SW72 Between Experience and Community: Pragmatic Inquiries in Legal Theory and Philosophy

FRIDAY from 8.30-10.30 & 11.00-13.00

Room 3.B52

Workshop abstract

Organizers:

Sanne Taekema (Erasmus University Rotterdam)

Michał Paździora (Univeristy of Wrocław)

Michał Stambulski (University of Wrocław)

The renewal of interest in pragmatism across several disciplines like social and political science also poses a challenge for traditional legal theory and philosophy. Pragmatism seems to be a good starting point for those legal theorists and philosophers who have interested in reducing dichotomies in legal thinking (fact/value, text/interpretation, creation/application of law). This perspective offers a theory of creative human action, an explanation of the emergence of a social self and sets the basis for considering the social ontology of law.

Pragmatism is often accused of reducing meaning and legal actions to economic rationality. However, the economic practice is only a part of much broader practical activities of individual agents. Ethical, political, aesthetic rationalities also create what William James calls the „whole of human life" and therefore affect legal practice. Legal pragmatism goes beyond the „agent/structure" dichotomy. Criteria of a successful action are socially constructed and emerge from complicated interactions between the individual and its social environment (legal culture, education, current politics, common beliefs). Legal decisions are both an expression of the patterns of the community and of individual creativity. Pragmatism seems to be a useful tool for all of those who want to view legal practice in all its complexity.

Our workshop examines the usage of pragmatism in contemporary legal theory and philosophy. In our understanding this approach can be a useful method, in various areas of legal scholarship and education. In the workshop, papers will be presented on pragmatist methods, concepts, and epistemology, on the consequences of pragmatic thought for legal theory and politics, and on pragmatist views on legal education.

List of presenters and titles

Presentations last 20 minutes, after 2 papers 20 minutes discussion

8.30-10.30

1. Wouter de Been (Erasmus University Rotterdam)

The science of human relationships: Epistemological holism in the pragmatic mold

2. Alexandra Mercescu (West University of Timisoara, Romania)

"Culture" in Action: A Pragmatist Reading, a Comparative Law Critique

DISCUSSION

3. Thomas Riesthuis (Utrecht University)

The interactional dimensions of law: "Moral all the way down"?

4. Sanne Taekema (Erasmus University Rotterdam)

Pragmatist method beyond dichotomies: Exploring the continuity between substance and procedure

DISCUSSION

Coffee break (10.30-11.00)

11.00-13.00

5. Michał Stambulski (University of Wrocław)

Law Schools and Epistemic Democracy

6. Michał Paździora (University of Wrocław)

Experience and community in legal education. A pragmatic approach

DISCUSSION

7. Jennifer L. Perevodchikov (University of Idaho)

Protecting Democracy by Practicing Law: Dewey's Reflections on Education and a Practical Simulation

8. Karolina Kocemba (University of Wroclaw)

Spaces and interactions in legal education. A pragmatic view

DISCUSSION

PAPER ABSTRACTS

1. Wouter de Been (Erasmus University Rotterdam)

The science of human relationships: Epistemological holism in the pragmatic mold

"If civilization is to survive we must cultivate the science of human relationships — the ability of all peoples, of all kinds, to live together." This is a line from a speech by Franklin Delano Roosevelt quoted on a fridge magnet I bought at the Franklin Delano Roosevelt Memorial. My interest in it here is not world peace, — the theme of the speech it originates from — but primarily the confident belief expressed in it, that there can be a "science" of "human relationships" embracing the cultural differences of "people of all kinds." It is an echo of a pragmatist view of the world that has faded into the background, but that once made eminent sense to the people Roosevelt addressed and to the public intellectuals that expounded it in the Interwar years. Today, this pragmatist stress on the continuities between understanding the world scientifically, ethically and culturally is no longer considered a winning approach. To many it suggests a simplistic faith in science to improve people's lives and, implausibly, to address substantive questions about values, ethics and esthetics. In this paper I will argue that this judgment of pragmatism is rooted in a narrow conception of scientific knowledge that is very different form the way the pragmatists understood what it meant to gain knowledge about the world. I will focus on Morton White's effort to retrieve this "epistemological holism" of the classical pragmatists in *A Philosophy of Culture: The Scope of Holistic Pragmatism* (2002) and discuss what it means for political and legal theory.

2. Alexandra Mercescu (West University of Timisoara, Romania)

"Culture" in Action: A Pragmatist Reading, a Comparative Law Critique

Comparative legal thinking, that is the theorizing about the comparison of laws or the actual practice of contrasting two or more legal cultures, can be a rich source of epistemological insights for law in general. Concepts such as "legal identity", "culture", "interpretation", "translation" or "migration" have been widely explored by comparative lawyers not only for comparative purposes but also as useful tools in casting a better light on the legal phenomenon in general. Among these, two concepts in particular seem to me to lend themselves to a pragmatist reading: "interpretative yield" and the very notion of "culture". Thus, in this presentation, I first seek to answer the following question: What does it mean to say that one comparison holds a greater "interpretative yield" than another? Secondly, I aim to investigate the gap between what one usually asserts in comparative law as a theory of culture and culture as it is used in practice, specifically on the occasion of those trials which involve in a way or another the so-called "cultural defenses". Along pragmatist lines, I will ask what the consequences of using culture are and whether the concept of "cultural resources" – as opposed to culture – can be deployed as, in a certain sense, more effective (theoretical? practical?) tool. While sensitive to the merits of pragmatism as an anti-foundational theory, my analysis will also allow me to expose some of the limits of this not always contiguous stream of thought.

3. Thomas Riesthuis (Utrecht University)

The interactional dimensions of law: "Moral all the way down"?

Pragmatist legal theories conceptualize law as a social practice in which interactional expectations shape the relations between citizens and institutions. For example, Lon Fuller's typology of enacted and interactional law highlights that interactional expectations ground the normative force of legal norms. Many pragmatist legal theories also conceptualize law as a purposive practice. On this view, law has a normative point, such as, for example, adherence to an internal morality of law (Fuller) or an orientation towards the master ideal of legality (Selznick). In this paper, I defend pragmatist legal theories against a pervasive Dworkinian line of critique that suggests that their contextual and experimental account of law obscures the fact that all conventions are inherently moral in nature. On this view, legal pragmatists fail to acknowledge that the interactional expectations that shape the relations between citizens and institutions are "moral all the way down." I will argue that this line of critique is unconvincing because it misconstrues the contextual and experimental approach of pragmatist legal theories. To illustrate my argument, I will engage with Dimitrios Kyritsis' moralized account of the separation of powers. Kyritsis maintains that the division of labour between courts and the legislature and the balance of powers between these institutions follows from the moral point of law. Although I agree with Kyritsis that moral arguments justify the separation of powers between courts and the legislature, I will argue that moral arguments cannot fully account for how relations of authority are sustained between these institutions.

4. Sanne Taekema (Erasmus University Rotterdam)

Pragmatist method beyond dichotomies: Exploring the continuity between substance and procedure

One of the most important methodological contributions of philosophical pragmatism is its rejection of dichotomous thinking. Most attention has gone to the rejection of the fact-value separation (eg. Putnam, Del Mar) but in the context of law there are other persistent dichotomies that need softening. In this paper, I focus on the distinction between the procedural and the substantive. This is a distinction that appears in legal and political theory in relation to areas of law, values, the idea of justice, etc. My particular attention in terms of application will be on theories of rule of law, but this is meant as an example. The aim of the paper is to examine the relationship between procedural and substantive elements in legal theory more broadly. My main idea is that we need to zoom in on the individual as the centre of moral attention in a legal context, and on the interactions between the individual (citizen), other people, and legal institutions and their officials, in order to clarify in what way procedural and substantive elements of law and legal value are continuous with each other. I defend the claim that without a theory of the moral importance of procedures for people, we cannot understand the centrality of procedural thinking in law.

5. Michał Stambulski (University of Wrocław)

Law Schools and Epistemic Democracy

Law Schools are educational and scientific institutions that are supposed to – at the same time – train lawyers and criticize the law. This can lead to tension, which becomes apparent during the discussion on the profile of a law graduate. Should a graduate be a professional, who is adapted to the requirements of the practice, or a distanced and critical of social reality thinker? Law School should be a "factory" or a "university"? This dilemma is based on the separation of practice and theory, which in pragmatism found a refutation. The goal of the paper is to look at the structure and aims of a Law School through a conception of scientific inquiry and democracy formulated in pragmatism (Ch. S. Pierce, J. Dewey).

According to pragmatism scientific inquiry is always a discursive, practical and collective undertaking. In the process, the hypothesis is formulated and criticized, based on its consequences. Knowledge is a result of a never-ending process of adapting to new environmental conditions. According to American philosophers, the more people participate in an inquiry, trying to improve or falsify the claims by providing new evidence or arguments, the more fruitful results it might bring. The truth emerges from dialogue rather than is being discovered. As such, the process of scientific research is an exemplification of the democratic way of life. Democracy, according to Dewey, is a "necessity for the participation of every mature human being in formation of the values that regulate the living of men together." In a democracy a multitude of voices and perspectives make the community undertake more thoughtful actions.

Pragmatic theory of democracy provides a framework for building a normative concept of legal education based on the following didactic dimensions: Socratic dialogue, moot courts, clinical education and imagination training. These dimensions are interlinked, conditioned by each other and they form institutional conditions for legal democratic inquiry. Analyses at each of these levels aim to resolve the initial dilemma ("factory" or "university") by demonstrating that critical lawyers are a prerequisite for a professional legal culture.

6. Michał Paździora (University of Wrocław)

Experience and community in legal education. A pragmatic approach

Anti-foundationalism rejects philosophy's traditional striving for the certitude of our cognition which used to be based on durable, unquestioned foundations. Accepting the thesis that such foundations are neither available nor necessary for human knowledge and social practices, this does not necessarily imply that we are abandoning the hope of obtaining a universal validity of claims that are made. Therefore, that there is a need to seek a new source of validation which allows reconciling the fact of plurality of views and values, on the one hand, and the normative claims to universality, on the other hand.

The philosophy of pragmatism is perfect for this task in legal education. For pragmatists, the experience is habit formation, and habit formation is a mode of cognition. The article aims to show that using examples of hard cases in legal education we train more than just legal reasoning skills.

We create a community of sense (sensus communis), an intersubjective community which is the source of validation of potential judgments. In order to communicate our judgments and solutions, we need to respect different ways of perceiving the world and inscribe our judgments into different perspectives, communicating them in a way that is comprehensible to others. The faculty of judgment can be reduced to the requirement of raising oneself above the 'subjective conditions of an individual judgment' by the capacity of taking note of other perspectives and making an attempt at situating oneself within those perspectives.

7. Jennifer L. Perevodchikov, (University of Idaho)

Protecting Democracy by Practicing Law: Dewey's Reflections on Education and a Practical Simulation

Over the course of the last century, careers in law that were once only available to a few are now pursued by the many. Women, racial minorities, and the LGBTQ community are increasingly entering the legal field (Law School Admissions Council Data and Statistics (LSAC), 2018). Courts and bar associations, too, are taking an interest in creating a well-rounded judiciary that better reflects the public it serves (Sloan, 2018). Law schools, following recent recommendations of the American Bar Association that legal education include more practical training and internship programs, are also reconsidering their curricula to create lawyers who are better suited for practice (Hobson, 2014; Rosenthal, 2016). These changes together are reshaping law practice to be more inclusive, practical, and collaborative (Noting as well the increasing use of alternative dispute resolution (ADR) methods in place of litigation, (LSAC, 2018)). In accord with post-secondary legal education becoming more practical and experienced-based, similar recommendations can be made for demonstrative and real-world based activities in middle and secondary education classrooms, and extracurricular (e.g. after-school) programs (Barron, B., & Darling-Hammond, L., 2008). Such is the longtime notion of John Dewey, that learning environments which support students' use of discipline-specific practices foster the development of transferable knowledge, and skills for use in the real world. Furthermore, this instructional approach promotes learners who are reflective, autonomous, and informed decision makers, who in turn grow to be citizens aptly able to take on the responsibility of upholding the public good. Included here is a discussion of Dewey's "Democracy and Education" and a practical example of simulation-based legal curriculum designed to develop interest and participation among diverse groups of students.

References

Barron, B., & Darling-Hammond, L. (2008). *Teaching for Meaningful Learning: A Review on Research on Inquiry-Based and Cooperative Learning*. George Lucas Educational Foundation. San Rafael, CA. https://files.eric.ed.gov/fulltext/ED539399.pdf

Hidi, S., & Renninger, K. (2006). The Four-Phase Model of Interest Development. *Educational Psychologist, 41*(2), 111-127.

Hobson, K. (2014). Law Schools Work to Make Students More Employable. Retrieved April 24, 2018, from https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2014/03/11/law-schools-work-to-make-students-more-employable

Law School Admissions Council (LSAC) Resources. (n.d.). Retrieved from https://www.lsac.org/lsacresources

Lo, J. C. (2015). Developing participation through simulations: A multi-level analysis of interest on students' commitment to vote. *Journal of Social Studies Research*, 39(4), 243-254. doi:10.1016/j.jssr.2015.06.008

Rosenthal, M. (2016). The Importance of Practical Legal skills. Retrieved from https://abaforlawstudents.com/2016/04/01/the-importance-of-gaining-practical-legal-skills/

Sloan, K. (2018). ABA's Law School Oversight Needs Younger Perspectives, Report Finds. Retrieved from https://www.law.com/sites/almstaff/2018/01/31/abas-law-school-oversight-needs-younger-perspectives-report-finds/?slreturn=20180324161314

Wenger, E. (2003). *Communities of practice : Learning, meaning, and identity* (1st pbk. ed., Learning in doing : social, cognitive, and computational perspectives). Cambridge: Cambridge University Press.

8. Karolina Kocemba (University of Wroclaw)

Spaces and interactions in legal education. A pragmatic view

The concept of "the Self" developed in pragmatism, strongly emphasizes the interaction of individual and social environment. This concept can be useful for problematizing legal education – research conducted by Centre for Legal Education and Social Theory shows that law students are socialized mainly through the interactions and space. This area was not well examined so far, but tools for studying relations between space and interactions can be delivered by pragmatism and especially by symbolic interactionism.

Thanks to pragmatism, we can examine the interactions through which the future lawyers are socialized. The subject of research in interactionist theory are everyday interactions between entities within an institution, but what is special in this approach, is a possibility in looking at the institution from the perspective of participants. These participants are functioning in a certain context, which undoubtedly influences the meaning for the individual. As a context, we can treat many factors, but one of them is rarely taken into account in the sociological research because it is treated as an unnoticeable background, and this factor is space. In-depth interviews conducted at the Faculty of Law, University of Wrocław display that space is a factor which strongly influences interactions of legal education subjects.

In my presentation, I want to show how space is influencing on interactions played at faculties of law and on future lawyers, using theories coined by Mead, Blumer or Goffman. I want also to show how we can use pragmatism theory for conducting empirical research.