does it mean that there is scope for a juridical ontology?
- Can we equate the aesthetic judgment about music with the practical judgment about Law?
- Is there scope for improvisation in Law?
- Is there a *public* in Law comparable to the public of a musical performance? What's its role?
- What are the implications for a procedural, reflexive and participatory methodology of Law?

WS 2
Room 1.05
Chair: Ana Margarida Simões Gaudêncio

14.45-15.15|Adam Dyrda & Tomasz Gizbert-Studnicki (Jagiellonian University Kraków): *The Limits of Theoretical Disagreements*

The existence of theoretical disagreements poses one of the most serious problems not only for positivists, but for all traditional approaches to jurisprudence. Pursuant to R. Dworkin theoretical disagreements, namely disagreements over "the grounds of law," are most serious and pivotal disagreements in legal discourse that have a particularly philosophical dimension. As we will argue, theoretical disagreements may be understood as disagreements between rivalry theories of law (legality) developed from varying platitudes about law and justice (folk conception of law). These theories, along with complimentary arguments framed within disagreements, contribute to what may be called "legal narratives." Even though the significance of theoretical disagreements has been widely recognized also by some of legal positivists (like S. Shapiro or A. Golanski), there is still no clear way of distinguishing between serious theoretical disagreements and pointless or futile theoretical disagreements. It is obvious that not every possible theory of law, legality or justice would do, but what are the limits? What is the rational threshold for accepting certain theoretical arguments? What meta-theoretical requirements have to be met by rivalry theories in order to constitute a rational dispute? In our paper we would like to address these issues by setting certain criteria that has to be met by any theory of law that aspires to be a "peer" in virtually any rational theoretical disagreement in law. As we will argue, these criteria are characteristic for theoretical disagreements in law which have a special feature: even though rivalry theories are in fact largely *underdetermined* by platitudes about law (and related normative phenomena), there are certain conventional, epistemic-practical, as well as ethical-practical constraints on the relation of *underdeterminacy*. In this light we will eventually discuss the way in which theoretical disagreements inform and shape "legal narratives" (understood as social dynamic semiotic structures).

Keywords: theoretical disagreements, peer disagreement, general jurisprudence, R. Dworkin, S. Shapiro, A. Golanski, narrative disagreement, legal narrative, legal positivism, metaphilosophy of law

15.15-15.45|Fernando Cáceres (Researcher at UCILeR – Universidade de Coimbra) ***Dogma(c)ti(vi)sm: the juridical(-political) path of an academic discipline***

What does dogmatics *know*? What *can* it *know*? What *should* it *know*? These are questions which the traditional juridical methodology, dominant during the 20th century, was not able to answer. This is because, other than in the academic knowledge of the legal science, it was actually interested in the functioning of legal practice, more precisely: the functioning of the judicial practice of law. To the traditional methodology, not the «theoretical *knowing*» but the «practical *doing*» crystalizes the core problem of legal scholarship. In harmony with its pragmatic approach, it denies proper relevance to the strictly theoretical knowledge, assuming that a pure reflexive analysis of law – *i.e.*: the investigation of the constitutive processes of law itself – nothing has to contribute. Intradisciplinarily, traditional methodology dedicates its energy to the themes of legal interpretation and legal argumentation, coming near, in order to articulate a (supposedly) strictly legal point of view, to the philosophy of law, with which it mobilizes, regarding the practical-argumentative and practical-interpretative "doing" of dogmatics, premises, postulates and normative values rooted at the frontiers between law and «moral»/«ethics». The present article suggests that the practical intention of the traditional methodology culminates in a politization, better yet: in a juridical-political activism of the dogmatics. Under the assistance of methodology, dogmatics does not want (also: is not able) to *learn* with law itself. It wants, instead, to *teach* legal practice how to "do" its job. Slips thus away an essential component of the processes of law's creation, which is: the «politics *of (the)* law», whose «constitutive will» the dogmatics tries to replace with its *disciplinary will* (with its legal interpretation and legal argumentation) – as if the politics of law was a problem to be decided by academics, not by law itself. Through the methodology's lens, dogmatics is therefore transformed from an academic discipline – which knows something specific about its object – to a field for a juridical-political discourse: *Dogmactivism*. Nevertheless, there is something new in town… The theory is back. Besides the suggestion about dogmactivism, this article brings forward for consideration the main concepts from a *theory of legal scholarship* (mos germanicus: *Rechtswissenschaftstheorie*) in order to analyze the methodological gains of today's renaissance of legal theory in its (intra)disciplinary relation with dogmatics – which has to be done, regarding the traditional methodology, in a theoretical double journey: destructively-reconstructively.

15.45-16.15|Rui Soares Pereira (Universidade de Lisboa):*Legal probabilism: a dilemma of legal epistemology?*

Probabilities are gaining a more prominent role in law. In addition to cases of factual uncertainty, situations of determination of civil or criminal causation (in particular, probabilistic or complex causation) and, in general, cases of decisions rendered in an environment of uncertainty, the presence of probabilities in other relevant legal discussions is now a reality. Following a brief description of probabilities in the legal domain, we will critically assess the tendency to adopt a probabilistic perspective in the discussion of legal problems and their respective possible solutions. Finally, we will consider if such a trend of

acceptance of what can be called legal probabilism hides a dilemma of legal epistemology that needs to be answered and, if so, how it should be answered.

WS 3
Room 2.13
Chair: Inês Fernandes Godinho

14.45-15.15|Anna Chmielarz-Grochal (University of Łódź): *The Limits to Constitutional Amendments and a Question of Constitutional Identity and Citizens' Consciousness (the Polish case)*

The cover issue of limits to constitutional amendments in the context of constitutional identity and citizens' consciousness is vitally important. In its brief analysis it may be reduced to the basic question about the role and value of a constitution itself in a multilevel (multicentric) legal order or even – in a broader sense – in a contemporary democratic state of law. Such question concerns the permissible scope of constitutional amendments and its limits. It is also linked to the concept of the constitutional identity and the level of citizens' constitutional consciousness – both in knowledge and in national identity aspect. Constitution's legitimacy has, in fact, a twofold legal and social nature.

There is really no dispute nowadays about the need of particular legal protection of constitution stability in a democratic state due to the system of values provided in such superior legal act. The values cover, in particular, the issues of a regime and organization of the state as well as „individual – state" liaisons. Furthermore, such values arise from common European humanistic ideas of great importance and influence on the society. This resulted with a legal tradition to provide a special procedure for introducing any constitutional amendments, particularly restricted in case of the changes to the provisions covering a state regime or individual rights and freedoms. Certain European countries (such as France, Germany, Italy or Czechia) provide clear rule of limitation for the permissible scope of constitutional amendments – namely, the eternity clauses. In other words, an eternity clause in the constitution or basic law of a particular state is a clause intended to ensure that the law or constitution cannot be changed by amendment. The Constitution of the Republic of Poland does not provide such clause. Nevertheless, it does not mean that it provides no limits at all. It is possible to point out certain „relatively perpetual and unchangeable" provisions that allow to determine the limits for permissible scope of amendments. In its very preamble – that may serve as *sui generis* ground for the fundamental rights of state and Nation – „principles as the unshakeable foundation of the Republic of Poland" has been mentioned. Similarly, the Art. 30 of the Constitution makes use of such wording as „inherent and inalienable dignity of the person" that is of „inviolable" nature.

However, in Polish legal theory and constitutional science there is no clear concept of constitutional consciousness. Legal practice, on the other hand, has provided such notion and its explanation in the case K 32/09 of Constitutional Tribunal, concerning conformity of the Lisbon Treaty with the Polish Constitution. The notion of „constitutional consciousness" had been examined as an element of a state as a sovereign entity. According to the legal practice and to the jurisprudence, the constitutional consciousness is determined by the provisions containing primary and general principles of the basic law (the Constitution) as well as the provisions concerning individual rights, in particular: the protection of inviolable dignity of the person and its constitutional freedoms; the principle

of sovereign state; the principle of democracy; the principle of social justice; the principle of subsidiarity and – last but not least – the rule of law principle. Substantial limits for amending the Constitution shall be considered as arising from such principles and values that had been recognized in the aforementioned ruling (K 32/09) as a source of constitutional consciousness in the context of delegating „to an international organization or international institution" – such as the European Union – „the competence of organs of State authority in relation to certain matters". There had been also certain procedural limits for changing the constitutional provisions covering substantial (from both – individual and state perspective) principles and values introduced to chapters I, II and XII. This gives to such provisions „relatively unchangeable" status.

The constitutional consciousness concerning the Constitution as basic law arises from the constitutional norms, principles, rules and procedures regulating its value and its amendment process. The socially- and politically-motivated changes to the system of powers as well as to the constitutional matters and legitimacy may be explained by reference to the constitutional consciousness, since it is related not solely to the „constitution in book", but also to the „constitution in action" and its political and social context. The European case-law, including the rulings of Polish Constitutional Tribunal, tends to confirm that the constitutional consciousness is a concept providing a certain content which is based on the axiological system of principles and values arising from the very „heart" of the constitution.

At the same time the constitutional consciousness shall not be regarded in individual terms solely, since it serves as a community-integrating factor. Such community of law and values is based on observance of democracy principles, rule of law and fundamental individual rights. The Constitution plays not solely the main legal role within the society, but also maintains the integrative and educational functions. If the society is aware of such role and functions (in other words: if it reaches the high level of constitutional consciousness) it tends to identify itself – as a community – with constitutional rights and values. The citizens' attitude towards the constitutional rights and values is linked, as a result, to a national identity viewed as a legal, axiological, historical and cultural community. The high level of constitutional consciousness – based on informed choices and knowledge – may serve as an additional source of the limits to constitutional amendment process and source of a self-restraint for the politics, preventing from rash political decisions on such matter. For that reason the proper legal education (including educational role of courts and their case-law) is of particular and great importance.

15.15-15.45 | Anna Kalisz (University of Łódź): *"Margin of appreciation" as a Limit for the ECHR Jurisdiction Emerging from Constitutional Identity*

I. Multicentrism has been perceived nowadays as one of the leading paradigms describing legal reality. Multi-level legal systems and legal orders are linked each to another on both legislative and decisional dimension. This not solely reshapes the classic concepts and paradigms of law and challenges the legal theory and practice, but also puts the emphasis on blurring the lines among legal systems in Europe[1] rather than on specifying their boundaries.

Multilevel protection of human rights may serve as a great illustration of the multicentric legal solution. It is provided not solely on the domestic and European level, but also has been aspiring (not entirely successful though) to cover the global level.

[1] „Europe" is hereinafter understood in terms of membership to the European Union and the Council of Europe – as a legal community – rather than in terms of geography *stricto sensu*.

II. However, recent political and social trends prove that there is a need for an alternative form of building a European identity. Mulitculturalism, pluralism, multicentrism are no more the prevailing perspectives for furnishing Europe and the concept of human rights has encountered with cotemporary populism and nationalism. Regarding the democracy crisis in the process of European integration (meaning not solely the EU, but also – and for the purposes of such paper – mainly the European system of human rights protection), the question concerning the possibility of building a European identity through shaping and strengthening the citizens' constitutional consciousness, as well as through integrating them around the principles and values which constitute the foundation of the constitution, should be raised. Current "democracy deficit"/"public legitimacy crisis" may be examined not solely from European, but also from individual perspective. The level of social consciousness on the role of public institutions (mainly in the area of human rights protection) corresponds with the level of constitutional identity. There is also a need for redefining patriotism – that provides the mix covering the sense of national identity as well as constitutional principles and values and "the constitutional traditions common to the EU member states". This determines its civic, universal and democratic nature.

III. Another question worth being pursued in such aspect is: are there any existing European concepts or instruments to support such development or is the "constitutional identity" purely a downward tendency or even it shall be considered as utopian in its nature.

The "margin of appreciation" may serve as an example of a positive response to aforementioned sort of needs, created long before the European integration fall into crisis.

Since the European Convention is of a very general, "open-texture" nature, the states are granted by the ECHR case-law with a doctrine of "margin of appreciation"[1]. However, there is a question, whether is it a tool for providing and protecting the "constitutional identity" or is it rather the proof that the ECHR has reached the dead end of the lack of a core European consensus on delicate matter of social values (as public morals or religion values).

The main goal of this very paper is to present the "margin of appreciation" as being far from the latter consideration. Such doctrine (and also a practical legal tool) links proportionality with subsidiarity within European space of HR protection, which means that the state should decide democratically what is appropriate in the domestic environment. This strengthtens the judicial dialogue between the ECHR and domestic courts. The ECHR's main – and growing - role is a sequent and constant supervision of national solutions undertaken in order to ensure that the rights laid down in the Convention are not interfered unnecessarily. This means that the ECHR is approaching the position of *sui generis* "constitutional court", what, in turn, may strengthen also the European integration in the area of human rights protection in a consensual manner, inspite of ongoing clutch and challenge.

15.45-16.15 | Luís Meneses do Vale (Universidade de Coimbra): Axiotelic *meaning,* phenomenological *modes* and sanctioning *media of social-democratic constitutionality as a transcultural project of politonomical social justice*

Favoured over a more *elegantly elusive* and perhaps *ambiguously symbolizing title*, the slightly enumerative and enunciative inflection of the opening paratext, while purporting to

[1] Vide: judgments of ECHR of 13.08.1981, Young, James and Webster v. U.K, no. 7601/76; 7806/77; judgment of 29.10.1992, Open Door and Well Woman v. Ireland, no. Open Door and Well Woman v. Ireland; judgment of 24.09.1993, Informationsverein v. Austria, no. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90; judgment of 21.02.2002, Matyar v. Turkey, no. 23423/94.

trace an abridged itinerary between some of the *stations* recently explored in the paths of a *doctoral research*, immediately betrays the mere panoramic range, digressive course, and expeditious pace tightly consented to the ensuing communication. Discursively entwined by the following considerations, five nuclear topics emerge.

(1) First of all, the *comprehension* of *constitutionality* as a *specific normative validity*, beyond mere functional differentiation, *dialectically* concerned with the *political* - as *abyssal* experience of the *common(ing)*, through all its layers of *agonistic, polemic and eristic difference* and *deferral*, *alterity* and *alternative*, *strangeness and alienation* - and thus culturally committed to a *physio-nomical, spatio-temporal, axio-teleological* and *inter-subjective bridging* of *human collectives*, genealogically rooted in the pre-legal (roman) Semitic and Hellenic morphologies of *nomos* (both as *pro-mise* and *de-sign*): the *self-transcendent enterprise* or *adventure of shared (and sharing) dwelling* and imaginary *travel* (with its inherent *cybernetics*)

(2) Secondly, the *meaning* of *social-democratic constitucionality* as a *project* of *structural responsibility* for *equal freedom* of *participation* in the *societal spheres* of a fragmented, globalized and individualized society, according to criteria of *proportion* (concretely assessible by law as *ius*), but under the need of just conditions of *modular intersectionality* and *synthesis* of *transversal commonalities*, as only granted by proper inter-institutional and trans-organizational media of communication and communion.

(3) thirdly, *the phenomenological trans-culturality* of grounds and conditions, sources and manifestations (principles, doctrines, arguments, precedents) displayed by the above-mentioned *normative sociality*, understood as a main constitutional content since modern times, albeit profoundly challenged by society's allegedly post-modern traits - all of which reinforce the shortcomings (*limits* and *limitations*) of an exclusively legal (specially judicial) response to the *political problem*, contemporarily focused in its *constitutive social dimension* (the *social question*), and therefore referred to the *transformational claim* of (and fundamental *bet on*) *peace through (social) justice*.

(4) fourthly, the practical-reflexive or structure-active *cultural nomicity* of the *means* required by the *realization of social justice*, politically disputed and democratically shaped, while righty pursued as a *social-democratic constitutional exigence* – considering them a key factor to a *mediological* polarization of the *nomos,* by dislocating our attention to the *constitutive mediality* and *throughput legitimation* provided by institutions and structures of *universal socialization*, as they warrant, guarantee and primarily sanction (make effective) such a *politonomy*, architecting and dynamizing *atmospheres*, *ecosystems* or *Systemic Lebenswelten* of real *aequalibertas*.

(5) Finally, the *inter-corporeal and incarnate foundation* of the normative *Sinn* or *meaning-sense* convoluted along the way - which brings us back to the relation of *soma and sema* underlying the human *rational* and *religious desire of connection* across time, space, difference, fact and norm, reality and idea, immanence and transcendence, hereby politically and socially problematized.

Coffee Break (16.15-16.30)

WS 4
Room 1.01
Chair: Luís Meneses do Vale

16.30-17.00|Maurizio Manzin (University of Trento): *Reasonableness of Limits, Reasonableness as Limit (in Legal Interpretation)*

My presentation aims at discussing the opposition between two different accounts on limits in legal interpretations: I will call them (i) "no limits option" and (ii) "pro-limits option". As for (i), it is based on a widely diffused understanding of individual freedom: that of a neverending break of every limit. This idea involves nowadays not only the commonly accepted moral limits, nor the material and social limits, but also the limits of conceptual determinations. As for (ii), it is based on the conjecture that limit is the condition of "no longer, not yet" – as such, a matter of *authentic* freedom. The "no limits option" can easily lead, in legal interpretation, to a radical contextualism according to which there would be unlimited meanings for a (syntactically and semantically) same legal text, depending on the pragmatic referents. The option of the *authentic* freedom, on the contrary, maintains that the existence of limits is reasonable, and that reasonableness itself is a limit to interpretation. In other words, the undetermined space of "no longer, not yet" in which the limit consists of is open to exploration by appropriate procedures of reasons-giving. According to the pro-limits account, common and reasonable core-meanings of a legal text should be sought also when contexts are different – and that would be precisely the nature of legal interpretation. Precedents of such an account can be found in Western legal philosophy from Aristotle to contemporary neurosciences (according to which reasonableness is *natural*) and under certain respects also in Roman law (which assumes that nature corresponds to reason). A remarkable consequence of the discussion on the two options deals with the concept of normativity, given that option (i) can conceive normativity only as an expression of will (the one to establish and to infringe limits), whereas option (ii) links normativity to reasonableness.

17.00-17.30|Larissa Emília Guilherme Ribeiro, José Djalisson Santos Oliveira (University Center of João Pessoa (UNIPÊ), Grad. in Law), *Reflections About The Post-Truth in The Criminal Proceeding: Capitu Was Unfaithful or Not?*

The present work proposes a study of the phenomenon and the dangers of the "post-truth" in criminal proceedings in the postmodern society, having a literary book "Dom Casmurro" as reference. The University of Oxford has defined the word "post-truth" as a word of the year 2016 and it can be define as "'relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief'. In Machado's book a criminal proceedings occurs in which the character Bentinho is, at the same time, narrator, victim, accuser and the judge. Capitu was judged based on the individual perceptions of Bentinho, extracted from disconnected evidences, which is taken as truth, in a true use of what we can call "post-truth", and using it basis of condemning it for crime of treason. The Capitu character did not defend himself and had no chance to. The "autist judge", who can be found in the figure of Bentinho, turns judicial decisions in acts of will, based on interpretations, being able to understand the truth as being infinitely manipulable. Gaving an idea that ontology is subject to epistemology and its involves a risk to society. It is also the removal of naturalness, that it is not a human innocence that we should all have, to the definitive proof to the contrary, that it is its force

and the argument of its redemption. The discussions bring up legal and literary aspects. In addition, a research will use an approach of qualitative methodological nature. Bibliography, authors, theories, articles and judgments pertinent to the proposed theme will be explored. The objective of this study is an exploratory study, since it details and analyzes the principles of post - truth and Brazilian procedural law.

17.30-18.00|Bettina Bor (Pázmány Péter Catholic University, Budapest, PhD Student), ***Peirce on the Normativity of Law***

The paper discusses certain questions of legal normativity as reflected in the pragmatist semiotics of Charles Sanders Peirce. Peircean semiotics is grounded in his ontological and metaphysical views, related to the interpretive capabilities of human beings. As is well known, Peircean pragmatism describes the relationship between the sign, the interpretant, and the object. From the perspective of the present paper, it is the interpretant that plays the main role in understanding and contextualising law as a system of signs.

In the paper I first examine what elements of the Peircean concept of semiotics can help us explain legal normativity and investigate the limits of law. I shall suggest that these are the following: (1) Peirce's phenomenological categories (Firstness, Secondness and Thirdness), referring to the intensity of 'semiosis'; and (2) the concept of Ground (the preliminary stage of semiosis), comprising some key principles and ideas. In the second part, I turn to (3) the relationship between the legal system and Thirdness. The legal system seems to belong to the category of Thirdness, but normativity depends on certain characteristics of the interpreting community (habit, tradition, custom, morality etc.). Finally, I discuss (4) the mental functions of the interpretant and the emergence of legal normativity. The interpretant, as the meaning of the sign, marks the limits of human knowledge, thus pointing towards an answer to the question of whether one may speak of absolute justice within the system of legal signs. My conclusion is that normativity emerges at the level of Ground, where universal principles and ideas shape the human mind.

WS 5
Room 1.05
Chair: Elisabeth Eneroth

16.30-17.00|António Ulisses Cortês (Universidade Católica Portuguesa): ***Human Dignity as a Legal Principle and the Limits of Law***

1. Human dignity is the most foundational principle of justice because dignity and recognition are certainly the minimum we all would fight for in an original moment of communication about the basic structure of a well-ordered society. This principle is double-sided, in that it has both legal and moral dimensions. It is the ultimate justification of human rights and constitutional rights, conceived as trumps according to Dworkin's legal theory. But it is also of major moral importance.

2. The Kantian idea of treating humanity in each person as an end in itself remains the basic criterion to understand the principle of human dignity. However, the categorical imperative

must be reinvented in order to overcome Kant's strict differentiation between an individualistic law and an altruistic virtue.

3. Duties to oneself and harm to self are beyond the limits of law. This is Mill's lesson, but a similar idea was already in Aquinas' theory of justice. Legally only the relationship to others is relevant. Therefore, this is the legal formula of the principle human dignity: "Humanity in each person must be treated by other people and by the State always simultaneously as an end in itself, and never as mere means".

4. It is not consistent with the principle of human dignity the sacrifice of a person's autonomy as mere means, as a disposable object, to achieve utilitarian goals of the State or other people. It is beyond the limits of law to allow the heteronomous sacrifice of peoples' life or body by others. The same could be said about the sacrifice of people's privacy by others, with no sufficient reason or within its essential nucleus. Finally, criminal punishment without guilt or labor dismissal without a reasonable justification also exceed the limits of law.

5. Kaufmann's negative utilitarianism is important to fill the meaning of Kantian categorical imperative, especially in Biolaw. In this field, Dworkin's Cartesian approach is not satisfactory. Hard problems like euthanasia or genetic selection in medically assisted reproduction must take into consideration the principle of humanity in each person as an end in itself as an unsurpassable limit of valid law.

17.00-17.30|Susana Aires de Sousa (Universidade de Coimbra): *The limits of causality and culpability: the boundaries and connections between law and science (from the perspective of criminal law)*

On a study about determinism and criminal law[1], Jos Andenaes relates the following story about the greek philosopher Zeno of Citium, founder of the stoicism and believer on a deterministic nature: "One day he caught his slave stealing and proceeded to whip him. But the slave was evidently one of those intelligent slaves who had attentively listened to his master's teaching about the inevitable connection among all things. And naturally he used this reasoning to exclude his responsibility. He objected that it was unjust to whip him, since it was his fate to steal. 'Yes - replied the philosopher - and to be beaten too".

This story is used as an example of the determinism-indeterminism difficulties and paradoxes, discussed in philosophy, science and law. In criminal law there are two fundamental categories that are in the center of the discussion of determinism/indeterminism: cause and culpability, and therefore open to the effects of this general discussion.

In order to achieve the liability judgment, criminal law uses categories summarized in words commonly used in other areas of knowledge, namely scientific and philosophical knowledge. A clear example is given by the concepts of *cause* and of *freedom*, which are used in the theory of crime as a fundamental support for the objective and subjective imputation of a criminal event. The possibility of knowing and predicting phenomena provides man the ability to dominate an event and to be liable because of its results (we note that the greek word *aitia* - αιτια - which originally meant guilt, was henceforth translated with the meaning of cause). However, both cause and culpability are wide-ranging concepts that cross multiple areas of knowledge, from law to science and philosophy.

At the center of our considerations is precisely the connection between these two concepts - cause and culpability - in the different areas of knowledge where they are used. In particular, causality is most relevant in physics and the neurosciences have recently addressed the

[1] Jos Andenaes «Determinism and criminal law», Journal of Criminal Law and Criminology, Vol 47 (1957), p. 406-413.

meaning of guilt. These two concepts – essential as they are in order to legitimate criminal liability – have however been questioned by those scientific disciplines, through different and parallel processes and pathways, in often paradoxical ways. Is the criminal imputation judgment jeopardized?

17.30-18.00|Inês Godinho (Universidade Lusófona do Porto): ***Law & Science: the autonomy and limits of culpability as a cornerstone to the ascription of liability***

In recent years, the advancements made in the field of neuroscience gained echo in criminal law, reigniting the discussion on culpability from the viewpoint of the possibility of its existence, considering the determinism echoes on the re-found inexistence of free will. This discussion triggered, once again, the boundaries and inter-relations between (criminal) law and science, namely on whether normative or legal concepts and categories should abide scientific breakthrough.

Bringing forth the theme of the limits of the law, this discussion is able to provide insight, with reference to a specific problem, as to there are plausible legal answers in the context of the ascription of liability if the subject of law ceases to be a responsible – and thus free – person.

Having under regard the evolution, both in science and in criminal law dogmatic, we aim to argue that in the particular case of culpability, the sought autonomy of law has limitations, and that without said limitation the ascription of liability would not have a correct answer.

For this argument we will firstly approach the meaning of culpability as a milestone of subjective responsibility in criminal law, so that we can then analyse some arguments made regarding the impact of neuroscience in the maintenance of a concept of culpability with the meaning given above, so that lastly we can proceed to the rebuttal of an overcoming impact of (neuro)science in the law and advocate the autonomy of culpability with the necessary limits imposed by the need of a plausible legal answer.

WS 6
Room 2.13
Chair: Brisa Paim

16.30-17.00|Gustavo Borges Mariano (Universidade de Coimbra, Master Student): ***The limits between Law and Morality/Politic: the problem of sexual education and the principle of equality in Portugal and Brazil***

This work starts with the problem of limits of Law (and its autonomy), the case's meaning exigences (Aroso Linhares) and the searching for which principle would provide foundation to normativity in a horizon of validity of the communitarian constitution (Castanheira Neves). The problem of the limits between Law and Morality/Politic is studied with this question: how does Law assimilate content and values and project a normativity about sexual education in Portugal and Brazil? It was found this summarized claim against the regulation of sexual education: the State cannot teach sexual education, because it would intervene in the parent's moral education and their "conscience right" – as they have

authority due to the immediate obligation of caring –, and it must be neutral. There are four main objections to that claim: they do not account public health and violent issues, as claims for normativity on sexual education; there is no profound argument about the right to be educated on sexuality and gender issues, with its correspondent duty; this correspondent duty could not be the parent's, which would not be legally dutiable; and there are implicit and fallacious presumptions that disregard the children's autonomy development in the matter of sexuality. Considering that children's bodies are culturally signified by performative mechanisms (Butler), they have the right to know about how their bodies are socially represented, how advantages and disadvantages are asymmetrically constituted and how it can imply in violence and health issues. Hence, it is the principle of equality that has the following political-juridical meaning as the foundation to the right to sexual education in a Democratic State: everyone must have equal opportunities to learn about sexuality, their meanings and their social effects. Thus, in Portugal, that duty is founded by equality and in Brazil the prohibition would be against this principle.

17.00-17.30|Kay Lalor (Manchester Metropolitan University): ***Complex entanglements and transnational assemblages: Approaching the limit and finding a continuum in human rights law***

Scholarship and activism in the field of gender, sexuality and human rights, has often struggled with the question of how newly achieved, and often much needed, rights protections might simultaneously have limiting or regulatory effects on the populations that they claim to protect. Equally, however, this newly developing 'cutting edge' of human rights protections also exposes practical and conceptual limits of human rights themselves. Not only does the increasing recognition of SOGI (sexual orientation and gender identity) rights expose important questions about the limits of law's capacity to encapsulate identity, experience, selfhood and relationality, it also opens up questions of how rights are 'operationalised' in response to events. In contemporary international arenas, for example, SOGI rights developments are influenced by transnational coalitions using a range of tactics ranging from boycotts and protests, to economic sanctions and diplomatic action, just as often as they are shaped by judicial pronouncements or UN debates.

Rather than assuming that these extra-legal rights based actions are beyond the limits of law, this paper seeks to explore their relationship with different legal systems in different circumstances. The paper explores how 'global assemblages beyond the state' (Ong 2005) reformulate questions of SOGI, rights, their limits, and the relationship between the legal and the non-legal. It seeks to view rights as a shifting continuum, within which the boundaries of inside and outside, self and other are reformulated and redrawn. This exposes not only the 'limits' of rights but more pressingly, the limits of contemporary international and transnational frameworks through which rights are administered. In particular, it brings into focus the spatiality of rights and the way that this spatiality differentially manifests at different times. In this framing, proximity and distance, subjectivity and identify are not stable, but are differentially constructed around different human rights 'problems'. The paper explores how this movement from 'limit' to 'continuum' means for how sense – of self, space and legality - can be maintained in the emerging field of SOGI rights.

17.30-18.00|Rosa Cândido Martins (Universidade de Coimbra): *Family law and the debate of the limits of law*

The invasive and pervasive intervention of law in the family occurs in numerous areas of law, such as social security law, labour law, fiscal law among others.

However, this panjurism does not characterize the core of civil family law. By the contrary, since the last decades of the last century family law has become thinner. The retreat of law regulating the constitution of the family, its ongoing life, the organization of the relationships between its members and its extinction is a growing trend in civil family law of western world countries.

The limits of law regulating family relationships, especially family relationships between adults, are frequently questioned as well as the need of a branch of law regulating the core of family relationships. Thus, transforming family law in a legal area where the discussion of the concept of law, its nature, its autonomy as well as the influence of other hetero-referential elements is more than needed. Its essential to its full and correct comprehension.

This may be seen as an effect of the pervasive influence of liberal political and legal theory in family law. Some liberal authors question the existence of a family law arguing that family pertains to the private sphere of individuals excluded from state intervention. Others sustain a thinner family law that does not impose a model of family or family relationships fully respecting the greater value of individual autonomy.

The legal discipline of marriage has been profoundly changed according to this trend. These changes have not proved to promote individual's happiness or satisfaction.

This essay aims to explore the reasons why it is this so and try to shed some light to other possible contributions of political and legal theory to a family friendly family law.

Coffee Break (18.00-18.15)

WS 7
Room 1.01
Chair: Maria João Antunes

18.15-18.45|Alexandra Mercescu and Raluca Bercea (West University of Timisoara): *Law's Other Limits*

Law, as an academic discipline has, for a long time, managed to preserve its disciplinary borders intact. It remained largely self-referential and, thus, its specificity (not necessarily easy to pin down conceptually) was left untouched: *lawyers* read and commented upon *legal* texts with a view to identifying correct *legal* answers. In other words, the limits of law were known: not positively (it was and still is difficult to capture the nature of law) but negatively (legal scholars knew what does not constitute law). In some legal spaces, especially in the common law world, postmodernity brought about a blurring of disciplinary genres and law, tough autarchic as it was, could not entirely resist these hybridizations, which inevitably involved relations of power. Thus, epistemically, law dominated (as in the law and literature case) and was dominated (as in the law and economics movement). On the other hand,

politically, law grew in importance as everything relevant to society came to be expressed in legal terms. We started to witness the so-called judicialization of politics, a phenomenon by which political matters end up being resolved inside legal battles and, therefore, move from a territory where anything can be said as an argument to a territory where only legal claims (thus, a specific vocabulary) hold. This paper seeks to address the relationship between the judicialization of politics and the functionalizing of law through hetero-referential elements – the former, we suggest, although it might seem counterintuitive, entails the latter. We shall take the European Union's Court of Justice's caselaw as a backdrop in order to examine in detail some occurrences of the relationship between law and other "contaminating" elements (economics, philosophy, sociology, ethics, etc). Is this *rapport* always one of authority (from the part of law)? Can epistemic equilibrium be reached? If so, how?

18.45-19.15|José de Sousa e Brito (Universidade Nova de Lisboa): *Public policy (ordre publique) and ius cogens as topoi of the question about the limits of law*

What are the limits of law? To answer this question, we need criteria that allow to separate the norms of law from other norms. These criteria are elements of the definition of law, they determine the extension of its concept. In a modern system of law such criteria are established by norms that identify the norms that belong to the same system. These norms specify the formal (about the mode of production or the sources) and the material (about the content) conditions of validity of the norms of English law or of Portuguese law, for example, as distinct legal systems and distinct from international law or European law. They belong to the material constitution of each system but do not differentiate conditions of being law from conditions of being English or Portuguese etc. law. The first set of conditions are however necessarily implied. Besides the norms that are recognized as originated by the same constitutional system or by the same system of sources, there are other norms (originated by other systems) that such a system prescribes to its addressees through transitional law, international private law, international law or constitutional change. In these cases the material conditions of validity of a norm are usually reduced to the conditions of its being law, according to the first system. The concepts of different types of constitutional policy (*ordre publique constitutionelle*) and of *ius cogens* define in these cases the limits of law. The paper gives a survey of such concepts and discusses their philosophical relevance.

19.15-19.45|David R. Papke (Marquette University, Milwaukee): *Beware the Nanny State: Neoliberal Ideology and American Health Law Reform*

When law is recognized as fluid rather than static, the power of ideology and its concomitant rhetoric to limit, reshape, and redirect law becomes especially clear. Ideological rhetoric sets out simplified versions of core arguments, lionizes heroic figures, and deplores disliked enemies. In the process, ideological rhetoric affects law reform.

Neoliberalism's impact on the efforts of American political progressives to improve health outcomes through law illustrates the manner in which ideological rhetoric might work. Neoliberalism's notorious rhetoric bemoans the tendency of the modern state to deny individual freedom and liberty, praises private markets, and deplores what it calls "the nanny state."

Powerful nanny-state rhetoric with regard to public health law has been a factor on all levels of American government. On the local level, nanny-state rhetoric successfully

challenged local ordinances controlling how large servings of sugary soft drinks might be. On the state level, the rhetoric undermined statutes requiring motorcycle riders to wear helmets. And on the federal level, the rhetoric contributed to the defeat of Congress's request for graphic, anti-smoking pictures on cigarette packages.

My goal is not to take sides in these controversies but rather to use them to demonstrate how neoliberal ideology and its concomitant rhetoric might limit law reform. Law, most agree, has porous borders; ideology might therefore infiltrate and, once inside the borders, reshape law for better or worse. Indeed, the examples noted above raise questions about the very relationship of law and ideology. Might they be perceived as fully interlocking discourses? Should law be recognized as primarily an expression of whatever in a given time and place might be the dominant ideology?

WS 8
Room 1.05
Chair: Susana Aires de Sousa

18.15-18.45|Mario Ricca (Università di Parma): *Perpetually Astride Eden's Boundaries. The Limits of the 'Limits' of Law and the Semiotic Inconsistency of 'Legal Enclosures'*

Legal systems can be taken metaphorically as semantic and pragmatic enclosures. The ancient world gives us at least three literary loci displaying the self-disruptive significance of such metaphors if assumed as practical guidelines that attempt to steer human experience. The first such loci can be found in biblical Eden (*Genesis* 2,8-3,24); the second in the Phaeacian garden described in Homer's Odyssey (VII, 112-132; XIII, 172-224); the third in the stories of the first and second Mythical Athens included in Plato's *Timaeus* (23 *D* – 25 *D*) and *Republic* (372 *A* – 374 *A*). In all these tales, human beings transgressively, although almost ineluctably, end up straying over the semantic-spatial borders which categories and rules have given them to encompass their experience. All these literary loci enshrine both a non-Greimasian semio-cognitive as well as a constitutional lesson for contemporary lawyers and rulers.

My intent is to use this lesson to demonstrate how the most relevant limit of legal systems, if taken as semantic and pragmatic enclosures, consists precisely in their inability to constitutively limit themselves and their semiotic borders. This inaptitude is due to the semiotic 'exceedance' of the phrastic or descriptive parts of legal rules even more than the semantic vagueness of the values underlying their legitimacy.

Any attempt to define the semantic and spatial boundaries of human experience by means of verbal enunciations implies the use of categorical schemes to define the legitimate and/or forbidden behaviors. But categorical schemes, in turn, comprise boundaries that draw protean verges between the inside and the outside of each category. The categorical 'inside'—compellingly—tends to exceed its borders so as to protrude out toward what is outside the category. In turn, the 'outside' shows more often than not some continuities with the axiological/teleological patterns underpinning the semantic boundaries of legal rules.

Any attempt to limit the competence/extension of law, if taken in its semantic/spatial significance, would seem to end up unveiling what law could or should be but it is not. Relying on the above literary loci, I will try to show how this apparently contradictory

implication is inherent in the dialectic between equality/universality and difference/plurality that is part of categorization itself, and thereby of the semiotic prerequisites for any legal rule.

18.45-19.15|Beatriz Barreiro Carril (Rey Juan Carlos University, Madrid): *Ziad Doueiri"s "The insult" or The limits of Law: Theatre, Memory and International Cultural Rights*

Memory Law can be currently considered as a subfield of Law in growing development. This papers argues that the new approaches of the United Nations Special Rapporteur of Cultural Rights (SRCR) are improving Memory Law by the use of *codes* other than Law. In this sense, this mechanism goes further that the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. In what can be seen as a *intersemiotic process*, the SRCR prompt "cultural workers" "to be engaged in critically analysing the information that exists and to develop meaningful collaborations and relationships with historians and academics[1]" for the construction of inclusive narratives which at the same time are respectful with the true and include voices who have been silenced in construction of the "official" memories. In this sense, it is *only* by using *extra-legal frameworks of meanings* that Memory Law can be really *effective*.

In order to practically illustrate such an argument this paper will apply the *codes (or semiotics)* of applied drama/theatre[2] to the film of Ziad Doueiri "The Insult," which will be presented in this paper as a practical example in harmony with the approach of the SRCR. The film starts with an insult made by a Palestinian refugee, Yasser Abdallah Salameh to a Lebanese Christian Tony Hanna. This incident ended in a court case that had all of Lebanon in suspense, including the president, who mediated between the two protagonists. Law by itself proved to be useless. Contrary, the conflict could be solved (and the *social need* – for using the expression of this call – could only be satisfied) by using what this paper's author will present –and explain – as an applied drama/theater approach to the case.

19.15-19.45|Marta Dubowska (Jagiellonian University Kraków, PhD Student): *The structure of a legal narrative (an analytical view)*

After the "linguistic turn" the influence of narratology within the field of jurisprudence cannot be underestimated. Since legal discourse is inclusive of other types of discourses (like the historical discourse or literary one) the influence of narratology, mainly interested in elucidating the ways in which (hi)stories are told within the domain of law, is rather obvious. What is not clear, however, is the exact way in which the narratives about legal institutions (as told in public), or narratives about legal duties (as told before the court), are structured, given the fact that at many points they are dependent on different, not specifically (or exclusively) legal types of narratives. This is the main question I'd like to ask. In the field, there is no clear and precise definition of said narrative, one which would be perpetuated by many authors. In particular, there is no agreement on whether the way we frame a "legal narrative" expands or limits the understanding of law, its institutions and

[1] See Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed Memorialization processes, 2014, p. 70. See also her 2018 on Artistic freedom and societies respectful with human rights and democracy.
[2] See in this sense the classic work of Eco, U. Semiotics of Theatrical Performance,The Drama Review: TDR Vol. 21, No. 1, Theatre and Social Action Issue (Mar., 1977), pp. 107-117 but also Aoimhe McAvinchey (2011) Performance Affects: Applied Theatre and the End of Effect, Contemporary Theatre Review, 21:2, 233-234.

obligations. In order to answer this question, one has to provide a comprehensive definition of narrative in general along with certain criteria that would make a particular narrative a "legal" one. Only then one can differentiate between legal and other types of narrative, and eventually determine the roles the latter play within the former. In my attempt to provide such definitions I would like to treat a "narrative" not as merely referring to a kind of "story", but rather as a methodological category that is generally ruled by certain universal rules.

Friday, 24th. May

VISIT **(9.15)**

WORKSHOPS (11.30-13.00)
Trindade College

WS 9
Room 1.01
Chair: Alexandre Dias Pereira

11.30-12.00|Anel Marais (Aberystwyth Law School, Wales): *The limits of legal imagination*

The proposed paper uses as its starting point comments made by Paul Ricoeur in his 1996 essay entitled 'Reflections on a new ethos for Europe'. He starts the essay by saying that the problem of the future of Europe is a problem of imagination. He regards this lack of imagination – the inability to imagine the future as a radical opening, as an 'unprecedented problem'. He then makes reference to a so-called 'post-national state' where it may be possible to imagine the establishment of as yet 'unprecedented institutions'. The 'political imagination', needed for such an undertaking has gained particular relevance in the current climate of fractious international relations. For Ricoeur the central problem is finding, or at least *imagining* a way to combine "identity" and "alterity"". The aim of the essay is to put forward suggested models of integration between these two extremes.

Ricoeur proposes three models (also called mediations): the model of translation; the model of the exchange of memories; and the model of forgiveness. All three models aim at resisting irreducible pluralism and the danger of incommunicability. All three these models are problematic, topical and radical. According to Ricoeur translation is the best way of demonstrating the universality of language, so-called crossed narration is the best way of sharing the memories of others and, most problematic, forgiveness is the best way of 'lifting impediments to the practice of justice'.

The concept of post-nationalism is still in an early stage of development. The proposed paper will provide a brief exploration of this new imaginary opening. The paper hopes to contribute to the ongoing debate on the balance between universality and historical/cultural difference and perhaps even a new vision on integration.

12.00-12.30|Miguel Régio de Almeida (Researcher at UCiLeR – Universidade de Coimbra): *The limits of legal imagination: revising Philosophy of Human Rights' foundational Events and Myths*

Historically Academia is the main framer of the legal identity, thus shaping not only the limits of Law, but also the boundaries of the legal imagination. Taking the Lacanian 'mirror stage' as a springboard, herein I will be concerned with how (critical) legal education will sculpt 21st century jurists' *forma mentis* regarding Philosophy of Human Rights.

A recent academic subject, this jusphilosophical field has been mainly subjected to the vices and myths commonly held beneath the hegemonic approaches to International and Natural Laws, therefore reproducing their original Eurocentric, colonial, capitalist and religious biases. Meanwhile, the ground for a counter-hegemonic Philosophy of Human Rights has been already laid out by some critical legal scholars, through the examination of legal mythologies (Peter Fitzpatrick) and paradoxes (Costas Douzinas), and via the radical innovations due to the New Approaches to International Law (Martti Koskenniemi), Third World Approaches to International Law (Antony Anghie, Upendra Baxi) and Decolonial Theory (José-Manuel Barreto). However, Philosophy of Human Rights still lacks an aggregated analysis of its key-Events and generated Imaginary, in order to provide a proper 'pedagogical turn', following Duncan Kennedy's classical appeal.

This is where my research and pedagogical proposal fit. Under a 'history from below' perspective, drawing on those scholars and adopting a Foucaultian and Blochean mixed-approach, I scrutinize the foundational Events of Philosophy of Human Rights, emphasizing its 'Darker Side' (Walter Mignolo) and the axis colonialism/slavery. From the Colonial Encounter to the Universal Declaration of Human Rights, I highlight the repressive and the emancipatory dimensions of such key-moments, and how they shaped the legal imagination. My aim is to deconstruct some of the main modern mythologies and narratives that restrain the legal imagination, hence enlarging it towards counter-hegemonic horizons and possibilities, revising the limits and 'signifieds' imposed by the orthodox approach to the 'signifier' Human Rights.

12.30-13.00|Leandro Rocha Jacondino (Universidade de Coimbra, Master Student): *Justice Speaks: Encounters With Difference, Plurality, And Law*

Starting with the idea of the treatment of the law as language (using two distinct categories: violence and translation) and exploring *deterritorialization* not only as a phenomenon that constitutes the crucial challenges of our time, but above all as a fundamental experience for all times, especially for those who are mobilized by the global era, my intention is to explore aspects of the law that plurality and difference irreversibly bring. Inserting *jurisprudentialism* as the ideal framework of narrative rationality, attentive to the difference, to the plural forms, we can immerse ourselves in the effort of understanding everything that brings us closer, especially when dealing with the «counterpoint between the *violence* of rules as *criteria* and the practical *consonance* of principles as foundational *warrants*» (J.M. Aroso Linhares). This article engages with today's scenario, to find possible alternatives that enable a decision-making approach in order to promote the encounter, comprehension and consequent understanding (of the many differences) that exist in ethnic communities or groups involved, through a special translator attitude: the use of a *translation mask*.

Keywords: *Law*; *Deterritorialization; Difference*; *Plurality*; *Translation Mask*.

WS 10
Room 1.05
Chair: António Ulisses Cortês

11.30-12.00 | Riccardo Bertolotti (Sapienza Università di Roma): *Limits of Law*

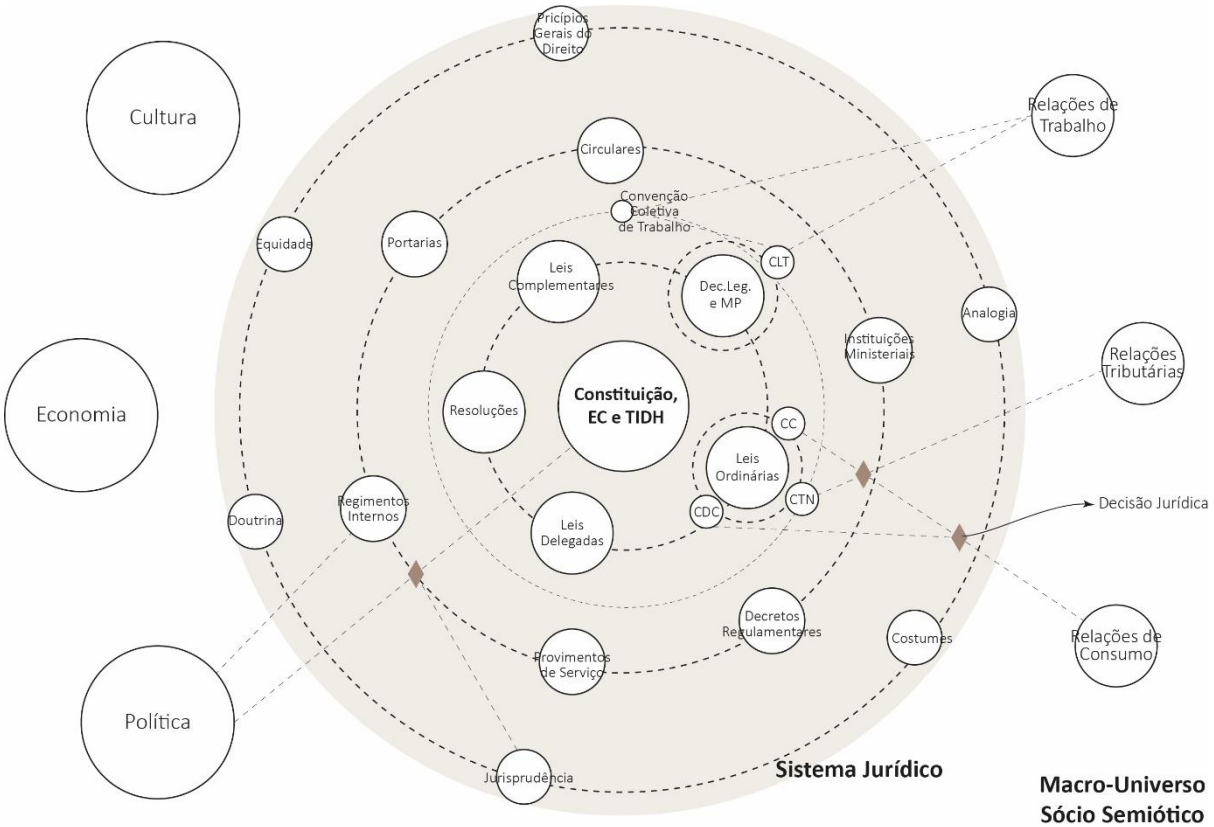
The expression "limits of the law" may be regarded in a dual sense: namely, by one hand, as the emergence of a crisis of social legitimacy regarding the juridical phenomenon taken as a wole, involving a devaluation of its role within a given society. By the other hand, this theme can encounter a kind of semantic *dérapage* of the word "law" itself, such as the impressive growth of heterogeneous (sometimes generic, despite their fine intentions) theoretical addresses, regarding the matter of the agentivity and of the sources of the law. By this point of view, the law is becoming more and more, in the words of Hjelmslev, merely a "form of expression": when law founds its sources everywhere, the content level appears to pulverize into an increasing fail of significance. Therefore, in this contribution we suggest to consider the relevance of the word "nomos". While for a jurist such as Robert Cover a "nomos" is regarded as a "normative universe", conceived in terms of narrative-mediated processes, (which indicate "the path and the values"), Carl Shmitt takes into account another dimension of the "nomos", that of the spatialization of the law. In particular, in the comparison the emphasis is driven on the matter of pluralism: i.e. an axiology that provides the proliferation of meaning and values within a society, which is valued as euphoric by Cover, but disphorized by Schmitt. We suggest that the different (in some respects complementary) ways in which these two authors draw their gaze on the matter of the "nomos", have something to say about two developement directions of a law that goes "beyond the limits". In fact, the matter of what can become a source of law (the "meaning" rising from cultural claims for Cover; the spatial *Ordnung* for Schmitt) seems to bind to this issue to that of the extention of the agentivity of law, or, in other terms, of how long can the law be regarded not merely as a "form of expression", but also of the content.

References

Cover, Robert M. (1983) *The Supreme Court, 1982 Term. Foreword: Nomos and Narrative*, in «Harvard Law Review» vol.97, n.4, pp.4-68. Tr.it. *Nomos e narrazione*. Giappichelli, Torino 2008
Foucault, Michel (1966) *Le corps utopique, suivi de les hétérotopies*. Lignes, s.l. 2009
Greimas, Algirdas J. (1976) *Sémiotique et sciences sociales*. Paris, Seuil
Hammad, Manar (2001) *Lire l'espace, comprendre l'architecture*.
Landowski, Eric (1989) *La société réfléchie*, tr.it. *La società riflessa. Saggi di sociosemiotica*. Meltemi, Roma 1999
Lewis, Eric (2006) *The space of law and the law of space* in «International journal for the semiotics of law», n.19, pp.293-309
Schmitt, Carl (1950) *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, tr.it. Il nomos della terra, Adelphi, Milano 1991
Wagner, Anne; Sherwin, Richard K. (2014) *Law, culture and visual studies*. Springer, Dordrecht

12.00-12.30|Eduardo Carlos Bianca Bittar (Universidade de São Paulo): *The concept of Legal System: An approach from Semiotics of Law*

This is a reflection about the conception of *Legal System* based on the methodological approach of the *Semiotics of Law*. This article exposes a conception of legal system, following the analytical dimension of the *Theory of Law*. The *semiotic* conception, which comes from *École de Paris,* and is adopted here as a point of inflection of this analysis, form the idea that *Law is a language*, and that the *language* presupposes the understanding of *signs* (verbal and non-verbal), as a threefold, complex and dynamic relation. In these terms, it can be said that the system of law, in an semiotic-legal approach is a *scheme of texts and legally relevant significances.* Considering Law as a *system of significances,* it implies assuming the concept of *jurisdicity*, which the *system of law* operates via a *semiotic scheme,* which provides the interconnection of not only *syntactics* of legal texts, but also *semantics,* as far as the exchange of contents is part of the activities of legal actors. Thus, its fundamental structure acts as a *semiotic network,* taken against an *intertextual network,* where the entanglement defines the reciprocal conditioning between the systematic elements. For a clearer visualisation of the format of the system of law, the approximation of the *semiotic theory* counts along with *theoretical physics,* following in close approximation by the semiotics of Umberto Eco. In fact, in the system of law, it can see the circular movement around the centre, which provides *unity* and *centrality,* since it is the *discourse source* of the system of law *radiating discursive of meaning* about the *micro-universes of discourse*. The representation of the system of law, in the vision of the *Semiotics of Law,* can be mirrored in the figure below:



12.30-13.00|Valerio Nitrato Izzo (Università di Napoli Federico II): *The Duty and Right to Justification in Legal Dilemmas*

Legal dilemmas seem to capture a paradox apt to illuminate some important challenges for contemporary law. While the *hyper-juridicisation* of social life grew in most legal systems, its capacity for providing legal answers is in decay and slowly being substituted by a set of "normativities" (Ost 2016) in which boundaries between law and non law became blurred along with the contested distinction between easy/hard cases (Linhares 2017). In this paper I will analyse the features and elements of legal argumentation in so called tragic cases and constitutional dilemmas (Atienza 1997; Zucca 2007). In such circumstances legal norms able to solve such cases are of difficult finding and application. Grounding on theories of legal argumentation in contemporary legal thought, I will try to show how it is possible to argue for a "right to justification" in legal dilemmas. This right to justification (Forst 2011; 2017), because of the *non liquet* obligation in most legal systems, should be granted through a justified decision. In this paper I defend the thesis that are the argumentative patterns chosen that can become the ground of the legal decision, even if this move us far from the usual depiction of the solution of a case as an application of the rule most appropriate for it.

In the first part I offer a reconstruction of the different uses and definitions proposed for "tragic cases" and "legal dilemmas". In the second part I will make bridges between theories of legal argumentation and Forst's idea of a right to justification. Then I will briefly analyse some cases from a variety of jurisdictions in order to illustrate the legal justification dynamic involved. In the concluding remarks I will point at the function the theory of legal argumentation can play in a tentatively defined "phenomenology of tragic judgment".

LUNCH

PLENARY SESSION III (15.00-16.00)
Faculty of Law Auditorium
Chair: José de Sousa e Brito

MANUEL ATIENZA (Universidad de Alicante): *Le post-positivisme et les limites du droit*

Une conception du Droit est un ensemble articulé de réponses que l'on doit apporter aux questions primordiales concernant le Droit. Et l'une de ces questions, peut-être la plus primordiale de toutes, porte sur la manière de tracer les limites du Droit, c'est-à-dire, quelles sont les frontières entre ce qu'est et ce que n'est pas le droit, entre le Droit et son environnement.

En termes très généraux je crois qu'il convient d'affirmer que cette conception, jusque vers la fin du XVIII^{ème} siècle, était représentée par une vision du Droit naturel ; qu'à partir de cette date et dû à une série de facteurs historiques (la consolidation de l'État moderne et la « positivation » du Droit), l'iusnaturalisme a été remplacé par le positivisme juridique ; et que récemment, comme conséquence surtout du phénomène de la constitutionnalisation et de la globalisation des systèmes juridiques, le positivisme juridique, dans n'importe laquelle de ses modalités, a cessé d'être une conception fonctionnelle du Droit.

En ce qui concerne particulièrement le monde latin, la conception dominante du Droit semble être encore celle du positivisme normativiste ; le Droit consiste essentiellement en un ensemble de normes qui peuvent être comprises et classées de diverses manières. En termes généraux, ce qui prédomine c'est une vision systématique ou holistique (il s'agit de caractériser l'ensemble, non pas chacune de ses composantes) qui tend à mettre en relief les aspects de coactivité et de dynamicité pour distinguer, en particulier, le Droit de la morale. Et la principale faiblesse de cette conception porte, d'après moi, sur ce qu'il convient de qualifier comme « l'idéologie de la séparation », qui semble unir tous les auteurs positivistes dans une tentative de tracer les frontières trop tranchées entre le Droit et son environnement, entre le Droit, la morale et la politique, entre l'être et le devoir être du Droit, entre le descriptif et le prescriptif et l'évaluatif, entre la législation et la juridiction… Le résultat en est une vision excessivement pauvre du juridique qui offre une description et une explication de nos ordres juridiques bien peu satisfaisante et désormais incapable de guider la pratique juridique.

La principale alternative du positivisme juridique est une conception du Droit que l'on peut (généralement) dénommer post-positivisme. Sa caractéristique principale consiste à voir le Droit non exclusivement comme un ensemble de normes, mais essentiellement comme une pratique sociale menant à l`accomplissement de certains objectifs et valeurs. Il ne s'agit pas de nier l'aspect autoritative du Droit, mais de comprendre que les normes, la coaction, etcétéra constituent en quelque sorte la forme, l'organisation externe du Droit, qui doit s'accoler avec son côté interne, avec le Droit considéré comme un système de fins ou comme une idée de fin (l'origine récente du post-positivisme se trouve chez Ihering, chez le « second Ihering »). C'est ainsi que se produit un changement dans « l'ontologie » du Droit, car désormais cela n'est plus conçu comme un objet, comme une réalité qui se trouve « á l'extérieur » et qui doit être décrite et expliquée par la théorie, mais plutôt comme une entreprise, un artefact social, une activité qui se déroule dans le temp et dans laquelle s'articulent de manière très complexe des moyens et des fins ; la théorie du Droit fait aussi partie de cette activité et de cette pratique, et c'est pour cela que les objectifs d'une conception post-positiviste du Droit ne sont pas uniquement cognoscitifs (portant sur la description, l'explication et l'analyse des concepts), mais ils sont aussi pratiques et normatifs.

L'une des thèses centrales du post-positivisme est celle de l'unité de la raison pratique, et cela ne signifie pas que le Droit puisse être réduit sans plus à la morale ou à la politique mais que cette unité a un caractère complexe. Ainsi donc, d'une part, il est vrai que les raisons ultimes d'un raisonnement justificatif sont de caractère moral ou que la politique conditionne la pratique juridique dans toutes ses instances. Mais, d'autre part, le Droit est une condition de possibilité pour que la moralité puisse exister, et, comme cela semble évident, l'un des traits du constitutionnalisme (en tant que phénomène juridico-politique) est la soumission du pouvoir politique au Droit. Tout cela ne veut pas dire que les rapports entre ces trois composantes de la rationalité pratique soient uniquement des rapports de complémentarité ; entre le Droit, la morale et la politique il y a des continuités mais aussi des discontinuités ; le Droit n'est pas une branche de la moralité politique et le raisonnement juridique ne peut être conçu comme un cas spécial de l'argumentation pratique rationnelle.

Une conception post-positiviste du Droit est aussi en condition d'apporter une réponse satisfaisante à deux types de questions qui se posent concernant les limites du Droit à partir de la perspective de la juridiction. L'une est de savoir s'il existe ou non une réponse correcte pour chaque cas et, en rapport avec cela, comment faut-il structurer la discrétion judiciaire. Et l'autre (qui est, si l'on veut, un aspect de la précédente) porte sur la question de l'activisme judiciaire, c'est-à-dire existe-t-il des limites marquées par le Droit aux juges et aux applicateurs, que ceux-ci ne peuvent transgresser sous peine d'abandonner la pratique juridique (et de mettre en danger les valeurs de cette pratique) ? La réponse que l'on offre ici est axée sur la reconnaissance de l'existence (bien que de manière extraordinaire) de cas tragiques, c'est-à-dire, des cas pour lesquels le système juridique ne peut offrir aucune

réponse correcte (ce n'est pas qu'il y ait plusieurs réponses qui peuvent être correctes, c'est qu'il n'y en a aucune). Par ailleurs, il convient de réviser le concept d'activisme judiciaire dans le sens où le juge actif (mais non pas activiste) ne peut être ni positiviste ni « néo-constitutionnaliste » ; il doit parfois contribuer à la création d'un nouveau Droit, mais en agissant toujours au sein de la pratique, c'est-à-dire, sans mettre en danger (en étant cohérent avec) les signes d'identité -les valeurs- de son système.

Coffee Break (16.00-16.15)

WORKSHOPS (16.15.18.15)
Trindade College

WS 11
Room 1.01
Chair: José Manuel Aroso Linhares

16.15-16.45|Mateusz Stępień (Jagiellonian University Kraków): *Law as a Primitive Tool. The Confucian Voice on the Limits of Law*

The issue of the limits of law has so far been considered mainly in the context of Western assumptions and presuppositions related to law and its role in maintaining social order. Also, non-Western attempts to address this issue, embedded in the different worldviews, need to be taken into account. This paper aims to reconstruct and critically discuss the Confucian thoughts on the limits of law, understood here as barriers and limitations (that are related to the very nature of law, its both basic features and methods of operation) in establishing and maintaining social order by using law/legal tools. A specific Confucian approach towards the limits of law results from both a particular understanding of the social order or rather ordering (Confucian philosophers have developed the aesthetic-based understanding of order/ordering) and strong predilection for some means of maintaining order (Confucian philosophers preferred values harmonization based on certain personal virtues and skills that make situationally sensitive approach to each decision possible). The analysis of the place of law in The Four Books (四書五經) shows that in Confucianism law is treated as a merely primitive tool, in respect to its role in achieving social values (the so-called axiological primitivism of the law thesis). Confucian philosophers have stressed that law, due its inherent qualities, cannot be used for values harmonization. In addition, the more detailed reading of Confucian classics brings the possibility of dismantling the axiological primitivism of the law thesis into a few narrower claims (the axiological alienation of law, the one-dimensionality of law, the inflexibility of law, the uselessness of law as a way of cultivating desirable personal skills). In sum, such considerations allow broadening the deliberations about the limits of law.

16.45-17.15|Ana Margarida Simões Gaudêncio (Universidade de Coimbra): *Legal validity within the limits of law: reflections on the frontier(s) between juridicity and ajuridicity*

The proposed reflection, on the possibilities of understanding *legal validity* within *the limits of law*, will be concentrated in questioning the frontier(s) between *juridicity* and *ajuridicity*, considering the intentional relevance of semiotic approaches, but not searching for a narratively justified exposition of such frontier(s), nor for a constitutive heteronomy of substantially binding morality (or *moralities*), as the foundational and determinant signification of juridicity. It will rather focus on a reflexive critique of the *post-modern* "promises of legal semiotics" (J. Balkin), and, still, look for a normative comprehension of the substantially filtered and inter-subjectively stated – and axiologically and dialogically constituting – foundation(s) and content(s) of juridicity. Intending to discuss whether *autonomous material foundations*, rather than *meanings(-senses)*, of law can actually be (or not) asserted at the present time (C. Neves) – in face of the growing plurality and complexity of *ways of life*, and therefore, of *comprehensions* of *subjectivity* and *inter-subjectivity* –, such a question will be posed by discerning the possibility of conferring normatively constitutive *intentions* to a substantial distinction between *juridicity* and *a-juridicity* – integrated and filtered by *normative principles*, as axiological foundations of law –, and, therefore, by discussing the foundation(s) of *tertiality* in law, as a *substantial* inter-subjective and constituting requirement of *juridicity*, anchored in *reciprocal recognitions* of *ethical dignity*… In order to understand the possibilities of assigning autonomous foundational *objectivity to law* – as *foundational validity of law* –, and, thus, presupposing that *collectivities* (sometimes, though not always, the *communities*...) – in temporally and spatially identified situations – assume *law* as a substantially and formally specific expression of *bilaterality* in the intersubjective determination of the reciprocal equilibrium and development of the corresponding subjectivities… and continuously question their substantial and formal *limit(s)*...

17.15-17.45|Miklós Könczöl (Pázmány Péter Catholic University, Budapest): *Forgetting Oneself and Finding Meaning: A Murdochian View on the Grounds of Morality and Law*

In most of her philosophical writings, Iris Murdoch discusses the basic concepts of morals, and the concept of the Good in particular. She develops her views in contrast to contemporary currents, and linking back to the Platonic realist tradition of moral philosophy. This paper first summarises the key elements both of her critical position and positive theory, based on three of her essays from the 1960s: "The Idea of Perfection", "On 'God' and 'Good'", and "The Sovereignty of Good Over Other Concepts". The second part of the paper then turns to the concept of 'meaning' (problematised by Murdoch herself, but not used to formulate her own position), which seems to provide an useful starting point for interpreting Murdoch's Platonic argument. Finally, the question is raised how far such an interpretation can help us understand the role of law in human moral agency, as well as the 'semiotic' difference between law and morals.

17.45-18.15|Elisabeth Eneroth (Malmö Universitet): *The Limits of the Law in Critical Substantive Validity Testing of Legal Norms*

The general starting point for this paper is my monograph *Critical substantive validity testing of legal norms. The example of homes for care or residence* (2016). I have elaborated a legal analytical tool for critical substantive validity testing of legal norms. The tool has five steps: 1 The choice of a legal norm 2 The analysis of the structure of the argument 3 The validity indicator 4 Linguistic rationality 5 The prospect of factual acceptance. The legal analytical tool is a conversion of Kaarlo Tuori's *Critical Legal Positivism* (2002) and his conception of legal validity and Jürgen Habermas' method rational reconstruction as presented in "What is Universal Pragmatics?" in *Communication and the Evolution ofSociety* (1979) into practical use in legal philosophy. The tool won support in application on the example of homes for care or residence (institutions).

The specific starting points for this paper are two research results in my earlier research, partly *the linguistic limiting effects of the legal order* in elaboration of the third method tool for performance of critical substantive validity testing of legal norms, linguistic (sub)competence, regarding explaining a legal actor's argument for justification and its build, partly *the linguistic limiting effects of the legal practices* in application of the third method tool in the concrete case. The purpose of this paper is to elaborate *the linguistic limiting effects of the legal order* and *the linguistic limiting effects of the legal practices* as two concepts, which shall *complement* the third method tool for validity testing. They shall be used in reconstruction of the legal actor's practical knowledge of the sub-surface-levels of the law. The elaborated concepts are examples of the limits of the law in critical substantive validity testing of legal norms.

WS 12
Room 1.05
Chair: Miguel Régio de Almeida

16.15-16.45|Olubukola Olugasa (Babcock University, Iperu): *The Limits Of Presumption Of Innocence In An Ict Driven Pre-Crime Prevention System*

Technological innovation has become the ultimate solution towards attaining an efficient and effective criminal justice administration all over the world, especially with the apparent limitations of the criminal justice administration in the face of multifaceted dynamics of the human society. Over the years there have been systematic subtle acknowledgments of the limitations of the criminal justice system in adversarial jurisdictions. Asymmetrical to the acknowledgment are some policy somersaults in the same criminal justice administration. The mainstay of the adversarial criminal justice administration is the doctrine of presumption of innocence. That doctrine predetermined the procedural methodologies of the criminal justice administration, namely the evidential requirement of proof beyond reasonable doubt by the prosecutor, the state, and proof on balance of probability by the defendant. On the sphere of enforcement the crime prevention philosophy is one that prevents the state from providing an environment that checkmates potential crimes, such as surveillance, data gathering of all citizens from names to DNA, fingerprints, iris identity, blood group etc., and keep same in a bank in case of need to find culprit via forensic analysis of crime scene information. In terms of policy somersaults, the criminal justice administration has jettisoned crime compounding for plea bargain and outright

imprisonment and capital punishment are now being substituted with parole mechanisms and life/long imprisonment. This paper reviews the criminal justice administration limitations in the light of these systematic modifications of the criminal justice administration with a view to preferring alternatives to the criminal justice administration within the same dichotomy of civil and criminal classifications and probably outside the classifications where necessary. It is purely a doctrinal discourse relying much on the jurisprudence of black letter law.

16.45-17.15 | Peter Robson, Patricia Branco & Johnny Rodger (University of Strathclyde, Glasgow): *The changing symbolism of the court in the 21st. century*

There have been two strands in the scholarship on the courts which have dominated in the past. The first has taken both a broad transnational approach (Resnick and Curtis 2010) as well as focusing on developments in individual jurisdictions (2003; Mulcahy 2011; Branco 2016; Robson and Rodger 2018). These studies indicate that from the 1840s the notion of the dedicated purpose built court seems to have become a feature of western legal systems. The other concern of scholars has been with the appropriateness of the internal geography of the court structures for serving the purposes of justice. Both the external and internal realms reflect different social and political functions and their symbolism has varied over time and between jurisdictions. This paper seeks to unite these two concerns with a view to future provision of courts. It looks at the changes in the spaces of justice in two small jurisdictions which have distinct histories of court development. Financial and other pressures on traditional systems of dispensing justice have had an impact on what is going to be available in the future. These seem likely to lead to a change in the iconic nature of courts going forward. This paper traces how these changes have come about and what common features they share. It also notes the very different approaches taken in other jurisdictions like France, the United States and Australia.

17.15-17.45 | Terezie Smejkalova (Masaryk University, Brno): *Outer limits of a judicial trial*

Although disputed by many, the ever-popular Sapir-Whorf hypothesis maintains that our world is limited by our language.

For many authors (e.g. Bourdieu, White, Hoecke) law is something created and conditioned by language and legal discourse; law may be understood as a discursive space. Knowledge of the language creating this space and the rules of its discourse may surely be perceived as advantageous. In this paper I shall understand the language of law (and the knowledge thereof) as a discursive enclosure of law. Therefore, not knowing the language of law limits our capabilities within the world created by law.

Within this discursive space of law legal proceedings – a trial – may be perceived as a consecrated ritualistic space of a kind designated to resolve disputes: parties bring their disagreements into the designated discursive space, and it delivers the resolution (Allen 2007-2008 or Smejkalová 2017). The enclosure of this space has various dimensions, both physical and discursive. Recently, the social media landscape has been changing the nature of that space, opening the otherwise formalized proceedings to a wider informal debate, thus widening the space of the discourse, and in consequence, contesting the limits of independent judicial decision-making. This paper tackles the issues of the discursive

boundaries of a trial and shows that because of the trial's essentially liminal nature contesting the limits of the space of a trial delimited by the traditionally specialized language diffuses the established discursive limits of law and those of a trial, possibly pushing the limits of judicial independence and influencing the classic notion of the publicity of a legal trial.

VISIT (**19.30**)

DINNER (**20.30**)

Saturday, 25th. May

WORKSHOPS (9.30-11.30)
Trindade College

WS 13
Room 1.01
Chair: Dulce Lopes

09.30-10.00|Leszek Leszczynski (Maria Curie-Sklodowska University, Lublin): ***General Reference Clauses between Law and Politics***

The general reference clauses, formed at the legislative level as the "open-texture" and "open-axiology" constructs, refer to the plural "extra-legal" (hetero-referential) criteria (values, norms). They not only bring social morality, political values, customs, etc. to the legal order but also, enlarging judicial discretion, cause the dispute on its boundaries.

Acceptance of the point that such opening of the legal system is generally both fair and effective from the social point of view does not exclude consideration of the impact of political arguments on direction, scope and effects of that opening. Two practices may be seen as the examples of strong and real danger of political interference in the legal discourse: (1), politically determined interpretation of the general reference clauses even if their language refers to the moral criteria in a private law (e.g. "good of child", "rules of rightness") and (2), political context of administrative application of general clauses (esp. in the light of its limited judicial control). Paper discusses how these practices, depending on many moderating factors (like type of branch of law, scale of the social change, type of political regime, etc.) and neutralized (not always effectively) by the legal principles expressing the intra-legal axiology, lead to the weakening of the rule-of-law principle and change the position of legal order vis a vis the politics.

10.00-10.30 | Imranali Panjwani (Anglia Ruskin University, Chelmsford): *Recognising the signified: The creation of minority case law to improve legal representation for asylum seekers*

Using the United Kingdom's asylum and immigration laws as a case study, this paper critiques three of its mechanisms with a view to uphold Muslim asylum seekers' rights in order to determine their status as refugees. These are: the methodology of granting asylum by the Home Office, the use of expert reports in immigration tribunals and the role of country reports in supporting asylum cases. Despite the value in all of these processes in producing just and transparent UK immigration laws, they have distinct failings because they do not adequately investigate the religious, political, legal and social dimensions of an asylum seeker's case. It is left to an unwitting member of the Home Office or one expert to make sense of an asylum seeker's race, religion, nationality, membership of a particular social group or political opinion. The result is that asylum seekers are not given a fair and rigorous voice to represent themselves. My question is: should the rights of an asylum seeker hinge only on the institutional signifier of law i.e a few decision makers within the national legal system? What about the role of interpretive communities in making law less Eurocentric and more universal in its approach to achieving justice for all?

These questions can be answered by rethinking the way in which minority communities such as Muslims who enter the UK as asylum seekers express their legal voice. Though it is understandable that others may speak on behalf of asylum seekers, it is the responsibility of Muslim communities already existing within the UK to be united enough to create their own case law that documents the type of persecution that asylum seekers face. This means producing evidence on specific terminologies, racial, cultural and faith practices and geographical data. At the same time, the dominant 'signifier' or legal system should be accepting to this development to improve its own immigration laws and policies. If this case law is produced in a format that an English or European judge who is not acquainted with Islam will understand, it acts as another evidential source to support the grievances and claims of Muslims.

In short, minorities can create their own case law that gives due justice to their own concerns which aids the decision of a judge in asylum cases. It also puts pressure on immigration laws and policies that may suffer from bias, political agendas and procedural and evidential unfairness. The paper will jurisprudentially justify the use of minority case law and conclude by proposing what it would look like in practice and how it could be adopted by other minority communities in the UK and Europe.

10.30-11.00 | Melisa Liana Vazquez (PhD at University of Rome-La Sapienza): *Law's Religious Neutrality and the Paradox of its Exclusive Universality. The secular city as a 'kindergarten' for modern legal subjects*

Among the modern social products attributed to the law is that of the modern legal city. The city, as conceptualized today, is the very emblem of a post-lapsarian and post-secular world in which humans have total control over world-making. Not even global warming seems able to give real pause to the relentless human quest for taking and making the world as we will it. We can think of this as something of a logical historical consequence. The foundational Western Christian prophecy of the Heavenly Jerusalem is the prolongation of an Ancient World mythology of the city as the exclusive place able to nurture civilization.

In this sense, the city has been a space of stability and control, mirroring a divine order, and as such sitting in opposition to wilderness, chaos and passions. As centuries passed, Western modernity turned to the 'new' idea that it is not God, but man who controls his own destiny, his own state of grace. The disenchanted world dominates, and brings us to today's reality of worlds, specifically cities and nations, as the products of human rational creation. The secularized city or nation, however, appears absolute. To the majority, it has nothing to do with God or the religious. It gives itself its own rules, categories, laws, realities, determined by human power. This is in part why the "public sphere" must be kept free of any signs of religiosity.

Nevertheless, it has been extensively argued that the secular and the religious were never able to fully separate; they are culturally co-constitutive because the specific cultural historical (and religious) roots of various secularizations are impossible to eradicate. The secularized city's inability to keep the religious dimension out—as witnessed by today's myriad conflicts between the secular and the religious—cannot be reduced to the geometric contours of the city. When Others or people from other cultures make their voices heard, the various conflations of the secular and religious are put under a spotlight that shows how the "neutral" is instead cultural, values-driven, and irrational depending on one's particular world. Regardless of the modern myth of urban total rational control, space must be made for unexpected and unprecedented Otherness and its meanings. What is inside and outside the ideological contours of the modern city conflate. As inherently constitutive of the urban environment and its alleged self-boundedness, law too must find ways to address the 'forms of the human' that are both inside and outside its boundaries. One question then is, does the secularized city (and its secular law) have enough in itself to create itself? And what happens when the confrontation with others prompts the facing of its (culturally specific) origins? If self-definition is only possible against the foil of the Other, how might we leverage the limits of law through a semiotic lens such that it becomes a place less of negation than of inclusive creation? Exploration of these ideas will involve the consideration not only of "Other" viewpoints but also domains of new creativity emerging from cross-border digital frontiers.

11.00-11.30|Richard Powell (Nihon University, Tokyo): *Authorised texts and ideological conflict in multilingual postcolonial law*

Unlike the EU, Canada or Hong Kong, which hold to the principle of equal authenticity among different legal languages and strive to reconcile perlocutionary differences among texts by retrieving their illocutionary force, Malaysia is an example of a bilingual jurisdiction that seeks to minimise language-borne ambiguities by declaring one language version to be prima facie the authoritative one. In general, English is authoritative for enactments passed before 1967 and Malay for enactments thereafter. This paper considers both the motivations and the effects of language-differentiated legal authenticity in the Malaysian context while hazarding possible implications for other jurisdictions.

The prioritisation of English before 1967 and Malay thereafter was motivated by a concern to balance the ideological outlook of status planning and the pragmatic outlook of corpus planning. As English had been the default medium of law and administration, giving *national* status to Malay, the first language of the largest ethnic community, was seen as a vital component of decolonisation. Yet for practical reasons English retained *official* status for some time after independence so that Malay could be equipped for legal and administrative use.

As for the effects of differential authenticity, the priority of English before 1967 reinforced its importance as the default medium of domestic, as well as cross-border,

jurisprudence. Conversely, the prioritisation of Malay since then imparted an overtly ideological dimension to legal discourse that tended to be more covert when English held sway. Malay is not only associated with postcolonial nationalism but also with ethnic identity and Islam, and disputes over the authorised language for individual texts (notably, the constitution), phrases (e.g. 'Islamic state') and even single words ('parent') can become cultural struggles. This is seen most clearly when exceptions are made for the 1967 split, such as a 2001 discretion to prioritise the Malay version of the constitution.

WS 14
Room 1.05
Chair: Eduardo Bittar

09.30-10.00 | Gabriele Aroni (Ryerson University Toronto): *The Limits of Copyright Law in Video Game Photography*

There is a consistent breakthrough from traditional image-making, including photography and film, in video games: "[a] Renaissance painting and a computer image employ the same technique (a set of consistent depth cues) to create an illusion of space – existent or imaginary. The real break is the introduction of moving synthetic image – interactive computer graphics and computer animation." (Manovich, 2001, p. 168) With the novel art of video game photography, the user is not a passive viewer of the image anymore, but s/he is an active participant in the scene, especially as regards point of view.

Most jurisdictions protect video game software codes and assets under copyright laws, however, jurists argue that the player might as well be the creator of content. In this regard, Boyden points out the opposition between "the limited nature of copyrightable information captured in a recording and its dissimilarity from the original work, a noninteractive recording as opposed to an interactive game." (Boyden, 2011, p. 8). Burk (2013) argues that game play performances can be compared to dance, theater or athletic performances, thus qualifying as original expression under copyright law. The authorship of the content created by the players in the case of video game photography, however, is dependent on the video game software and visual assets. Video games could thus be considered as an authorial tool, such as a word processor or a 3D modeller (Tyler, 2012). For this reason, the act of taking pictures within the game, known as *screenshotting*, are in a particular position, as they are a content generated by the player based on assets and a platform – the video game – created by the game developer. What are the limits for copyright laws as regards screenshots? Are the players the sole owners of their creations, provided they are original enough, or do game companies own them? Are screenshots a derivative work to a copyright-protected video game, so that players need to obtain permission to use the content they create?

References

Boyden, B. E. (2011). Copyright's middle ground: The interaction of players and video games. In *The Game Behind the Video Game: Business, Regulation, and Society in the Gaming Industry*. New Brunswick, New Jersey.
Burk, D. L. (2013). Owning e-sports: proprietary rights in professional computer gaming. *University of Pennsylvania Law Review*, *161*(6), 1535.
Manovich, L. (2001). *The Language of New Media*. Cambridge: MIT Press.

Tyler, O. (2012). Who Owns an Avatar? Copyright, Creativity, and Virtual Worlds. *Vanderbilt Journal of Entertainment & Technology Law*, *14*(4), 959.

10.00-10.30|Tulishree Pradhan (KIIT School of Law, Bhubaneswar): *Progress Or Regress Through Media Freedom: A Due Process To Protect Liberty*

Freedom and democracy are inseparable. Democracy needs media and for this reason freedom of the media cannot be unbridled. Most of the countries from all over the globe have the same opinion about it. Nonetheless, the restrictions on media freedom must be reasonable and must be drawn through the law. Like *prejudice* and *sub-judice* notions are considered a hindrance to the administration of justice and often contested on the ground of *Unreasonable* by the media. But at the same time, we witness several cases getting affected by this media trial. Hence, there is a need to explore the extent of media trial. In several countries like U.K., Australia, New Zealand etc., especially in criminal cases, before the information is circulated and publications are made by both print and digital media, go through a serious scrutiny otherwise these are treated as prejudicial and violative of due process. The prejudicial information and publication, prejudice the minds of the Adjudicators, Judges and even the Jurors. Supreme Court of India has also accepted in many cases about the 'subconsciously' prejudiced notion of Judges. After *K. M. Nanavati* case Jury Trial was stopped because of such media trial interference in the administration of justice. In the context of freedom of speech and expression some contradictory views, widening the scope of media freedom are articulated by the USA Courts as in USA the restrictions are narrow than the expression of restrictions in India and it has to pass only the test of clear and present danger. Broader reasonable restrictions are imposed in India but actual prejudice of judges in the case is not necessary for Contempt Law proceedings. If substantial risk of prejudice is involved in the matter then only it would be considered as a contempt. As per the public perception, the doctrine of "Justice must not be done but must be seen to be done", which allows the Judges being subconsciously prejudiced in UK and Australia. Contempt Law protects the 'administration of justice' and the 'course of justice'. Therefore, an impartial trial includes non-interference with the rights of the suspect or the accused. In view of the above, this research paper critically analyses the different legislation and law commission reports prevailing administration of justice all across the globe such as Contempt of Courts Act, 1971 and 200th Law Commission Report of India to demarcate the extent of media trial in the fair administration of justice. Through a comparative analysis a standard constitutional approach can be put forward to address the emerging legal challenges of media freedom in the 21st century.

10.30-11.00|Gilda Almeida (Miami Law School, J.D. Candidate), *Taxpayer Participation in International Tax Arbitration*

Globalization has subjected corporations to multi-jurisdictional tax systems. As a result, cross-border entities are exposed to possible auditing and tax adjustments with respect to the same transactions. In addition, various states' measures—such as Tax Information Exchange Agreements (TIEA) and the Foreign Account Tax Compliance Act (FATCA)—have promoted international cooperation, thereby allowing tax authorities to have access to an unthinkable volume of data. The risk of double taxation has greatly increased due to the easy access of multi-jurisdiction's data.

To address and balance the overlap of jurisdictions in tax matters, states are signing bilateral and multilateral treaties and protocols with consent provisions for mandatory and binding tax arbitration between contracting states, thereby extending states' historic competent authorities' negotiation process under a mutual agreement procedure (MAP). However, taxpayers are not part of the arbitration process.

The initiative which addressed taxpayers and states' concerns about better aligning taxation rights internationally was made by the Organization for Economic Cooperation and Development (OECD), which pioneered the Base Erosion Profit Shifting (BEPS) project. The project contains several action plans and deadlines for their implementation.

The emphasis here is Action-14 of BEPS, which established binding arbitration for unsettled MAPs among OECD members.

More substantial participation by taxpayers in the arbitral procedure remains a matter of state policy; however, states can grant and define the extent of access taxpayers have to the dispute. Taxpayer's inclusion, future consent, and submission to arbitration would result in short and final arbitration procedures. The way tax arbitration is currently set, states must continue to handle arbitration with domestic litigation in addition to MAP arbitration because of the lack of enforcement of the award on the taxpayer.

MAP arbitration numbers are growing quickly and are expected to speed up given recent tax settings such as FATCA and court-by-country report. Competent authorities expect a vast number of cross-border disputes to be generated.

The binding-arbitration model can be truly effective given the level of taxpayer access and commitment to it, which would include taxpayer's consent and a fork-in-the-road submission. Taxpayer participation would facilitate the arbitration process, and the results would be definitive. A taxpayer is a real party to the proceedings and should not be confined to an auxiliary role. Taxpayers must get on board.

11.00-11.30|Mami Hiraike Okawara (Takasaki City University of Economics): ***Japanese Trademark Cases in Linguistic and Economic Contexts***

This presentation revisits two Japanese trademark disputes, one from the 1980s and the other from the 1990s, using linguistic analysis to comment on and supplement the more legalistic deliberations that decided them. In a claim by White Horse Distillers against Toa Distiller's use of a golden horse label and logo, the courts considered the perspective of the ordinary consumer in ruling that no confusion between the two products was likely. However, in settling Chanel Group's claim against a small bar the courts prioritised commercial interests over sociolinguistic perceptions in ruling against the bar's use of the Chanel name and one somewhat similar to it.

A comparison of the Golden Horse and Snack Chanel rulings suggests that the courts may bend their interpretations toward what they perceive as the good order of society. In the latter case, legal professionals would be no less aware than lay people that a shabby bar named Chanel would have never been taken to have a relationship with the Chanel group yet, being attuned to the demand of the industry, some likelihood of confusion between the two business was upheld. On the other hand the courts were more amenable to linguistic arguments in ruling out the likelihood of confusion between Golden Horse and White Horse.

This is not to argue that linguistic approaches are more suitable than legal reasoning to judge trademark issues. Both legal and linguistic reasoning are based on scientific principles. However, while one approach may lean more toward business interests, the other may rely more on social attitudes. Furthermore, in the Snack Chanel case the evidence made

little use of scientific-based reasoning at all, preferring to concentrate on narrower legal principles.

Coffee Break (11.30-12.00)

PLENARY SESSION IV (**11.45-12.45**)
Faculty of Law Auditorium
Chair: J. M. Aroso Linhares

FRANÇOIS OST (Université Saint-Louis, Bruxelles): *Entre guerre et paix, violence et amour, enfer et paradis, le droit*

Se pourrait-il que le droit ait quelque chose à voir avec la violence et l'amour? On dira, en première approximation, que le droit s'arrache à la violence, et que, dans les meilleurs des cas, il se laisse inspirer par la solidarité, parfois même la fraternité. Pour comprendre leurs régimes respectifs, on peut dès lors distinguer trois « types-idéaux » : *bia* (violence), *ius* (droit), et *agapè* (amour fraternel).

Dotés de caractères spécifiques, ces trois mondes comportent pourtant d'importantes interfaces. Dans une perspective dialectique, on peut même soutenir que le droit lui-même résulte de la tension permanente entre les rapports de force et les aspirations éthiques, comme si ses limites extérieures le travaillaient de l'intérieur.

Autrement dit: ses frontières sont aussi des zones hybrides d'échange, de confrontation et de fécondation réciproques : *agon*, la confrontation réglée, en deçà du droit, et *philia*, la socialité, légèrement au-delà.

Mais, si le droit est le produit de cette tension, il en est aussi la limite et la mesure; moins performant que la force, moins sublime que l'amour, il en est cependant la médiation nécessaire. Au conflit, il impose une règle et un arbitre; à l'amour, potentiellement aliénant et possessif, il fournit une mesure. Aux deux parfois conjugués, il fait barrage au nom des droits de la personne. Limité et pourvoyeur de limites, le droit reste le meilleur garant de la liberté et de la justice.

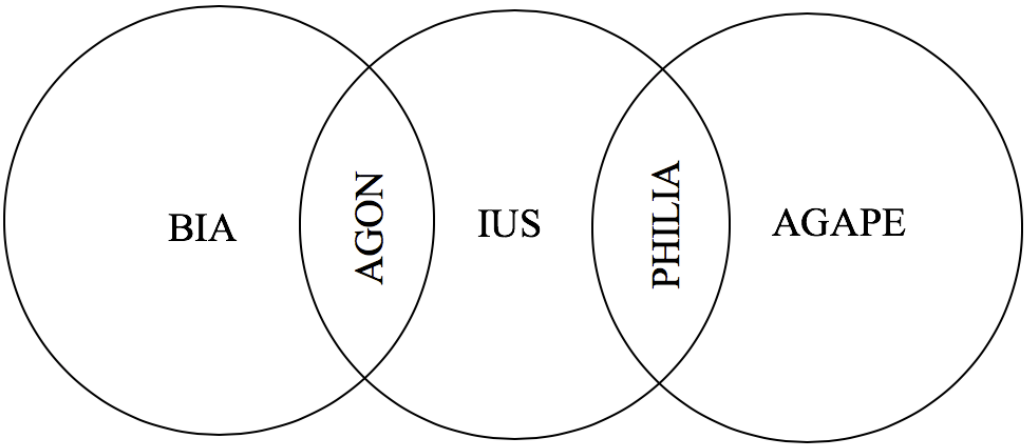


Figure 2

LUNCH

WORKSHOPS (14.45-16.15)
Trindade College

WS 15
Room 1.01
Chair: André Dias Pereira

14.45-15.15|Nasim Khodakhah (Attorney-at-Law of a Justice, Iran): *Comparison of Legal Pressure Constraints in Iran and Other Countries*

A group believes that the free press can bring a society to prosperity and promote the advancement of a country. Sayed Jamal al-Din Asad Abadi, who is one of the major contemporary thinkers and reformers, has such a thought about the press. He considers the existence of free press as one of the reasons for the progress of the European nations and states: "One of the reasons for the progress of the West is the freedom of the press". Today, the media have pushed back the geographical boundaries. The title of the fourth pillar of democracy has been raised. In our country, attention has always been paid to this matter and its impact. The Mirror Press Law is a full-blown view of the type of Islamic Republic's oversight and monitoring of the press, which has been discussed in different periods. It should be acknowledged that the press will enter the society and the general culture due to its effective and irreversible roles. Therefore, despite the acceptance of the principle of the freedom of the press, there are limitations.

15.15-15.45|Mateusz Klinowski (Jagiellonian University Kraków): *Brutes are here! Normativity for the powerful in a weak democracy*

Boundaries of legal systems are not only determined by a specific content of norms, but also conscious human agents interfering with a legal system. I focus on the latter and argue that *agency* is more adequate for explaining current crisis in the Western politics (i.e. the demise of liberal democracy or the idea of rule of law). In doing so, I describe and name different sorts of attitudes toward the law. Each of them refers to different types of agents imposing limits on the law by their own actions - from outside of the system or from within. In most cases those limiting actions can play an important and vital role for the legal system - resolving tensions and mediate between conflicting interests. But, as I argue, there is a new, special type of agents questioning the law at a deeper level than renegade agents usually do. Brutes, as I call them, are a product of populistic expectations against the legal system, but also of an inability of liberal democracies to prove its own substantial value, or the European Union to defend own rudimentary principles. On most occasions brutes don't just change the content of the law, they keep it as it was, instead. They even claim that their goal is to truly defend essential democratic values, otherwise endangered by inefficacious liberal (presumably too liberal) institutions. In fact, what brutes really do, and what is new here, is to change the sheer understanding of the normativity of law to exclude themselves from the binding force of certain legal norms. And that subversive strategy, I argue, poses a serious challenge to the legal system. So how can we undo the understanding of normativity that brutes impose on us? Maybe to fight brutes you must be a brute yourself?

15.45-16.15|Plínio Pacheco Clementino de Oliveira (Universidade de Coimbra. PhD Student): *The Connection Between The Tolerance And The Legitimacy Of Authority In Multicultural Democracies*

The paper develops an interpretation of the connection between the tolerance and the legitimacy of the authority in constitutional democracies. In fact, a challenge to legal practices is to create conditions for the legitimation of authority in a multicultural environment. Formulated as a contribution to the understanding of such challenge, the article has three parts: first, there is an investigation into the concept of tolerance and its relations with law and morals. The analysis is undertaken in the light of the hypothesis that the tolerance is a moral virtue, has an extralegal character and is concerned with the intersubjective relations in which individuals admit that other people have objectionable actions and characteristics. Second, are analyzed the concepts of authority and legitimacy of the authority. Considering that the exercise of power occurs by the imposition of reasons, is accepted the idea that authority is primarily the right to rule. Moreover, agreeing with Joseph Raz, is adopted the notion that the exercise of the right to rule is legitimate when the person subjected to authority is more likely to comply with reasons which apply for him if he accepts the directives of the authority. Finally, is examined the connection between the concepts of tolerance and legitimacy of the authority. The conclusion is that the practice of the authority requires the understanding (to tolerate, recognize or reject) of the specific meanings that the reasons receive in each cultural context. Both the recognition and the tolerance are bases for the legitimation of the right to rule. The legitimation of the authority presupposes that the authority, based on recognition or tolerance, apply reasons in accordance with interpretations of the subjects of the directives.
Keywords: Tolerance – Legitimation of the authority – Multiculturalism.

WS 16
Room 1.05
Chair: José Manuel Aroso Linhares

14.45-15.15|Ana Raquel Moniz (Universidade de Coimbra): *Le gardien de la Constitution revisité: entre le politique et le juridique*

Le problème du gardien de la Constitution est un des plus classiques du Droit Constitutionnel et, spécialement, de la Justice Constitutionnelle. Si ce thème évoque naturellement la discussion entre Carl Schmitt et Hans Kelsen, on ne peut pas oublier que la problématique est antérieure (au Portugal, par exemple, elle était discutée, pendant le XIXe siècle, justement à cause du contrôle de la constitutionnalité de certains décrets gouvernementales), et que ses graines continuent à germiner toujours aujourd'hui. En effet, la nature complexe da la Constitution, qui comprend des moments politiques au-delà des moments juridiques, se reflète sur le dilemme qui module la Justice Constitutionnelle, tant qu'elle doit rencontrer son propre chemin, tout en prenant conscience des difficultés provoquées par les vagues qui dominent le tourbillon entre Scylla et Charybde, vers une politisation du droit. D'une part, les spécifiques attributions des Cours Constitutionnelles rendent de plus en plus difficile la délimitation des questions juridiques parmi les innombrables questions constitutionnelles – un aspect qui demande la confrontation de ces attributions avec la juridiction ou la fonction juridictionnelle. D'autre part, les dictamens de l'économie et des finances – enfin, les considérations propres d'une rationalité stratégique – s'introduisent silencieusement (d'une façon presque inaperçue) dans les fondements des décisions des Cours Constitutionnelles – ce qui donne lieu à des réflexions sur la possibilité de la convocation des méthodes d'interprétation orientés par les résultats de la décision, sur les limites de l'activisme du juge constitutionnel et sur l'autonomie du droit en face de la politique.

15.15-15.45|Clara Chapdelaine-Feliciati (York University, Toronto): L*es réserves en droit international ont-elles des limites?*

Au cours des dernières décennies, le cadre juridique des traités internationaux des droits de la personne a été maintes fois critiqué pour ses nombreuses faiblesses, et notamment pour l'absence de sanctions à l'égard des États coupables de violations. En ce sens, le droit international est souvent comparé à un 'tigre de papier' ou un 'tigre édenté' (Alston, Van Bueren). Une lecture sémiotique nous permet d'observer les limites quant à la formulation des droits inscrits dans ces traités, qui peut sembler parfois trop générale, et parfois trop précise. Cependant, l'une des plus illustres restrictions en droit international est la possibilité pour les États parties de formuler des réserves aux dispositions d'un traité international afin de diminuer la portée de certains droits sur leur territoire. En effet, la Convention de Vienne sur le droit des traités (1969) autorise les États, lors de la signature, ratification ou adhésion à un traité international, à formuler des réserves. Le choix d'émettre une réserve à un droit spécifique indique l'intention de l'État ('Meaning-Intention', Victoria Welby) de ne pas respecter ce dernier dans son ensemble. Par ailleurs, plusieurs réserves ont un caractère vague et incertain, permettant aux États parties de restreindre de façon significative leurs obligations en vertu du traité. Les réserves émises lors de la ratification de la Convention relative aux droits de l'enfant (CDE 1989) quant au droit à l'éducation sont particulièrement notables et seront le sujet d'analyse de cette communication. Nous allons d'une part étudier le contenu de ces réserves, et d'autre part, l'intention des États lors de la

rédaction des dispositions, telle qu'illustrée dans les *travaux préparatoires*. Nous effectuerons une analyse sémioéthique (Petrilli et Ponzio) des réserves émises par les États parties, afin de discuter de la possibilité de modifier ou retirer ces dernières.

15.45-16.15 | José de Faria Costa (Universidade de Coimbra): *L'espace libre du droit: limite immanente du droit*

Le droit est un ordre normatif d'un être, d'un « est » (l'« être » du droit), qui doit être et qui, par cela même, a besoin de « respirer ». Autrement dit, le droit n'a de sens que plongé dans un espace libre de droit. Telle est sa nature, telle est sa force, telle est sa limite apparemment paradoxale. Pour rendre les choses plus claires nous posons trois axiomes : d'abord, le droit comme tout autre ordre normatif, du vivre ensemble des hommes et de leur époque, n'a de sens que s'il n'est pas une completude ; ensuite, le droit parce qu'il est un être (il est un « est ») qui doit être, il a nécessairement une dimension hétéronome (il est une hétéronomie) que se construit dans l'histoire ; enfin, le droit porte avec lui, comme une autre face de Janus, l'espace libre du droit.

CONCLUSIONS (16.30-17.00)
Trindade College
Room 1.01


· U C ·
INSTITVTO IVRIDICO
FACULDADE DE DIREITO
UNIVERSIDADE DE COIMBRA


FCT
Fundação para a Ciência e a Tecnologia

ATFD


Springer