

IVR Special Workshop “Law, Normativity, and the Mind”
Lucerne, 11 and 12 July 2019 in the afternoon

ORGANIZERS

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ABSTRACT

The workshop aims at exploring the contribution that contemporary cognitive sciences may afford to the understanding and potential reframing of the phenomenon of normativity in general, and of legal normativity in particular.

Amongst the many relevant issues, we will especially focus on the following ones.

- *Psychologism and anti-psychologism in the theory of law.* Since the beginning of the XX century, the indictment against psychological reduction of normative phenomena has been particularly influent in legal theoretical approaches. What is the impact, if any, of contemporary cognitive sciences on the arguments in favour and against psychologistic views of legal reasoning and legal rule-following?
- *Law and the psychology of rule-following.* A wide-spread view of rule-following represents it as a ratiocinative process: an inference in which an explicit (conscious) rule plays the role of an operative reason in favour of the prescribed course of action. Recent approaches in moral psychology and in the psychology of decision-making – somehow reminiscent of Wittgenstein’s famous remarks – have challenged this view in favour of non-ratiocinative accounts of rule-following as an automatic, non-inferential process based on implicit (unconscious) parameters: emotions, bodily schemata, etc. Is the distinction between ratiocinative and automatic forms and aspects of rule-following relevant for the understanding of legal dynamics? In case it is, how should be mapped the distribution and interconnection of ratiocinative and automatic rule-following in law?
- *Cognition and emotion in normative judgment.* Related to the former point, how is to be conceived the role of cognition and emotion in legal reasoning and behaviour?
- *The cognitive structure of legal concepts.* Is there any difference between the “logical structure” of a given legal concept (“property”; “right”; “legal personhood”, etc.) – that is, the set of interrelated propositions logically entailed by its correct application – and its “cognitive structure”, that is, the way in which the mind tends to represent and apply the concept? Are these differences, if any, relevant for legal reasoning and legal cognition? Moreover, what kind of cognitive mechanisms are at play in the attribution of legal significance to facts, relations, objects, and events?
- *Presuppositions of legal thought and talk.* Kelsen’s “basic norm” and Hart “internal statement” are but two examples of a theoretical construct which recurs to the notion of presupposition in order to explain legal normativity. Could we adapt the

experimental approaches borrowed from the cognitive sciences to test whether these presuppositions are indeed present in legal reasoning or verbal interactions among jurists? What conclusions should we draw from such a test of the theories in question against empirical data?

PROGRAMME

THURSDAY 11 JULY, AFTERNOON (4 HOURS)

Bruno Celano bruno.celano@unipa.it
Psychologism in legal theory: a defense

José Juan Moreso josejuan.moreso@upf.edu
Naturalism in law and morals

Nicola Muffato nmuffato@units.it
The ways of reduction and the intensionality problem

Sebastian Figueroa Rubio figueroa.sebastian@gmail.com
Action and mental states in the legal domain

Noam Gur n.gur@qmul.ac.uk
Legal directives and practical reasons. A dispositional account of law's normativity

Carsten Heidemann heidemann.carsten@gmail.com
Rule-following and its role in Kelsen's theory of validity

Gonzalo Villa Rosas villarosasgonzalo@gmail.com
A presuppositional theory of legal power

FRIDAY 12 JULY, AFTERNOON (4 HOURS)

Marek Jakubiec marek.m.jakubiec@gmail.com
Are abstract legal concepts embodied? On different types of legal conceptual metaphors

Terezie Smejkalová terezie.smejkalova@law.muni.cz
Social representations as a method of analysis of conceptualization in law

Adriano Zambon adriano.zambon8@gmail.com
Can legal concepts be objective entities?

Alberto Rezende Medeiros albertodellisola@gmail.com
& Renato César Cardoso
Embodiment cognition and its influence in court decisions

Giuseppe Rocchè giusepperoch@hotmail.it
The method of familiarization and subjectivism

Horacio Spector hspector@utdt.edu
Fictions and emotions in law

Youlo Wujohktsang youlo.wujohktsang@rwi.uzh.ch
Human rights and the naturalistic turn. On emotions and legal rationality

BOOK OF ABSTRACTS

1. Psychology in legal theory: a defence

Bruno Celano (*University of Palermo*)

Abstract. The origins of the vast majority of 20th century philosophical trends may be traced back to Frege and Husserl. This is true for, on the one hand, the analytic tradition and, on the other hand, so-called “continental” philosophy. One common theme, of crucial importance, in the thought of both Frege and Husserl is the rejection of psychologism. Anti-psychologism, as inherited from the work of Frege and Husserl (and the Neo-Kantians), has become a cornerstone of the main trends of 20th century philosophy. Jurisprudence and the philosophy of law are no exception to this general imprint. The rejection of psychologism is a cornerstone, a (usually tacit) foundational assumption, both in the continental tradition of legal theory, mainly due to the influence of Hans Kelsen, and in the Anglophone world, via Herbert Hart. Anti-psychologism crucially influences the theory of norms and of legal concepts - and, thus, views about the nature of law, legal facts, and legal institutions - and, as far as analytic legal theory is concerned, the method itself of jurisprudential enquiry, namely, linguistic or conceptual analysis. As a consequence, legal theory in the 20th century has been blind to the bewildering developments of psychology and the empirical sciences of human nature in general (including cognitive science and the neurosciences) in the last four or five decades. This neglect is the cause of several deficiencies. I focus on one of them. A widespread paradigm in contemporary psychological enquiry are so-called “dual process theories”, according to which, roughly, mental processes are basically of two kinds: fast, effortless, unreflective or automatic, not consciously accessed, and mostly not even in principle consciously accessible (“System 1”); and slow, effortful, consciously accessible or accessed, and under conscious control (System 2”). The anti-psychologistic bias makes legal theory blind to the workings of System 1: the law is understood as being a matter of System 2 processes only. This is a serious theoretical shortcoming. Validity, or the existence, of legal norms and legal facts is dependent on System 1 processes as well. What is, and what is not, a suitable candidate for a judgement of validity, be it affirmative or negative, depends on unreflective, automatic, background mental processes. I.e., whether X - a norm, an act, a fact, and so on - turns out to be the object of a judgement of legal validity or invalidity, legal existence or non-existence (“X is/isn’t legally valid”; “(it is true/false that) John is/isn’t the owner of this car”, etc.) depends on System 1 mental processes. The content of legal norms and legal facts is fixed also by System 1 processes. This dependence is responsible for a paradox in the identification of valid law and of legal facts (“the paradox of nomodynamics”): inconsistent validity judgements are sometimes equally warranted.

2. Naturalism in law and morals

José Juan Moreso (*Pompeu Fabra University, Barcelona*)

Abstract. It seems that law and morals presuppose that there is a region of objective reasons for action. But philosophical naturalism (*ontological*: there are no non-natural entities, and *methodological*: the reliable knowledge comes from empirical sciences or, at least, compatible with empirical sciences) rules out mental entities non-reducible to physical ones, abstract entities as mathematical or semantic objects, modal objects as possible worlds or practical entities as reasons for action). If we do not like to endorse an anti-naturalist account, we should follow one of the two known strategies: either some kind of anti-realism account or some kind of relaxation of the naturalist premises. In this presentation, two of these possibilities are introduced: (moral and legal) *expressivism* and (moral and legal) *relaxed realism*.

3. The ways of reduction and the intensionality problem

Nicola Muffato (*University of Trieste*)

Abstract. The aim of this intervention is to explore in which sense and to which degree attributions of correctness/incorrectness to actions (and situations) can be reduced to psychological or physiological (neuroscientific) facts about human reasoning and decision-making, thereby vindicating a naturalistic stance toward the explanation of normativity. In this preliminary investigation, the topic will be approached by distinguishing different concepts of "norm", "reason" and "reduction" and showing how their multifarious combinations produce diverse reductive theses. To test their plausibility, a classical anti-reductionist objection will be presented and analyzed, that will be labelled "intensionality problem". According to this objection, natural sciences can describe - through more and more complex theories - the extension of a concept, but they cannot fix once and for all its intension (its criteria of application) in every context and practice, especially not in ordinary contexts and practices. However, if these theories become widely accepted and followed, scientific discoveries (expressed by synthetic a posteriori judgments) can start to be used as criterial, as normative conditions for the meaningfulness of certain actions. This conceptual shift does not lead to a steady equilibrium, but depends on multiple varying factors in the social dynamics. To the extent that the intensionality problem is real, the logical stringency and the explanatory need of a reduction are questionable: it is then worth to reconstruct and assess some solutions to this challenge.

4. Action and mental states in the legal domain

Sebastian Figueroa Rubio (*University Adolfo Ibañez, Chile*)

Abstract. This presentation explores the idea that action is a basic element of any successful account of normativity. In the legal context we have access to another's mind through their behavior and we define legal mental concepts (e.g. acceptance, claim, intention) on its basis. With this in mind, it is proposed to understand action as expressive of mental states. Two consequences of this proposal, related to cognitive sciences, are explored. The first is that we attribute mental states to persons, not to brains. One risk of embracing some ideas from cognitive sciences is to adopt the belief that there is a relation of identity between mental states and brain states and, from that assumption, attribute mental states to the brain. This has been called the *mereological fallacy* (Bennett, D. & Hacker, P.S. 2003. *Philosophical Foundations of Neuroscience*. Wiley-Blackwell). The second consequence is that we should understand the relationship between mind and behavior from an expressivist approach rather from a causalist one. When we assume that physical brain states cause behavior, we split mind from agency and we see actions as mere body movements caused by the brain. As a consequence of that, human behavior loses its normative meaning. On the contrary, when we understand actions as expressive of mental states we can make sense to the idea that we attribute and assess mental states using normative concepts (through attributing and assessing actions) identifying behavior in a normative way.

5. Legal directives and practical reasons: a dispositional account of law's normativity

Noam Gur (*Queen Mary University of London*)

Abstract. Drawing on my recent book *Legal Directives and Practical Reasons* (OUP 2018), this presentation aims to offer a fresh perspective on the relationship between law and practical reasons. Two central aspects of the book are particularly relevant to the workshop, and would be focal to my presentation: (i) how resources from social psychology are used in the book to highlight the relevance

of motivational and cognitive problems to the question of legal normativity; **(ii)** the book's contention that an adequate understanding of law's normative significance must incorporate the attitudinal dimension of the problem, which focuses not on reasons for action but on reasons to adopt desirable attitudes and dispositions towards the law. I will start the presentation with a brief description of the book's central line of analysis, as follows. Two competing positions will initially be juxtaposed: Joseph Raz's view that (legitimate) legal authorities have pre-emptive force, namely that they give reasons for action that *exclude* some other reasons; and an antithesis, according to which law-making institutions (even those that meet prerequisites of legitimacy) can at most provide us with reasons that *compete in weight* with opposing reasons for action. It will be argued that, although each of these positions offers insight into the conundrum at hand, both suffer from significant flaws. Against this background, an alternative position ('the dispositional model') will be put forward. According to this position, the existence of a reasonably just and well-functioning legal system constitutes a reason that fits neither into a model of ordinary reasons for action nor into a pre-emptive paradigm—it constitutes a reason to adopt an (overridable) disposition that inclines its possessor towards compliance with the system's requirements. I will highlight the key distinguishing traits of the dispositional model as well as its key advantages over the rival positions. I will then locate the dispositional model in relation to the debate between psychologism and anti-psychologism about legal normativity.

6. Rule-following and its role in Kelsen's theory of validity

Carsten Heidemann

Abstract. The paper has a threefold aim: (1) to give an interpretation of Wittgenstein's notion of rule-following, (2) to explain why it might be central for metaphysics by relating it to Kantian and neo-Kantian theories, and (3) to show how Kelsen's concept of validity can be traced back to neo-Kantian theorems of implicit rule-following. A rule as such is not, according to Wittgenstein, an object in any sense. Rather, as the most elementary form of normativity, it is *implicit* in a practice. As it is no object, it is neither reason-based nor can it be questioned. It just "shows" itself by the possibility of distinguishing correct moves from incorrect moves inside the practice. Reasons can be brought forward only for rules which are "made an object of" by being made explicit on a meta-level, and it is only on this level that a rule can be questioned or criticized. The "rule as an object", however, is no longer the same as the rule implicit in a practice. When stripped of the Wittgensteinian socio-pragmatic surroundings, according to which the practice of rule-following necessarily is a *communal* enterprise, the notion of an implicit rule can be taken to be a fundamental element of metaphysics. Forerunners of the conception of implicit normativity can be found in the philosophies of Kant, Lotze, and the neo-Kantians of the Baden school. Kant's "spontaneity of understanding" is impossible without the assumption of this basic form of normativity. Lotze's conception of normative "validity", as opposed to "existence", removes values (norms/rules) from the realm of existing objects and paves the way for later neo-Kantians, like Windelband and Rickert, who distinguish normative validity from the existence of objects, and take the former to be fundamental for metaphysics, while ontology is dependent on it. The main advantages of this conception are that, (1) an implicit rule being beyond reasoning or critique, the Agrippa-Trilemma can be avoided, (2) the naturalistic challenge to normativism in the form of attempts to "reduce" it by psychology and the cognitive sciences can be met, and (3) the Kantian project of metaphysics without an ontology is made possible at "low cost", for relying on implicit normativity avoids both Platonism and reductionism. The most blatant disadvantage is that implicit rule-following is "out of control"; the implicitness of the rule immunises it against any critique. Rather, following an implicit rule, though carrying the germ of rationality, is itself irrational; it is based on a "hidden art in the depth of the human soul", as Kant put it metaphorically. This is unsatisfactory, but it is probably the best that can be had. In legal theory, Hans Kelsen's conception of validity in his neo-Kantian writings from the twenties, as a vital part of his most sophisticated and plausible theory of the legal norm as a theoretical judgment of legal

science, can be traced back - via the philosophy of Windelband - to a conception of implicit normativity.

7. A presuppositional theory of legal power

Gonzalo Villa Rosas (*Christian Albrechts Universität zu Kiel*)

Abstract. This paper is divided into two parts. The first part is devoted to explore the concept of competence in general sense. This part is composed of three main thesis. The first thesis aims to put forward a general concept of competence. In the most comprehensive sense of the term, competence must be understood as the ability to follow rules. The second thesis affirms that the attribution of competence is a necessary condition for our practices. Since rule-following behavior implies knowledge and intention, it can be distinguished from that behavior that as a matter of fact conforms to some rule in a causally determined way. Notwithstanding, given that knowledge and intention are mental states which are only accessible by the subject who experiencing them, the actual use of a rule is the only warrant for the fact that it has been understood. In consequence, our practices require that competence must be ascribed to the agents. The third thesis holds that the attribution of competence in general sense amounts to a speaker's existential normative presupposition, when she makes a normative statement. According to this thesis, the question whether the content of a normative statement ought to be performed does not arise, unless the ability to follow the normative statement's content by any subject who meets the conditions of the rule referred by the normative statement is presupposed. The second part is devoted to explore the concept of legal power as a special case of competence in general sense. This part is composed of the following thesis. The first thesis distinguishes two concepts of legal competence. As a special case of competence, legal power must be understood as the ability to follow certain kind of legal rules in order to create legal norms (or legal effects) through and in accordance with enunciations to this effect (Ross, (1968) 2009). The second thesis posits the distinction between legal power-conferring rules and procedural rules of legal power. The third thesis holds that the attribution of legal power amounts to a normative legal presupposition of any exercise of legal power.

8. Are abstract legal concepts embodied? On different types of legal conceptual metaphors

Marek Jakubiec (*Jagiellonian University, Cracow*)

Abstract. The interactions between cognitive science and law have been the subject of intensive research in the last years (in particular in the context of so-called *neurolaw* of late, see e.g. Shen 2015; Pardo, Patterson 2013). The relation between scientific knowledge concerning cognition, and law (legal knowledge) is typically analyzed in the context of "law in action," i.e. the opportunities of practical application of advances in neuroscience in legal procedures. There have also been examinations of how results obtained within cognitive science may affect legal philosophy and legal theory (see e.g. Brožek 2018; Roversi et al. 2017; Winter 2001; Larsson 2017). In my presentation I will try to portray the role of embodied cognition in legal philosophy in the context of the theory of legal concepts. The presentation will be focused on one of the main threads of the recent discussions which concern the role of perception in the higher cognitive processes, with particular emphasis on the research program of embodied cognition, especially conceptual metaphor theory. This theory is currently evaluated as the most plausible theory (or one of the most plausible theories) of abstract embodied concepts (Lakoff, Johnson 1980, 1999; Evans, Green 2006; Jamrozik et al. 2016, Borghi, Binkofski 2014), in spite of the many controversies it raises. "Metaphor" is interpreted as a "bridge" between the multimodal simulations of concrete, perceivable objects, and abstract representations. Thus, within the framework of cognitive science, metaphor is not interpreted as a linguistic tool, but as a cognitive mechanism ("mapping"; see Lakoff, Johnson 1999, Lakoff, Núñez 2000) that allows

us to think about abstractness (i.e. process abstract concepts which are the “target domain”) in the terms of physical objects (which are represented by concrete concepts that are the “source domain”). During my presentation, the role of embodied cognition and metaphor theory in the analysis of abstract legal concepts will be briefly described. Then I will portray three groups of metaphorical concepts in law, taking into account the nature of cognitive processes underlying the metaphorical mapping, character of embodiment (“strong”/“weak”), and visibility of metaphorization (with particular emphasis to the so-called “conceptual skeumorphism”). This will allow me to propose more general remarks concerning the role of cognitive science in legal philosophy.

9. Social representations as a method of analysis of conceptualization in law

Terezie Smejkalová (*Masaryk University, Brno*)

Abstract. Exploring concepts of law should not end at the classical exegesis of black-letter law; even in civil law countries legal discourse is not limited to the statutes passed by legislative bodies but extends towards the judicial decisions or to extra-legal considerations. Accepting that law does not stop at the limits provided by the written statutes means that exploring legal concepts should not be based only on reading these statutes (or judicial decisions) and on their exegesis. Should we approach law as a discursive (social) space, it becomes clear that a legal concept is a much more diffused entity, one whose analysis needs a different approach. In this paper I argue that the method of social representations (as developed by Moscovici, 1962, and advanced since by others) and may provide means for such an approach. I explore the possibilities of how various methods of studying the so-called social representations of concepts may be employed in analysis of legal concepts, especially those that appear vague or ambiguous. To this end, I have tested one of the methods available on a group of law students and explored their understanding of the word “law”. Using the results of this research I discuss why it is a useful concept in studying legal concepts and how it can serve as link between the in-law meaning and the use-meaning of a concept.

10. Can legal concepts be objective entities?

Adriano Zambon (*University of Milan*)

Abstract. To say that a concept has a cognitive structure means to claim that a concept can be the content of human minds, since its cognitive structure is the structure it has when it is contained in human minds. Instead, to say that a concept has a logical structure means to claim that a concept logically entails certain propositions: the logical structure of a concept is the set of propositions a concept entails when logic is applied to it. In order to admit that concepts entail certain propositions by virtue of logic, then, concepts must be regarded as something to which logic can be applied. Therefore, to make concepts have both a cognitive structure and a logical structure, they must be characterized as entities that can be both contents of human minds and subjects of logic. The thesis that such a characterization is not possible originates from the identification of concepts with Fregean senses, which would make them entities belonging to a third realm. To speak of the cognitive structure of a concept, then, would be impossible, since whatever takes place in the mind would not be qualified as a concept. However, one could speak of the logical structure of a concept, because logic is committed to the Fregean third realm, in that it is defined as the description of this realm. This perspective is accompanied by a rule endorsed by Frege when discussing the case of proper names, i.e. that the same term ought not to be associated with distinct senses, if its references differ: this results from the fact that logic, since it is a description of the third realm only, is regarded as a set of prescriptions in relation to the realm of language. Legal language offers an argument against such a rule. A term used both in natural language and in legal language may have different senses and references depending on the language in which it is employed. For example, in natural language the

term 'possession' may be a synonym of the term 'detention', while in legal language it often designates a situation that is not describable by simply using the term 'detention', because it involves the existence of the *animus possidendi*. If, in such cases as this, we decided to use a new term for the legal concept involved, we would make legal language depart too much from natural language, by endangering the relation of semiotic borrowing between them, which must be preserved for the correct functioning of a legal system. This means that, for those who accept the anti-mentalism of the thesis under discussion, it is necessary to abandon (at least) the idea that the differences between the two senses of a term employed both in legal language and in natural language ought to be mirrored by a linguistic difference. The problem, however, is that this could lead to see logic simply as a description of the third realm and not as a set of prescriptions for our language.

11. Embodiement cognition and its influence in court decisions

Renato César Cardoso and Alberto Rezende Medeiros (*Federal University of Minas Gerais*)

Abstract. Frequently, while analyzing the court decisions, it is not known that such decisions were made by human beings. Unfortunately, human beings are not as rational as we might imagine and their ability to make decisions is strongly influenced by a number of factors that often go unnoticed: tiredness, smells in the environment, body position and even the glycemic index of the judges' blood may be the big factor behind certain court decisions. The influence of these factors on the decision-making process can now be explained through the theory of embodied cognition. The concept of embodied cognition is based on the theory that many characteristics of human cognition are shaped by aspects of the organism as a whole. This concept breaks with the idea that the brain would make supposedly rational and isolated decisions from the rest of the human body. That is, the five senses and the movement of the body would not only be means to input or output information to that brain. As Margaret Wilson well defines: "Proponents of embodied cognition take their theoretical starting point not mind working on abstract problems, but a body that requires a mind to make it function." (Wilson, 2002). Cognitive functions are divided into: memory, attention, language, perception, and executive functions. In this article, we did a literature review involving scientific articles whose research focused on the alterations in certain cognitive functions due to the phenomenon of incorporated cognition and its implications in the process of court judgment.

12. The method of familiarization and subjectivism

Giuseppe Rocchè (*University of Palermo*)

Abstract. The Method of Reflective Equilibrium (RC) prescribes that we work back and forth between our moral judgments about specific cases and general moral principles until they no longer clash. We can distinguish four different understandings of RC on the basis of the use that we consciously – note, in both cases – make of inferential reasoning and spontaneous (non-inferential) emotional responses. About that we have an alternative “upstream” and an alternative “downstream”. Downstream, we have an issue about the criteria for deciding which judgments or principles should be abandoned or revised in case of *conflict*. The relevant alternative is that between, on the one hand, a rule which makes reference to the occurrence of a spontaneous psychological – non-inferential – solution of the conflict in the agent’s mind – let’s call it “Rule of Reference” –, on the other, rules solving the conflict even when no psychological resolutive event unfolds by means of inferential reasoning – “Rule of Reasoning”. Upstream, the issue is that of the *pedigree* of the intuitions which are relevant – from the very beginning – to reach the equilibrium. Some thinkers cast doubts about the reliability of our intuitions, evoking their religious, social or biological origins. According to them many of our intuitions are prejudices devoid of justificatory weight, and we have to ignore them outright. Here, we have an alternative between a version of RC in which all the intuitions we happen to have merit

to be taken into consideration, and another version in which only the intuitions with the right pedigree matter. In this latter horn of the “upstream” alternative, again, we opt for a Rule of Reasoning: as a result, our thinking is more regulated or inferential and less spontaneous. Combining the responses to the upstream and the downstream alternatives, we have: (i) RC1 in which non-inferential reasoning is discredited twice, both upstream, when we select only the intuitions with the proper pedigree, and downstream, when we resort to a Rule of Reasoning in order to solve conflicts among judgments; two different halfway positions, namely (ii) RC2 in which non-inferential reasoning is discredited upstream but not downstream – conflicts created by the intuitions with the proper *pedigree* are solved by means of a Rule of Reference –, and (iii) RC3 in which non-inferential reasoning is discredited downstream but not upstream – all the intuitions we happen to have matter, but if conflicts occurs, they are solved by means of a Rule of Reasoning; and eventually (iv) RC4 in which justification boils down to the confirmation of our spontaneous (non-inferential) responses – all the intuitions matter, and we use a Rule of Reference to settle the conflicts. Only if we adopt RC4, it is true that what *seems* – psychologically – to us right *is* – really – right. In all the other cases, we leave room for the possibility that what seems – psychologically – right to us is – really – wrong. That is to say, we grant that our moral world is populated by persistent illusions. I call RC4 “The Method of Familiarization” (MF). I discuss the hypothesis that MF is the only method of reasoning compatible with a qualified version of Subjectivism, based on the denial of the idea of moral knowledge. Although the convergence between MF and Subjectivism is not perfect, I draw the conclusion that the subjectivist standpoint is that practical standpoint which consciously assigns in decisive cases a justificatory role to our unconscious responses.

13. Human rights and the naturalistic turn – on emotions and legal rationality

Youlou Wujohktsang (*University of Zurich*)

Abstract. The law in general, and human rights in particular, are based on assumptions about human nature, mind and morality. This comes as no surprise, as law itself is a product of human thought and civilization. In recent years, there has been a surge in neuro-cognitive research on human morality and the workings of the human brain more broadly. These findings are often said to reveal fundamental, new insights into traditional presumptions about human moral cognition, the reason-emotion dichotomy, and even normativity itself – implicating sometimes radical consequences for our legal system and society at large. Even though many of these claims and studies put forward may be too reductionist or overstressing their empirical evidence, the appeal and need for opening-up the legal philosophical discourse to the new wave of empirical-experimental approaches is increasingly undeniable. Yet, the fact that empirical sciences find their way into law and moral philosophy is not new. The new dynamics and prospects prompted by cognitive science, however, call for heightened attention and an active engagement in an interdisciplinary discourse – even more so because their challenges to traditional “armchair” moral (and legal) reasoning are regularly directed at the very heart of law, i.e. its self-conception as rational/-izing and moral enterprise. The so-called “naturalistic turn,” with its commitment to a methodological naturalism and that has become quite mainstream in philosophy, may now also become a useful and necessary development for and in the Law. In this regard, human rights could provide an especially insightful object of study, as they are generally considered to inhabit a constitutive role for legal systems and legal justice. The “naturalization” of their moral foundations could thus contribute to a justificatory account, though the extent of its contribution may be unclear, and it may also prove to be insufficient in and out of itself for such a justificatory task. Notwithstanding, it may provide a valuable addition to a sound moral grounding, which is necessary for the justification of human rights. It will thus be questioned whether the new science(s) of morality and especially insights into the role of emotion in moral cognition provide justificatory arguments and whether the traditional moral/legal concept of emotions has changed, and how this may impact the normativity and legitimacy of reason/rationality in the moral/legal discourse.

14. Fictions and emotions in law

Horacio Mario Spector (*University of San Diego and University Torcuato di Tella, Buenos Aires*)

Abstract. In paper I explore the role of political fictions in controlling emotions and passions. Specifically, I will focus on two fictions: democratic law-makers' claim that their deliberative and majoritarian procedures secure the political legitimacy of their enactments, and courts' claim that their knowledge of and loyalty to law secure the fairness and truth of their decisions. Both claims can be pragmatically ascribed to political and judicial authorities in contemporary constitutional democracies. These claims are epistemically unreliable, yet they are socially helpful in stabilizing a political society by controlling emotions and passions as a means to preventing the dramas of social conflict and civil war.