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Special Workshop no. 122:
Resistance, Dissent and Innovation: Perspectives from Around the World

Chair
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in Cooperation with
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The third edition of this special workshop gathers scholars from Asia, Europe and the Americas. Besides direct invitations, the convenor made an open call for relevant papers from academics who have work or interest on the theme. This workshop's theme involves the notions of "Resistance", "Dissent", and "Innovation" within the law or despite the law. Behaviors of resistance and dissent can be related and can be observed in all sorts of societies: democratic and respectful of fundamental rights, authoritarian, and in those that fall somewhere in between the first two extremes. To resist and to dissent imply not only to have a possibility but also to make a choice to divergently speak out, omit, or act in face of rules, opinions, or conducts of others. These conducts may offer alternatives to existing perspectives and may bring about innovation that triggers technical, social, political, or theoretical changes. Innovation and dissent can also be linked, because the first implies a degree of rupture with what already exists (be it forms of thought and behavior, traditional ways, or accepted standards). The workshop's overall aim is to investigate, illustrate, and better understand any or all those three notions and establish possible relations between them – how they can be conceptualized, how they manifest themselves, and how they are received. Historical and recent illustrations of how resistance, dissent, and innovation have been regulated are of particular importance. The workshop brings together scholars from different jurisdictions and political contexts.

Language: English.

Total Number of PAPERS: 11 (ELEVEN)

1. Jeanne d'Arc, #MeToo and Greta Thunberg - Female Resistance in History and in the 21st Century. **Hanne Petersen**, Center for European and Comparative Legal Studies (CECS), University of Copenhagen.
2. Dworkinian Protestantism, Civil Disobedience and Democratic Citizenship. **Win-Chiat Lee**, Wake Forest University.
3. Resistance, Dissent and Innovation in 21st Century Open Societies: Rethinking the Legitimacy of Institutions. **Elaine Mak**, Utrecht University.
4. Building a Theory of Dissent: Law in Times of (Digital) Polarization. **Denis de Castro Halis**, University of Macau; CECS/University of Copenhagen; UNESA/Brazil.
5. How to Apprehend Acts of Political Nature from the Civil Society in Law Through the Concept of Civil Disobedience. **Demay Clémence**, Institute of Public Law, University of Lausanne.
6. Populist Resistance Against the Liberal Democratic Order: Challenges for Innovation? **Carla M. Zoethout**, Open University/The Netherlands.
7. The Constitutional Court and Public Perception Transformation in Korea. **Yukyong Choe**, Korea Legislation Research Institute.
8. Living on the Edge: The Brazilian Political Praxis and the Necessity of Reforms. **Rubens Beçak**, University of São Paulo.
9. On the Community of Human Destiny. **Chengwen Mou**, Huazhong (Central China) Normal University, China.
10. President Bolsonaro's New Foreign Policy in Brazil: Dissent Against the Mediating Tradition of Brazilian Diplomacy. **Simone Cristine Araújo Lopes**, Juiz de Fora Federal University (UFJF/GV).
11. The Legal Pragmatism of Holmes and his Consequentialist Interpretation of Freedom of Speech: Its Limits in Concerning the Hate Speech. **Adrualdo de Lima Catão**, Federal University of Alagoas; CESMAC; UNIT/Brazil.

SPECIAL WORKSHOP 122

RESISTANCE, DISSENT AND INNOVATION: PERSPECTIVES FROM AROUND THE WORLD

IVR 2019 – UNIVERSITY OF LUCERN, SWITZERLAND

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LIST OF ABSTRACTS

1)

Jeanne d’Arc, #MeToo and Greta Thunberg - female resistance in history and in the 21st Century.

Joan of Arc was born in 1412 in Lorraine in France. 17 years old, she led an army, which broke the occupation of Orléans by the English. After a legal process, she was burned as a witch in Rouen in May 1431 because she had cut her hair, worn a man’s dress and persisted that she received her orders directly from heaven, challenging the authority of the Catholic Church. 25 years later the judgment for heresy was overruled in a process started by Pope Callistus. In 1921, she was canonized as a saint.

In 2006 African–American activist Tarana Burke, started a ‘me too’ grass roots campaign for women of colour, who had experienced sexual abuse, inspired by a story by a 13 year old girl. In October 2017, actor Alyssa Milano popularized the #MeToo movement. Milano links the overwhelming reactions to the offensive comments on women made by the president of the US. The mobilization of women at the US mid-term elections demonstrated resistance of American women against a government based on inequality in both fields of economy, politics, race and gender.

During the long and dry summer of 2018, Sweden experienced a devastating number of wild fires. In August, 15-year-old Greta Thunberg declined to go to school and started her climate strike at the Swedish Parliament before elections in September. Greta Thunberg spoke at the COP24 meeting on climate change in Katowice, Poland, in December 2018, and said, “we can no longer save the world by plying by the rules, because the rules have to be changed.” On March 15, 2019 the school strikes are expected to culminate so far. They will take place in 93 countries and 1325 cities.

This presentation will consider these historical and contemporary examples of resistance and dissent.

Keywords: female resistance, youth, mobilization, mental change

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2)

Dworkinian Protestantism, Civil Disobedience and Democratic Citizenship.

In *Law's Empire*, Ronald Dworkin argues for what he calls "the Protestant View". On this Protestant View, it is the responsibility of each citizen to interpret the law for herself in discharging her political obligation, i.e., the duty to obey the law. On this approach, however, what a citizen thinks she ought to do in obeying the law in a particular situation might be in conflict with the prevailing understanding of the law in the community, including the courts. This would then be a situation in which the citizen's duty in obeying the law, on the Protestant approach, is to disobey the prevailing understanding of the law. I argue that this opens up a kind of civil disobedience that is different from the more familiar one in which a citizen disobeys her community's law in the name of justice or a higher law (as in Martin Luther King's case). The civil disobedience under the Dworkinian Protestant View, instead, is to challenge the prevailing interpretation of the law in the name of fidelity to the community's own law. This Dworkinian Protestant View on the citizens' duty to obey the law, I argue, also gives us an understanding of the democratic input citizens have in shaping the law that is non-legislative.

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3)

Resistance, Dissent and Innovation in 21st Century Open Societies: Rethinking the Legitimacy of Institutions.

Karl Popper's famous book *The Open Society and Its Enemies* (1945) promoted the normative ideal of a society based on individual freedom and rights, in which there is space for socio-economic, technological and cultural innovation and for a diversity of opinions (including resistance and dissent). This ideal is often equated with the notion of the liberal-democratic state and it responds to the threat of totalitarianism, which formed the contextual background to Popper's analysis.

Yet, contemporary open societies are faced with new challenges, such as the dynamics of neoliberal (global) market economies or the balancing of security and privacy concerns in times of terrorism and big tech. It is essential to develop a better understanding of these dynamics and balancing questions in order to safeguard the 'openness' of the open society, in particular its space for contestation and innovation. In this regard, the question arises: which institutions yield power in 21st century open societies and what constitutes their legitimacy, that is: under which conditions is their exercise of power acceptable and accepted?

This paper presents the first sketch for a reconceptualization of the legitimacy of institutions in open societies. It analyses the characteristics of the 'open society' from socio-economic, philosophical and legal perspectives and connects these with normative and empirical conceptions of legitimacy. Next, the changing types of institutions and their interactions are outlined, taking the context of global markets as an illustration. Based on this overview, the paper presents a critical reflection on Popper's conceptualization of the open society and some possible amendments to ensure its relevance for current philosophical debates.

The ideas presented in this paper connect with a think paper developed within the stream 'Legitimacy' of Utrecht University's strategic research theme 'Institutions for Open Societies'. I am a co-author of this think paper.

Keywords: Popper, open society, legitimacy, institutions, global markets

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4)

Building a Theory of Dissent: Law in Times of (Digital) Polarization.

The paper presents an investigation about dissent – how it manifests itself and how it is received – from a legal, philosophical and sociological perspective. It develops the argument that certain types and forms of dissent can interrupt processes of conformist or passive social behavior, which may be key contributors to injustices or bad decisions. These processes of conformist behavior can be paralleled to those identified, and described, by Hannah Arendt, which contributed to form her notion of "banality of evil". Grounded in legal scholarship, but with an interdisciplinary approach, the paper presents exemplary types of manifestations and reactions to dissent in different jurisdictions; and proposes the outline of a typology and a concept of dissent. The motivation for the investigation comes from first-hand experiences of individual and collective dissents and the way that governments and people reacted to them. I observed these initiatives and following reactions across the world, not least during my time in mainland China, Hong Kong, Macau, and in Brazil. The overall goal is to advance an interdisciplinary field by developing a definition of dissent that becomes the core of several fundamental rights and freedoms in a time of digital polarization. It is hoped that the paper produces new insights that are helpful to solve legal disputes involving the importance, legitimacy and limits of dissent.

Keywords: Dissent, Theory of Dissent, Digitalization, Polarization, China.

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5)

How to Apprehend Acts of Political Nature from the Civil Society in Law Through the Concept of Civil Disobedience.

The repertoire of contention of political groups from civil society has evolved during the past years in order to include more actions that are illegal but aimed at raising public's awareness on specific issues of societal importance (for example, an ecologist movement occupying a nuclear plant, animalists freeing livestock from butchery, to name just a few). These acts are called acts of "civil disobedience" or "civic disobedience". Political theory usually defines those actions as citizen acts permitting to counterbalance the "tyranny of the majority rule" or enabling minorities to take part in the public debate. However, this topic has had very few echoes in continental law, juridical orders tend to consider those acts as ordinary offenses.

Firstly, this contribution aims at analyzing the way an actual political system can be considered as a fertile ground to the deployment of actions of civil disobedience (crisis of the representative system, lack of financial and material means to take part in the public debate for minority groups, rights centered on the individuals unable to think an action as collective, and so on.) and briefly tracing its conceptual origin. Secondly, we will focus on the reception within the jurisprudence of those acts and analyze several landmark cases in Switzerland.

One main argument is that civil disobedience and activism raise fundamental questions regarding the law, especially in a constitutional democracy, such as the role of the citizen within the lawmaking process, the evolution of the law and the grounding of its legitimacy.

Keywords: Democracy, citizenship, political action, civil disobedience.

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6)

Populist Resistance Against the Liberal Democratic Order: Challenges for Innovation?

Populist resistance is increasingly challenging the foundations of the liberal democratic order. It has consequences for politics, for society and for constitutional law in many countries in the west. Unlike what many people think, it is likely the populist movement will not be a temporary phenomenon, but a challenge for the coming decennia. Therefore, there is every reason to study the populist dissent with the existing order and the challenges it entails for liberal democratic institutions.

In Hungary and the UK, populist revolts have been directed in particular against international organizations. In Hungary, the revolt against the European Union goes hand in hand with a rejection of the liberal democratic values and the creation of a self-declared 'illiberal democracy'. Priority is being given to national politics, with far-reaching consequences for its constitution and its position within the EU.

The UK for that matter, has threatened to leave (not only the EU but also) the European Convention of Human Rights. Criticism focuses in particular on the European Court of Human Rights and its interpretation of the Convention. The debate may (after finalizing the Brexit) lead to introducing a national 'Bill of Rights'. Obviously, this will be a major constitutional change.

This paper concentrates on the populist resistance against the liberal democratic order and more specifically, against international institutions. Firstly, populist resistance will be analysed as it manifests itself in many countries in the west. Secondly, the focus is on Hungary and the UK and the constitutional changes that are taking place as a result of populist tendencies. Thirdly, the question is how to regard these constitutional changes? Should they be regarded as a threat or a challenge for innovation of the liberal democratic order?

Keywords: Populism, constitutional change, Hungary, UK, Europe

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7)

The Constitutional Court and Public Perception Transformation in Korea

This study starts with a fundamental question of whether “the Constitutional Court has an impact on the change of public perception or *vice versa*?”

In Korea, since the Constitutional Court was established in 1988 separate from the Supreme Court, a total of 35,481 cases were filed, of which 956 cases of unconstitutionality of an Act, 2 cases of Presidential Impeachment, and 1 case of political party dissolution case, etc. In the meantime, the Constitutional Court of Korea has ruled ‘unconstitutional’ over 1,667 as of November 2018. In general, "public perception or social changes that involve transformation in the law are reflected in legislation or are reflected in judicial decisions." In particular, "constitutional judgments are more likely to be based on more fundamental principles, values and principles in a society.

The purpose of this study is to outline interdisciplinary and basic legal theories about the decision of the Constitutional Court through social survey analysis by analyzing constitutional decisions and the change of the value/perception through the leading cases. This study encompasses a few landmark cases of the Korea Constitutional Court case to investigate the relationship with the media affected by the public perception and/or social values. In order to go beyond the limits of quantitative research on unconstitutional decisions, it tries conduct a qualitative research method on the decisions of the Constitutional Court of Korea from 1988 to 2019, analyzing keywords such as 'society', 'values', 'social change', 'judicial sense', and etc. It attempts to design a research method for research by combining with change in public opinion.

Yukyong Choe

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8)

Living on the edge: The Brazilian political praxis and the necessity of reforms

The Brazilian political praxis seemed to be much more dynamic than the instruments traditionally present in its constitutionalism, even with the formal introduction of mechanisms of semi-direct democracy in the text of 1988. The natural hypertrophy of the Brazilian executive, exacerbated by the practice of direct legislation through provisional measures added to what Abranches defined "coalition presidentialism" caused the collision of interests with the legislature to be amplified. Moreover, the deep crisis of legitimacy of the political institutions intensified by the profound consumerist anguish of postmodernism, in which the collection of individual needs exceeds any possibilities of satisfaction by the Government. This phenomenon which already appeared on the occasion of the impeachment of Collor de Mello in 1992 will return to haunt all subsequent presidencies, notably with the known crises of governability that sometimes arose. It certainly occurred also in the episode of the impeachment of Dilma Rousseff in 2016. In this case, the profound electoral and ideological division should not be ignored. Almost half of the electorate did not vote in the then president, showing the complete exacerbation of the national political division. The use of the constitutional instrument of impeachment was obliterated according to the opinion of many, to these being evident that what was intended was the deposition of the president due to political-electoral dissatisfaction. Not least, the role of the judicialization of politics in national life, especially the work in the whole process of police investigation and judgment of the Operation 'Lava-Jato'. The continuous experimentation of the fermentation about the possibility of political-electoral reforms that would eventually provide a solution to this conundrum is always frustrated by the final vote of less important aspects by the Congress.

Keywords: Brazilian Political Praxis / Electoral and Ideological Division / Impeachment / Judicialization of Politics.

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9)

On the Community of Human Destiny

Chairman Xi Jinping has repeatedly proposed his idea of building the Community of Human Destiny at home and abroad since the 18th congress of the communist party. His idea was firstly written to the UN resolution on February 10, 2017 and became a Chinese wisdom whereby the development of world's civilization would be able to be hugely promoted. So, what is the Community of Human Destiny? Why should the Community of Human Destiny be built? How can the Community of Human Destiny be built? To solve these problems is of great significance for us to grasp precisely and understand comprehensively Xi's idea. In my opinion,

The Community of Human Destiny is a kind of benefit association built by humanity for the sake of solving human common problems and realizing human common value expectations or common interest demands. Our humanity still has some problems in survival, development and stabilization. It is the most important reason to build the community of human destiny. We must start from such two aspects as follows: on the one hand, we should establish some right ideas and discard all wrong thoughts. What are the right ideas that should be established? Firstly, conception of intergrowth, which requires that we should regard co-exist as a human common value and understand sufficiently the interdependence and the solidarity among different countries. Secondly, conception of reciprocity, which requires that we should regard reciprocity as a human common interest demand and understand comprehensively interactions among different benefits from different countries. Thirdly, conception of mutual assistance, which requires that we should regard mutual help as a basic method whereby human common value and interest demands can be realized and understand rationally the significance of mutual assistance in the realization of co-exist and reciprocity. Fourthly, conception of mutual learning, which requires that we should regard mutual learning as a basic mode in the realization of human common value and interest demands and understand dialectically the significance of communicative dialogue among different civilizations or among different development modes. What are the wrong thoughts that should be discarded? Firstly, cold war mentality, which is an outdated thought featuring hegemonism, power politics and absolute security, but now revered by western minority. Secondly, zero-sum mentality, which is one of extreme and narrow-minded competitive mindsets, a mind of the jungle, just the opposite of the conception of "reciprocity" and a particular idea of "one's gain is another's loss". Thirdly, exclusive thinking, which is one of extreme and narrow-minded existential thinkings, just the opposite of the conception of "mutual learning", characterized by excessive worship of the civilization of its own

and overladen belittling of the other civilizations. The foregoing considerations are regarded as an epistemological premise of building the Community of Human Destiny. On the other hand, it is necessary to build “Global partnership” with practical actions which is a praktik premise of building the Community of Human Destiny. It is not enough only to change our thoughts in building the Community of Human Destiny and we also need to take such practical actions, roughly speaking, as four aspects. Firstly, top-level design. Secondly, advance in order. Thirdly, stratified implementation. Fourthly, validity check.

Keywords: Human Destiny, The Community, Chinese wisdom, Human common value.

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10)

President Bolsonaro's New Foreign Policy in Brazil of President Bolsonaro: dissent against the mediating tradition of Brazilian diplomacy

In October 2018, Jair Bolsonaro was elected President of the Federative Republic of Brazil. Prior to inauguration in January 2019, for a 4-year term, he appointed career diplomat Ernesto Araújo as Foreign Minister. This indication caused a profound change in Brazil's way of acting in relation to foreign countries and international organizations. Since its independence from Portugal in 1822, Brazil has preserved a position that prevailed over the peaceful resolution of conflicts and the mediation of disputes from countries required him action, which was often successful. Despite this tradition, in the early days of the Bolsonaro administration, the new foreign policy placed into practice pointed to dissent with countries such as China, Venezuela and, indirectly, the Arab countries. This work intends to present some historical facts relevant to the mediating tradition of Brazilian diplomacy, as well as to show how important it was in many moments which gave more than a secular prestige to the Brazilian diplomacy and how this mediating action must be supplied by another international actor who seeks to assume this vacuum in search for an equitable arbitration in the set of nations.

Keywords: Dissent – Foreign Policy – Mediation - Diplomacy

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11)

The Legal pragmatism of Holmes and his consequentialist interpretation of freedom of speech: its limits in concerning the hate speech

It is possible to analyze the legal problem about limitations of hate speech through an approach that takes into account the issue of the free exercise clause and the establishment clause about freedom of expression. That is because hate speech normally involves questions about ideology or the manifestation of ideas and religious thoughts. Thus, the previous prohibition of the use of some expressions implies the restriction on the expression of thought and religious freedom. In this sense, legal pragmatism of Oliver Wendell Holmes Jr. can contribute to the debate on the democratic legitimacy of the restrictions of freedom, specifically, freedom of speech. Pragmatic legal thought finds its most characteristic expression in Oliver Holmes Jr. and his thought gave rise to the so-called "American legal realism". Holmes says that the law is nothing more than a set of prophecies about what the judges will do in each case. So it is up to the legal researcher to avoid abstractions and study the law made by judges, in an emphatic defense of the common law method. This methodological skepticism about the statutory law leads to a mistrust of essentialist postures, clearly influencing his view on freedom of expression. The fundamental value of this principle exists precisely because the ideas should always go through the test of experience and should never be under the tutelage of any group or person. Whilst maintaining that freedom of expression is not absolute, Holmes was a supporter of the idea that it can only be questioned in cases of grave danger, creating a whole libertarian constitutional doctrine on the subject in the US Supreme Court. Holmes argues that freedom of speech must be recognized even in relation to what causes most repulse in society. He also defended, in the Supreme Court of the United States and in his works, that only individuals could decide the ideas that would support or would reject, without state or centralized prior regulation. Holmes argued in their judgments in *Schenk v United States* and *Abrams vs. United States* that the hateful ideas would disappear naturally. They would lose the strength in the "free market of ideas". But in speaking of "pragmatic balancing," Holmes also argues that we should examine the consequences of the decision and not just the literal expression of the constitutional text, analyzing the costs of damage to these fundamental rights when judging a legal case. From a pragmatic point of view, it is necessary to examine whether the forbidden act of expression so-called "hate speech" can cause the so-called "clear and imminent hazard" that serves as limit the freedom of speech and expression of thought. It is, therefore, a question with fertile ground for pragmatic analysis.

Keywords: Pragmatism, Freedom, hate speech

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