**Special Workshop SW 50:** **Legal Positivism and Legal Realism**

**Schedule**

**Organisers:**

Juan Pablo Alonso (Buenos Aires University) [jalonso@derecho.uba.ar](mailto:jalonso@derecho.uba.ar)

Giovanni Bautista Ratti (Genoa University)

Julieta Rábanos (Genoa University)

**Abstract:**

The claim that law and morals are separate domains that have no necessary connection– the so-called “separation thesis” (ST) – is commonly considered as the kernel of legal positivism. Even though ST has been challenged in several ways – mostly on justificatory grounds – the workshop is planned to focus on two related challenges: (1) the ontological challenge (OC); and (2) the interpretive challenge (IC), and the replies these challenges have received within the positivistic camp. OC amounts to maintaining that law necessarily incorporates or refers to morality, so that one cannot identify a legal system without resorting to moral considerations. In turn, IC maintains that, since legal sources are globally or partially undetermined, there is the need for the interpreter to supply moral resources in view of determining solutions to relevant legal questions. Through legal interpretation, thus, law and morality would necessarily meet.

Positivistic replies to such challenges have taken two paths: a formalistic one and a realistic one. The first maintains that it is impossible that every claim about what the law is results from some interpretation or other. In this perspective, positivism maintains that, owing to conceptual reasons, law must necessarily be understood in its literal, conventional, and/or intended construction. Realistic replies, in turn, have maintained the epistemic character of ST, highlighted the non-cognitivist nature of interpretive sentences, and defended the view that legal theory should inquire into the factual causes that bring about certain patterns of decision-making.

The proposed workshop aims at disentangling two main questions regarding ST: (1) how legal positivism is to be “properly” interpreted or understood, in the light of OC and IC; and (2) whether legal positivism requires a particular theory of legal interpretation, oriented to defend a specific version of ST against OC and IC.

**Keywords:**

Legal Positivism, Legal Realism, separation between Law and Moral, ontological objection, interpretative objection.

**Languages:** English, Spanish

**Tuesday July 9 2019 – Martes 9 de julio de 2019**

(Spanish sesson - sesión en castellano)

**14.00 / 14.45 hs.**

**Riccardo Guastini**, Tarello Institute for Legal Philosophy. Genoa University

“El realismo jurídico como teoría positivista del derecho”.

**14.45 / 15.30 hs.**

**María Cristina Redondo.** Universidad de Génova. CONICET (Argentina)

“Los conceptos institucionales en la perspectiva de Alf Ross. Un análisis crítico”

**15.30 / 16.00 hs.**

**Juan Pablo Alonso.** Universidad de Buenos Aires.

“¿Nunca el derecho es “triángulo”?”

**16.00 / 16.30 Coffe break**

**16.30 / 17.00 hs.**

**Pierluigi Chiassoni.** Università di Genova

“Creación judicial de derecho: una exploración analítica”

**17.00 / 17.30 hs.**

**Andrej Kristan.** Universidad de Génova.

“¿Es el iuspositivismo coherentista un oxímoron?”

**17.30 / 18.00 hs.**

**Sebastián Agüero.** Universidad Austral de Chile.

“Derecho, prácticas sociales y ontología”

**Thursday July 11 2019 – Jueves 11 de julio de 2019**

(English sesson - sesión en inglés)

**14.00 / 14.45 hs.**

**Frederick Schauer.** University of Virginia

“Judicial Opinions as Positive Law?”

**14.45 / 15.15 hs.**

**Hugo Ricardo Zuleta.** Buenos Aires University

“On Legal Positivism and Originalist Interpretation”

**15.15 / 15.45 hs.**

**Giovanni Battista Ratti.** Genoa University

“Three Kinds of Logical Indeterminacy in the Law. Alf Ross’s Insights”

**16.00/16.30: Coffee Break**

**16.30 / 17.00 hs.**

**Eric Millard.** Paris Nanterre University

“Is the Separation Thesis important for Legal Realism ?

**17.00 / 17.30 hs.**

**Jorge Cerdio y Germán Sucar.** ITAM - Law Department

"Grounding and the Legal Domain"

**17.30 / 18.00 hs.**

**Ricardo A. Guibourg.** University of Buenos Aires

“A wrong debate on positivism, realism and natural law”

**18.00 / 18.30 hs.**

**Mikhail Antonov.** National Research University Higher School of Economics (Saint Petersburg, Russia)

“Legal realism in Russian law”

**Friday July 12 2019 – Viernes 12 de julio de 2019**

(English sesson - sesión en inglés)

**14.00 / 14.45 hs.**

**Brian Leiter.** Karl N. Llewellyn Professor of Jurisprudence. Director, Center for Law, Philosophy & Human Values. University of Chicago

"Legal Positivism as a Realist Theory of Law."

**14.45 / 15.15 hs.**

**Horacio Mario Spector.** University of San Diego Law School. Universidad Torcuato di Tella

“Law a part of Politics”

**15.15 / 15.45 hs.**

**Julieta Rábanos.** Universidad de Génova

“Law, Authority, Interpretation: a strange (conceptual) loop”

**16.00 / 16.30: Coffee Break**

**16.30 / 17.00 hs.**

**Ezequiel Monti.** Torcuato Di Tella University

“On the moral impact theory of legal obligations”

**17.00 / 17.30 hs.**

**Cesar Serbena.** Federal University of Paraná, Brazil

“What is a fact in the context of a legal system? A not so simple question”

**17.30 / 18.00**

**Alejandro Daniel Calzetta.** Universidad Alberto Hurtado, Chile

“The construction of a rigth. An análisis of Jeremy Bentham`s quasi-realist legal competence model”

**Special Workshop SW 50:** **Legal Positivism and Legal Realism**

**Schedule + Abstracts**

**Tuesday July 9 2019 – Martes 9 de julio de 2019**

(Spanish sesson - sesión en castellano)

**14.00 / 14.45 hs.**

**Riccardo Guastini**, Tarello Institute for Legal Philosophy. Genoa University

“El realismo jurídico como teoría positivista del derecho”.

Desde los años sesenta del siglo XX, siguiendo a Norberto Bobbio, todo el mundo está (o debería estar) capaz de distinguir entre tres formas de positivismo jurídico (LP): (a) metodológico, (b) teórico, y (c) ideológico.

Por cierto, en la literatura iusfilosófica italiana, el LP a menudo se opone al realismo jurídico (LR). Sin embargo, hace falta preguntarse: ¿de qué tipo de LP y de qué tipo de LR estamos hablando?

(i) En cuanto al LR, los iusfilósofos que oponen realismo y positivismo tienen en mente esencialmente el realismo escandinavo, especialmente Olivecrona y Ross. Esto es doblemente sorprendente. Por un lado, Olivecrona comparte el aspecto metodológico del LP: la visión según la cual la ciencia (incluida la ciencia jurídica) es una empresa empírica wertfrei (libre de valoraciones) que tiene que ver solo con fenómenos observables. Por otro lado, Ross es un fuerte defensor del LP metodológico, en contra del concepto de validez de Kelsen, entendido como fuerza vinculante, así como en contra del “punto de vista interno” de Hart.

(ii) En cuanto al LP, aquellos iusfilósofos que oponen realismo y positivismo tienen en mente o bien la teoría del derecho prevaleciente en el siglo XIX o bien la teoría pura de Kelsen. La oposición entre el LR y la teoría pura es fundada. No obstante, tal oposición no surge de una supuesta postura anti-positivista del LR. Depende más bien de dos tesis no positivistas sostenidas por Kelsen: es decir, el concepto de validez como fuerza vinculante, y la teoría normativa de la ciencia jurídica, concebida como un conjunto de oraciones deónticas (no fácticas) que se hacen eco de normas válidas (es decir, vinculantes). La oposición entre el LR y el LP del siglo XIX es igualmente fundada, pero no tiene sentido cuando se hace referencia al LP contemporáneo, que consiste principalmente en una actitud metodológica (“Benthamita”) hacia el Derecho.

El LR es una visión abiertamente positivista del Derecho. Sin duda, no todos los juristas positivistas son realistas, pero todos los realistas son positivistas (“duros”).

**14.45 / 15.30 hs.**

**María Cristina Redondo.** Universidad de Génova. CONICET (Argentina)

“Los conceptos institucionales en la perspectiva de Alf Ross. Un análisis crítico”

En el presente trabajo propongo una discusión sobre los conceptos institucionales jurídicos en la visión de Alf Ross. En primer lugar, argumento que la propuesta de Alf Ross es engañosa y está parcialmente basada en un razonamiento falaz que confunde el contenido de los conceptos institucionales con el contenido de las instituciones que caen dentro del ámbito de aplicación de los mismos. En segundo lugar, trato de mostrar que, una vez eliminada esta confusión, podemos apreciar que el análisis de Alf Ross no es, como generalmente se asume, un análisis que reduce o permite eliminar las entidades institucionales en general. En realidad, si evaluado en mayor detalle, su esquema de análisis de los conceptos institucionales jurídicos da por supuesta y se compromete con la existencia de una realidad institucional de base. Concretamente presupone la existencia de normas que imponen deberes y prohibiciones jurídicos.

**15.30 / 16.00 hs.**

**Juan Pablo Alonso.** Universidad de Buenos Aires.

“¿Nunca el derecho es “triángulo”?”

Los realistas jurídicos genoveses sostienen que las normas jurídicas, casi siempre expresadas en palabras de clase que enuncian casos genéricos, son vagas y ambiguas, o potencialmente vagas o ambiguas. “Triángulo” es una palabra de clase que expresa un caso genérico en el que se subsumen casos individuales como los triángulos equiláteros, isósceles o escalenos; grandes, medianos o pequeños. “Triángulo” no es ni vaga ni ambigua y, al igual que muchas normas jurídicas, en los procesos de subsunción (de los casos individuales en el supuesto genérico) no se presentan problemas de vaguedad ni de ambigüedad.

**16.00 / 16.30 Coffe break**

**16.30 / 17.00 hs.**

**Pierluigi Chiassoni.** Università di Genova

“Creación judicial de derecho: una exploración analítica”

Los realistas jurídicos se caracterizan por enfatizar el rol de los jueces en la creación de derecho. Sin embargo, la noción de creación judicial del derecho, y las formas en que dicha creación se manifestaría, están lejos de representar un rincón del laberinto ius teórico que ya no necesita de investigaciones. El paper se propone desarrollar una exploración analítica.

**17.00 / 17.30 hs.**

**Andrej Kristan.** Universidad de Génova.

“¿Es el iuspositivismo coherentista un oxímoron?”

Esta contribución se centra en la famosa "tesis de la separabilidad" considerada como una tesis definitoria del positivismo jurídico. Mi objetivo consiste en ofrecer una crítica de aquellos proclamados iuspositivistas que pretenden solucionar el desafío de Dworkin contra la tesis de la separabilidad al demostrar que los principios jurídicos implícitos se obtienen exclusivamente de fuentes positivas del derecho. Argumentaré que dicha solución es problemática en cuanto concibe el sistema jurídico mediante la noción de coherencia de los miembros de la base axiomática del sistema con los principios jurídicos implícitos. Como sostendré, la coherencia es un requisito moral y, por lo tanto, incompatible con la tesis de la separabilidad.

**17.30 / 18.00 hs.**

**Sebastián Agüero.** Universidad Austral de Chile.

“Derecho, prácticas sociales y ontología”

El positivo jurídico centra su atención en el derecho puesto por los seres humanos, sugiere así el estudio de un conjunto complejo de hechos, comportamientos y prácticas sociales, junto a sus productos. Desde esta perspectiva, los aspectos más destacados y desarrollados por la teoría jurídica han sido los vinculados con los órganos de creación y aplicación del derecho, sin embargo, al momento de presentar una ontología jurídica, no siempre se ha intentado conciliar ambos aspectos. Por ello, el este trabajo sugiere una propuesta ontológica que captura cómo ambos aspectos están intrínsecamente vinculados entre sí, al punto de determinarse y configurarse recíprocamente.

**Thursday July 11 2019 – Jueves 11 de julio de 2019**

(English sesson - sesión en inglés)

**14.00 / 14.45 hs.**

**Frederick Schauer.** University of Virginia

“Judicial Opinions as Positive Law?”

A central claim of some of the American Legal Realists was that judicial opinions were ex post rationalizations that neither reflected the decision-making processes of the judges who wrote them nor influenced subsequent judicial decisions. The goal of this paper is to situate this claim within the core ideas of legal positivism and its concern with the sources of law, and to contrast this claim with the perspectives of various other legal realisms, in particular the empirical psychological claims of Scandinavian Realism, and the focus on judicial justifications in Genoese Legal Realism.  The goal is not to show that these (and other) legal realisms have some core idea in common, but rather to suggest that the various realisms may share little except a label.

**14.45 / 15.15 hs.**

**Hugo Ricardo Zuleta.** Buenos Aires University

“On Legal Positivism and Originalist Interpretation”

One of the main questions this workshop aims at disentangling is whether legal positivism requires a particular theory of legal interpretation or not.

Professor Larry Alexander is one of the prominent scholars who answer affirmatively to that question. Indeed, he claims that there is a conceptual link between legal positivism and originalist interpretation.

In my contribution I criticize the arguments offered in a recent paper by Professor Alexander in support of that thesis, which I consider mistaken.

**15.15 / 15.45 hs.**

**Giovanni Battista Ratti.** Genoa University

“Three Kinds of Logical Indeterminacy in the Law. Alf Ross’s Insights”

By “logical indeterminacy of law” I do not refer to the problems stemming from normative gaps and inconsistencies between norms. These flaws of the legal systems are normally examined by means of logical tools, but their origin is not logical, but rather empirical: a careful lawgiver may avoid them, to a great extent, by crafting a complete and consistent set of norms.

Instead, by “logical indeterminacy” I refer to flaws which stem from logical features of normative discourse which not even the most careful of the lawgivers could completely escape. They are, so to speak, conceptual, rather than empirical drawbacks.

Not surprisingly, Alf Ross’s analysis is, on this score, pioneering. In the early forties of the past century he discovered a paradox that still bears his name and haunts deontic logic and legal reasoning alike; in the late sixties he deepened our mastery of the notion of a conditional norm and its negation and was so able to dismiss the too hasty analogy which is frequently made between descriptive conditionals and normative conditionals, and in a period spanning more than a decade (1958, 1969) he discovered a foundational self-referential puzzle which jeopardizes the very idea of legal determinacy. In the paper, I shall analyze these three issues in this order, highlighting that the claims about the indeterminacy of law that are usually connected to legal positivism have a much wider reach than what is normally considered.

**16.00/16.30: Coffee Break**

**16.30 / 17.00 hs.**

**Eric Millard.** Paris Nanterre University

“Is the Separation Thesis important for Legal Realism ?

The Separation Thesis of Law and Morals (ST) has been asserted as central by legal positivism and legal (european) realism (LR). Its epistemic importance is obvious and has not to be chalenged for any Theory of legal science (TLS); but it’s misleading to refer to the ST within LR as a specific theory of Law, should it be derived from a TLS. First, LR cannot be consistent when using concepts of Law and Morals as implied by ST. Second, a descriptive approach of Law in action as LR requires to understand “Morals” in a broader sense than the conventional one.

**17.00 / 17.30 hs.**

**Jorge Cerdio y Germán Sucar.** ITAM - Law Department

"Grounding and the Legal Domain"

Legal Philosophers discuss about fundamental issues of legal practice such as legal error, legal validity or legal gaps as if those problems are out there. They seldom acknwoledge that those problems and their corresponding arguments depend on a theoretical model about the nature of the Law (and legal knowledge). A consequence of our thesis is that discussions about the Law are necessarily within a Legal Theory: A discussion about fundamental issues of the Law cannot take place without a Legal Theory (the Law is not out there); in addition, rival analysis about a certain issue cannot be sensical from more than one Legal Theory at the same time. To show our thesis we analyze the legal status of simple statements and their truth-conditions to argue in favor of what we term the Theory-Grounding Thesis.

**17.30 / 18.00 hs.**

**Ricardo A. Guibourg.** University of Buenos Aires

“A wrong debate on positivism, realism and natural law”

The discussion between natural law and positivism is set as if both tendencies were talking about the “real condition” able to define reasonably the concept of a real fact. This way, the debate remains dimmed in relevance, as a metaphysical reflection long away of practice. This kind of reflection could lead us to a new, different way of practicing the law: one which could, maybe, constitute a kind of the Copernican Revolution the law never had.

**18.00 / 18.30 hs.**

**Mikhail Antonov.** National Research University Higher School of Economics (Saint Petersburg, Russia)

“Legal realism in Russian law”

This paper discusses the realist aspect of Russian/Soviet law. The ordinary language usage refers to American legal realism represented by such names as Jerome Frank, Karl Llewellyn or Felix Cohen. This version of realism borrowed methods from the social sciences to carefully study the law as experienced by lawyers, judges, and average citizens. But the term realism is broader and can encompass the ideas of Leon Petrażycki or his followers who were dubbed by K. Opalek as the school of “Eastern European legal realism”. There are some methodological affinities between this latter version of legal realism and the concept of “decisionism” which will be discussed in the paper. Formalism and decisionism/realism are mutually exclusive in theory, but they were, nonetheless, combined in the legal practices of the Soviet regime and in Soviet legal theory. This contradiction was due to, among other reasons, the original ambiguity of the Marxist-Leninist attitude to the law. The law was understood as a tool of class oppression and at the same time as a necessary means of state governance under the conditions of the dictatorship of the proletariat. Following ardent debates in the 1920s about the nature and the future of the law, Soviet legal theory and practice in the late 1930s became a binary combination of formalism and decisionism—their characteristic features throughout Soviet history, which still survive in Russian law to this day.

**Friday July 12 2019 – Viernes 12 de julio de 2019**

(English sesson - sesión en inglés)

**14.00 / 14.45 hs.**

**Brian Leiter.** Karl N. Llewellyn Professor of Jurisprudence. Director, Center for Law, Philosophy & Human Values. University of Chicago

"Legal Positivism as a Realist Theory of Law."

In earlier work, I have argued that "legal realism" presupposes a positivist theory of law. This paper argue that the most plausible version of legal positivism is an essentially "realist" theory. By "legal positivism," I mean the view about the nature of law that H.L.A. Hart articulated most powerfully in 1961 (while learning from and modifying the work of Hans Kelsen) according to which (1) where a legal system exists, there exists a "rule of recognition" specifying the criteria in virtue of which norms are valid law; and (2) a rule of recognition is nothing more than a complex psycho-social artifact constituted by the practice of officials, in particular, the criteria of legal validity they converge upon and which they treat as obligatory (in Hartian lingo: that they accept from "an internal point of view"). That means laws and legal systems rest at bottom on the conventional practices of officials.

By realist theories of law, I mean theories which: (1) describe without sentimental or moralizing illusions what law is and how it actually operates in human societies (descriptive adequacy takes priority over moralizing sermons); (2) recognize that law is never adequate to explain how courts adjudicate all cases that come before them; and (3) account for law and adjudication within the constraints of a naturalistic theory of the world, i.e., one that eschews appeal to any entities or properties that do not find a place in successful empirical scientific accounts of natural and social phenomena. Both the American and Scandinavian (self-identified) "legal realists" were proponents of realist theories of law in this sense, albeit in very different ways, a point to which I return. Hart was a critic of both American and Scandinavian legal realisms, though in both cases he missed his mark. The irony is that Hart's legal positivism is also a realist theory of law, and once we sort out the misunderstandings and confusions, it will be clear that legal positivists and realists form a unified theoretical front against the moralizing and ideological obfuscators about law, from Lon Fuller to Ronald Dworkin. It will also turn out that one of Raz's additions to Hart's theory, namely, the idea that law necessarily claims authority in Raz's "Service Conception" sense, betrays the realist ambitions of Hart's theory.

**14.45 / 15.15 hs.**

**Horacio Mario Spector.** University of San Diego Law School. Universidad Torcuato di Tella

“Law a part of Politics”

Most contemporary legal philosophers claim that law resembles morality or is a specialized form of morality. Among the advocates of such a moralized conception of law are Ronald Dworkin, Robert Alexy, Carlos Nino, and Mark Greenberg. In this paper I will show the inadequacy of this view and will suggest that law is a specialized form of doing politics. Political deliberation and decision making are essentially defined by procedures, not by substantive rules. According to the political portrayal of law, legal deliberation and decision making are distinctive forms of doing politics. I will explore the special features that characterize law as opposed to other forms of doing politics.

**15.15 / 15.45 hs.**

**Julieta Rábanos.** Universidad de Génova

“Law, Authority, Interpretation: a strange (conceptual) loop”

The aim of this presentation is to argue that, even if it could be true that legal positivists and legal realists hold the concept of Law as intrinsically connected with the concept of Authority, they might be not only using a slightly different concept of Authority but also (even if they are using the same or a similar one) they might be identifying different authorities altogether. I will further argue that, in the centre of these differences, hides what I think that is the very core of the discussion: the relation between issuance and interpretation (between law-makers or legislators and interpreters or adjudicators). In this sense, legal positivism and legal realism seem to mainly place “authority” in one of these two sides of the question, relegating the other play a secondary (albeit important) role but with other different status.

After laying down some conceptual and preliminary remarks about some concepts that I consider to be important for this discussion, I will also propose a general, rough outline of the different possibilities of the concept of ‘Law’, if a determinate combination of Authority, Interpretation and Issuance is taken into consideration. Then, I will take Eugenio Bulygin’s and Riccardo Guastini’s positions on the matter, as examples of a legal positivist and a legal realist, to apply the definitions and the aforementioned possibilities.

**16.00 / 16.30: Coffee Break**

**16.30 / 17.00 hs.**

**Ezequiel Monti.** Torcuato Di Tella University

“On the moral impact theory of legal obligations”

Greenberg claims that legal obligations are those moral obligations created by the action of legal institutions in the legally proper way (MITLO). Furthermore, legal institutions create moral obligations in the legally proper way simply by manipulating the factual circumstances so as to trigger pre-existing moral reasons. In this paper, I argue that we ought to reject Greenberg’s account. The main argument is that there are many moral obligations triggered by the action of legal institutions that, intuitively, are not legal obligations. Thus, it is necessary to distinguish between ‘legally proper’ and ‘legally improper’ ways of triggering in a way that rules out the false positives. Greenberg suggests that this can be done by appealing to what legal systems are for. However, I shall argue that this strategy does not work.

**17.00 / 17.30 hs.**

**Cesar Serbena.** Federal University of Paraná, Brazil

“What is a fact in the context of a legal system? A not so simple question”

Facts occupy a central place in Law. Positive laws, legal authorities and institutions presuppose a factual world, which is the starting point for the complex set of operations performed by law professionals. But what could be wrong with the facts? Why could they be a problem? If facts are simple and obvious, why could they be complex and confusing in some situations? I will try to show how these questions can run counter to common sense and cover up interesting philosophical problems. Among the everyday facts of the normal world of people and the facts that enter into the legal systems there is a distance and a detailed path that I will try to analyze in its more general characteristics in the present article, from the point of view of Legal theory and philosophy of science. I will briefly recall the conceptions of legal fact in the theories of Kelsen, MacCormick, Schauer, Alchourrón and Bulygin and Taruffo. I will propose a legal facto concept from the constructive empiricism of Bas C. Van Fraassen, one of the most influential authors of contemporary epistemology. The purpose of this article is to conceptualize legal fact as a model or set of models empirically adequate to the models of a legal theory, in the same sense that Van Fraassen defines the concept of empirical adequacy for scientific theories. The advantage of this definition for a Legal theory is that its traditional problems such as "the nature of the legal fact" or "the truth or justice" of a legal concept are overcome, provided they are approached from the methodological proposal described in this article.

**17.30 / 18.00**

**Alejandro Daniel Calzetta.** Universidad Alberto Hurtado, Chile

“The construction of a rigth. An análisis of Jeremy Bentham`s quasi-realist legal competence model”

El trabajo tratará acerca del modelo de competencia esbozado por Jeremy Bentham en su obra On the limits of the penal branch of jurisprudence. En particular sus nociones de poder de constricción y poder de imperación, y como el ejercicio de estos se distribuye entre soberano y delegado. Para ilustrarlo se tomará como modelo un derecho subjetivo como el derecho a testar. El análisis del modelo dejará ver un modelo de creación de normas en el que el juez tiene un rol central, lo cual permite caracterizar al modelo como cuasi realista. Se finalizará viendo como dicho modelo puede ayudar a entender la competencia, y la relación legislador-juez, en los sistemas jurídicos contemporáneos.