

SW 118: Law and Realism

Convenors:

André Ferreira Leite de Paula (Goethe-Universität Frankfurt am Main)

Andrés Santacoloma Santacoloma (Goethe-Universität Frankfurt am Main)

Schedule:

Tuesday 9 July, 08.30-13.00, Room: 3.B52

Thursday 11 July, 08.30-13.00, Room: 3.A05

The purpose of this Special Workshop is to provide an understanding, both defense and criticism, of realist comprehensions of law. Realism would be taken in its broad philosophical sense: a claim to some sort of existence of some sort of entities or properties: legal norms, systems, legal materials, moral properties, moral facts, etc. Thus, in scope are not only legal realism but moral, political and philosophical realism as well, and their possible relationships with one another and with the law as such. At the core of the discussion would be the practical, legal, and ethical consequences of realist assumptions. Ontology, social ontology, and constructivism will also be part of the workshop concerns.

Tuesday 9 July, 08.30-13.00

Room: 3.B52

On Teleology and Deontology. The Ontological Foundations of Normativity in Nature, Holistically Considered

André Ferreira Leite de Paula, Goethe-Universität Frankfurt am Main

About the Reality of Law

Lorenz Kähler, Universität Bremen

Can Legal Norms be Described? Thoughts on Legal Realism's Unexplored Radicality

Leonardo Amorim, Panthéon-Sorbonne University

The Magical Legal Realism of Tû-Tû: A Tale Told by an Obtuse Observer, Signifying Nothing

*João Andrade Neto, Pontifical Catholic University of Minas Gerais; Arnaldo Janssen
Faculty of Law*

On the Existence of Law and Legal Norms

Jing Zhao, Goethe-Universität Frankfurt am Main

Thursday 11 July, 08.30-13.00
Room: 3.A05

Knowing, Objectivity, Reality: A Fresh Perspective

Bruce Anderson and Michael Shute, Saint Mary's University

A Realistic Approach to the un-Socratic Dilemma of Moral Knowledge

Andrés Santacoloma Santacoloma, Goethe-Universität Frankfurt am Main

Realistic Rhetoric as a Philosophical Precondition of Tolerance

João Maurício Adeodato, Law Faculty of Vitória (FDV)

Realism, Relativism and, Individualism: Old and New Paradigms in Contemporary Family Law

Giulia Terlizzi – Università degli Studi di Torino

The Criminal Responsibility Between Constructivism and Realism

Bruno Buonicore, Goethe-Universität Frankfurt am Main

Honor and the Rule of Law

Renato Teixeira Campos de Melo, Humboldt Universität zu Berlin

Abstracts

The Teleological Foundation of Normativity

André Ferreira Leite de Paula, Goethe-Universität Frankfurt am Main

The aim of my talk is to investigate the origins of normativity in nature. The central claim is that normativity is a kind of teleology, and not vice-versa. It is shown how teleology is the most fundamental form of causality in both inorganic and organic nature and that both moral and legal norms have not only a causal and historical *origin* in nature, but also follow forward-oriented *purposes* from nature. One of the many consequences for ethics is the idea that the so-called 'state of nature' cannot be left.

The article advances firstly how physical causality works, then how the organic activity of living beings introduces in nature additional principles of motion that are not present in exclusively inorganic parts of reality. Afterwards, by means of the example of incest avoidance, it is shown how legal and moral norms arose out of natural teleological behavior for the unconscious purpose of life-maintenance, and how the same teleology is

necessarily maintained in all norms and behaviors in the present even after the enlightenment of humanity about its own natural condition.

About the Reality of Law

Lorenz Kähler, Universität Bremen

If law is not real, it is hardly worthwhile caring for. It comes hence as no surprise that against the various legal realisms developing a realist perspective nobody argued that the law actually is unreal. But if everybody agrees that the law is real the concept realism loses its distinguishing feature. So what precisely does it mean to claim that a particular norm or law in general is real? The most straightforward realism is the attempt of Olivecrona and other Scandinavian legal realists to conceive law as an empirical fact. The reality of law would then rest on its empirical existence. One would have to show that legal norms are nothing else than psychological or sociological facts. Although hardly anybody holds such a position it is interesting to see why it fails and that this failure implies the necessity to explain the reality of law by normative properties. Most prominently, Kelsen maintained that the existence of law lies in its validity. In this perspective an invalid law could not exist. But this thesis is implausible as well, because invalid norms could very well be formulated, described and discussed, which would be weird if they would not exist. Roman law, for instance, is despite its invalidity still a subject of discussion. Therefore, it seems that neither empirical facts nor the validity of norms alone constitute the reality of law. Unlike Kelsen one has to distinguish between the existence and the validity of norms. Neither of these properties can be identified with the reality of norms. Instead the paper will argue that the reality of a norm lies in its combination of validity and normative content.

Can Legal Norms be described? Thoughts on Legal Realism's Unexplored Radicality

Leonardo Amorim, Panthéon-Sorbonne University

The article explores the radical and skeptical idea that legal norms cannot be the object of descriptions. According to this view, every statement about the validity (or the existence) of a norm is a prescriptive statement, a proposition on how facts *should* develop or the utterance, albeit indirectly, of an *order* or of its *justification*.

First, this article explores how the concepts of validity and efficacy relate one to the other in the views of three scholars. To Kelsen, norms can be described as such by a

“normative science”, since logic permits an external observer to derive the validity of norms from higher to lower levels of observed normative commands, provided these norms are efficacious “on the whole”. To Alf Ross, norms can be described as well, nonetheless only as a formula for referring to efficacious beliefs – meaning that the assertion that a norm is valid is only a statement of its utility to fairly describe a social behavior largely believed to be obligatory. This monistic approach is reproduced by Michel Troper with some normativist constraints: concrete norms, i.e. the concrete applications of general propositions to specific cases (e.g. “X is guilty”), can be described as factual linguistic entities, while the same is not true for general, underdetermined guidelines such as abstract legal acts, which have an infinite number of possible meanings.

This article then sustains that none of these approaches is accurate, given that highly complex systems of normative statements do not allow mere *descriptions* of the system to be made, neither based on logic nor on the observation of supposed common beliefs. More than grey areas, the modern legal discourse, in its most concrete manifestations, is built in reference to several levels of normativity of unclear hierarchy (soft law, arbitration, treaties, constitutional courts’ rulings, etc.; see Ecuador vs. Chevron for an example of this superposition of normative levels). This interpretation, although emerging from typical legal realists’ insights, is not taken to its last consequences by Ross nor Troper, given that their objective to establish an “empirical legal science” is ultimately still bound by the goal of *describing* some kind of norm. This article concludes that trying to describe “the law” in this manner makes as much sense as describing “politics” as an abstract entity – while describing instead *judicial institutions’* regularities or chaotic behavior makes as much sense as describing *parliamentary institutions’* pressure points and tendencies.

**The Magical Legal Realism of Tû-Tû: A Tale Told by an Obtuse Observer, Signifying
Nothing**

*João Andrade Neto, Pontifical Catholic University of Minas Gerais; Arnaldo Janssen
Faculty of Law*

Magical realism is a literary style that presents fictional worlds and characters in a very realistic way but also adds absurd elements to the story. In this essay, I affirm that Legal Realism is “magical” in the same sense. The Scandinavian School, in particular, purports to offer a realistic description of law but inadvertently adds a preposterous element to its narrative: a storyteller that is supposed to have no previous knowledge about the normative

phenomena she is describing. I argue that this ideal observer of legal phenomena does not exist in fact, for any legal scholar shares with the legal practitioners she is observing much of the same intra-discursive code, that is, she is a participant in the same practice, whether she is aware of it or not. I claim furthermore that, when transposed to modern legal states, this perspective of an overidealized observer – as the one Ross suggests in *Tû-Tû* – necessarily leads to an obtuse and unrealistic account of legal practice. My analysis is based on the following premises. (1) In which respects legal discourse, one can formulate claims of three types: intra-discursive, extra-discursive, or inter-discursive. (2) What the members of a legal community refer to as their “law” is the intra-discursive code that makes their legal claims intelligible as such. (3) Law’s intra-discursive code embraces not only legal wording but also its context, that is, legal practice and institutions. (4) Distinctive of the legal participant’s perspective, as opposed to the legal observer’s, is not the use of prescriptive language but the logical possibility of making intra-discursive legal claims. Thus, inasmuch as the perspective of an overidealized observer recommended by Legal Realism is impractical, a legal scholar who attempted to adopt that epistemological position would be at best a cynical participant (pretending to be an observer) – and so would be her description of legal practice.

On the Existence of Law and Legal Norms – A Neo-Kantian Aspect

Jing Zhao, Goethe-Universität Frankfurt am Main

The Southwest school of Neo-Kantianism immediately follows the Kantian philosophy and is an Epistemology above all. This standpoint is named as “transcendental idealism” by Rickert, which stands opposite to the “subjective idealism” on the one hand and to the “realism” (for example the “epistemological or transcendental realism”, the “metaphysical realism” and the “empirical realism”) on the other hand. Insofar, the position of the Southwestern Neo-Kantianism—concerning *epistemological* questions – is in contrast to the realism.

However, concerning *ontological* questions, the Southwestern Neo-Kantianism is compatible with the realism. Rickert states that the transcendental idealism is most closely linked with the empirical realism or positivism; and it does not intend to destroy the empirical realism but to justify this. With an idealistic concept of “value” (“Wert”) the Southwestern Neo-Kantians attempt to complete the reality through a system of unreal “valid forms”, which make objective knowledge of the reality possible at all.

In the area of law, the legal philosophers of the Southwestern Neo-Kantianism also criticize the realism (as *methodological* or *epistemological monism*) in an epistemological

sense, for that the realists only see the reality dimension the law but ignore the value dimension. This kind of value-reality-dualism is the epistemological starting point of the philosophy of the Southwestern Neo-Kantianism. Regarding to the way of the existence of law, however, the Neo-Kantianism and the realism are consistent with each other: the positive law is a reality and has under all circumstances not an ideal existence (Lask: The “juristic one-world theory”). Concerning the relationship between law and legal values (for example the “justice”) based on the concept of value-relatedness, the Southwestern neo-Kantian only pose the question of “how is the knowledge of law at all possible”, but not the question of “what is law” or “what is the way of existence of law”. Insofar the validity of law also has no necessary relation with the validity of legal values (in contrast to the natural law as *ontological dualism*).

Knowing, Objectivity, Reality: A Fresh Perspective

Bruce Anderson and Michael Shute, Saint Mary's University

The philosopher Bernard Lonergan (1904-1984) claimed that knowing is not like looking, that objectivity is not simply seeing what is there and not seeing what is not there, and that the real is not what is out there to be looked at. Rather, his view was that knowing involves sense experience, understanding, judging & believing, that objectivity depends on a constellation of related judgments insights & judgments, and that the real world is the world mediated by meaning.

We will begin by analyzing the grounds for Lonergan's position by focusing on his distinction between the world of immediacy in which objects are ‘already out there now’ and the world mediated by meaning in which ‘objects are what are intended by questions and become understood, affirmed, and decided by the answer.’

Next we will consider the relevance of Lonergan's position to Jurisprudence. For instance, what are the consequences of ignoring human knowing in legal practice and theory? Does understanding result from a concept or does a concept result from understanding? Should we conceive law in terms necessary and unchanging features or should we conceive of law empirically and study its method? Also, what are the consequences of neglecting deliberation, evaluation, and decision in legal practice and theory? Is the ground of legal justification a logical procedure stressing consistency and coherence or is it a process comprising deliberation, judgments of value, and decision?

A Realistic Approach to the un-Socratic Dilemma of Moral Knowledge

Andrés Santacoloma Santacoloma, Goethe-Universität Frankfurt am Main

Is there any knowledge in the world which is so certain that no reasonable man could doubt it? This question, which at first sight might not seem difficult, is really one of the most difficult that can be asked
Bertrand Russell, *The Problems of Philosophy*, S. 1.

In a passage of his *Ethics and the Limits of Philosophy* Bernard Williams reaches a strong and problematic conclusion when analyzing the possibility of acquiring moral knowledge: through reflection a society will face the problem of disturbing, unsettling and, changing the moral conditions on which its beliefs rest upon, all of which, on due time, could lead to the impossibility of acquiring or destroying any moral knowledge. The purpose of this paper is threefold. First, I shall reconstruct the arguments stressed by Williams, arguing that they are a result of at least two false assumptions: (i) that reflection is to be carried on without any sort of epistemic constraint and (ii) that the value of truth is to be taken into account in deciding the truth-aptness of moral content. Second, I would discuss the scope of these arguments and objections concerning the meaning of knowledge, departing from William's particular view on the subject, to show that he discharges the core idea of fallibilism in acquiring/modifying knowledge, which lead him to a wrong conclusion. Third, I will introduce a realist account to show that the un-Socratic dilemma is a result of a mistaken approach and, more importantly, that a form of realism is appropriate to deal with truth and knowledge in morals.

Realistic Rhetoric as a Philosophical Precondition of Tolerance

João Maurício Adeodato, Law Faculty of Vitória (FDV)

The tri-partition of the rhetorical perspective into material, strategic and analytical, that I try to develop in my realistic rhetoric, has a long tradition and may be traced to ancient rhetoric, Friedrich Nietzsche and Ottmar Ballweg.

The first of the three ideal types – the only one to be exposed in this abstract – is the material rhetoric; more or less what common sense and traditional ontological philosophy would call “reality”. This material rhetoric does not only mean that human knowledge of the world is intermediated by the cognitive apparatus of human beings; it means that reality itself is rhetorical, for every perception is literally created by language. The material rhetoric builds the environment of the human beings and the relationships between them by means of

narratives; it provides the set of reports that constitute human existence itself. In this sense reality is auto-referent: There is no external and objective instance to control language.

The thesis here is that this realistic view leads to tolerance and that positive law shall assure the basic environment for the development of tolerance. It has to stay completely apart from any sort of moral or religious views, which intend to be valid in themselves. The price to pay is the formalization, that is: the task of law is to guarantee an arena, a public space of procedural rules in which the different ideologies towards how the world ought to be can confront each other to gain the minds and opinions of the people.

One goal of modern democracies is the domestication of intolerance, for democratization implies inclusion, common rules, reckoning of the other, fragmentation of power, distribution of wealth. Philosophically, it also presupposes some mistrust of human characters and features, with their self-indulgence, vanity, struggle for power and self-esteem. As a political system, democracy formalizes the means of decision through proceedings and empties law of any previous ethical content: ethics “is” no specific (ontological) behavior, ethical is what is decided to be ethical.

The Case of Surrogacy and Parenthood: Realism, Idealism or Relativism? Changing Paradigms in Family Law Discipline

Giulia Terlizzi, Università degli Studi di Torino

Law has always referred to philosophical conceptions as basis in framing, establishing and justifying legal principles and norms, to establishing rules for civil and social cohabitation between citizens, and among their reciprocal relationship. In recent times, family law guiding principles, especially regarding parenthood and childhood – are progressively changing in modern western legal systems, overcoming former standards and fundamentals based on philosophical categories linked to realism, in favor to a conception close to idealism, or even to relativism. In fact, it is evident a shift from nature to intention which is linked to the increasing power of personal autonomy. This involves a second step, enlightening a conception of family relationship that moves away from relations and links established by blood or genes, in favor of parental responsibility based on social and legal parentage, with no more links needed with biology or genetic. This last shift highlights a totally new conception of parenthood which is characterized by the fact that the right to procreate and the “alleged” right to become parents run along two straight lines with no more point of

intersections. Since the introduction of adoption before, and most recently of ARTs (assisted reproductive technologies), it is possible to become parents even though the subjects are not able - or not willing - to procreate. This change implies practical consequences that must be considered by law, judges and legal scholarship, and it opens questions and problems, not easily solvable. All these questions revolve around a common dilemma: is the law abandoning a realistic view in family law discipline in favor of other philosophical approaches? Or on the contrary legislators are taking a more realistic view of societal changes in family law?

The Criminal Responsibility between Constructivism and Realism

Bruno Buonicore, Gilberto Pedrosa, Goethe-Universität Frankfurt am Main

The paper aims to study the relationship between constructivist and realist approaches in the building of criminal law, especially with regard to the foundations of responsibility and its relationship with the concept of individual freedom. In the so-called theory of crime from a European continental perspective, different methodological as well as theoretical arguments about normative construction are in dispute, which operates with different constructivist and realistic assumptions. In this context, some presupposes a natural fact as the basis of criminal responsibility, e.g., neuroscientist approaches; while to others, is the metaphysics as the ultimate foundation of criminal law assumed, not to mention those who move within the framework of the theory of discourse and draw closer to a radical positivism. Beyond those ontological as well as normativistic angles, by considering the current trend towards a functionalist constructivism, along with the complex possibilities of relationship that open between criminal law (must be) and natural, metaphysical and social facts, this study asks: To what extent is it possible to leave behind a realistic approach in the construction of criminal law, of any order, without falling into a kind of positivist relativism in which there are no secure ontological anchors that limit the spectrum of criminal policy actions? This paper rise the hypothesis of a necessary anchor point between penal law normativity and an ontological object, which the former cannot renounce a realistic realm of order in the construction of how the duty ought to be. Such an object, however, should not be natural, not even metaphysical, but social, in other words, based on social ontology in a weaker sense. Otherwise, either the normativity would be nullified by a deficit of subjectivity, or it would face an insurmountable problem of deficit of objectivity. The intent of this study is to push forward the theoretical

debate about the foundations of criminal responsibility and its binds with individual freedom, understood in all its inter-subjective complexity as a social fact.

Honor and the Rule of Law

Renato Teixeira Campos de Melo, Humboldt Universität zu Berlin

Research question: Is there any conceivable constitution that encompasses all manifestations of honor, viewed from an essentialist perspective, so that honorable actions are always legal in its realm?

Hypothesis: The preservation of honor potentially conflicts even with a rational and just constitution due to the limitation of its scope. The possibility of an illegal but honorable action cannot thus be avoided, so that in such an exceptional case law should not be applied to the transgressor.

Methodology: We present an essentialist conceptualization of honor, which is independent of time and space, instead of a socially constructed one, since social constructs are arbitrary and cannot thus be a parameter for a philosophical investigation of the relation between honor and the rule of law. Only such an essentialist conceptualization admits that a person can transgress social norms, including constitutional norms, in order to preserve or enhance his honor. With this essentialist understanding of honor in mind, we investigate the possibility of a constitution that encompasses it entirely, that is, that allows one to act honorably in any situation. The result of this investigation is the answer to the research question.