

# RCSL NEWSLETTER

INTERNATIONAL SOCIOLOGICAL ASSOCIATION  
RESEARCH COMMITTEE ON SOCIOLOGY OF LAW

<http://rcsl.iscte.pt/>

**President:** Masayuki Murayama

Meiji University, Tokyo, Japan

Email: [masayuki.murayama@gmail.com](mailto:masayuki.murayama@gmail.com)

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**Secretary:** Germano Schwartz

Unilasalle and FSG, Brazil

Email: [germano.schwartz@globo.com](mailto:germano.schwartz@globo.com)

## PRESIDENTIAL ADDRESS

Dear Colleagues,

At the beginning of 2017, I wish you happy and healthy New Year!

This year, we will have the Joint meeting of the RCSL and LSA in Mexico City on June 20 to 23. This meeting is co-sponsored by the Socio-Legal Studies Association, Japanese Association of Sociology of Law and the Canadian Law and Society Association which has decided to join the meeting as their annual meeting. This will be our third annual meeting in Latin America, the first in Caracas, Venezuela, and the second in Canoas, Brazil. Mexico is a very important country in Latin America with a developed network of academic institutions and publishers. The joint meeting will provide us a wonderful opportunity to meet colleagues conducting research in the same fields and to build international networks for future collaboration. I hope to see many RCSL members in Mexico City in June.

We will also have exciting programs for 2018. We will join the ISA World Congress in Toronto in July 15 to 21, 2018. The Congress main theme is "Power, Violence and Justice: Reflections, Responses and Responsibilities". This theme has strong relevance for the sociology of law, and research on the theme has become particularly important in our increasingly unpredictable world. I hope we will be able to organize many sessions related to the main theme, though sessions on different themes are also welcomed. Professor **Ravi Malhotra** at the University of Ottawa will serve as Program Coordinator of the RCSL. The call for Sessions will be issued by the ISA on February 2, 2017. If you are interested in organizing sessions, please prepare for the submission of your session proposal. I hope to see you as many as possible in Toronto.

In addition to the ISA World Congress, we will hold our own RCSL annual meeting in Lisbon, Portugal, on September 10 to 13, 2018. The Sociology of Law and Justice Section of the Portuguese Sociological Association was created recently, and this Section will

co-sponsor the RCSL annual meeting at the University Institute of Lisbon. Although we have held our annual meeting many times in Europe, this is the first time for the RCSL to hold our annual meeting in Portugal. Please read **Pierre Guibentif's** fascinating article on this issue, in which he introduces the Sociology of Law and Justice Section of the Sociological Association and his research centre at the University Institute of Lisbon. We have met an increasing number of empirical researchers from Portugal. I hope this annual meeting will provide a wonderful opportunity to develop research networks among RCSL members.

I would like to inform you that the Board decided to create a Life Membership category for senior scholars who retire from institutional positions. Members from 65 years old are eligible for Life Membership as an alternative to ordinary membership. I hope many senior scholars will stay in the RCSL as life members.

Masayuki Murayama

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In the first article of the Winter newsletter, Pierre Guibentif, who served as Scientific Director of the Oñati Institute from 1998-2000, introduces the hosts of the 2018 Annual Meeting of RCSL.

## PORTUGUESE SOCIOLOGY OF LAW AND JUSTICE LOOKS FORWARD TO WELCOMING THE RCSL 2018 ANNUAL MEETING IN LISBON

We learned about the call for the organization of the RCSL 2018 Annual Meeting at the best possible moment. The "Sociology of Law and Justice" section of the Portuguese Sociological Association was created very recently, at the end of 2014 (<http://www.aps.pt/index.php?area=318>), and, after the first meeting held in Coimbra in January and a second meeting soon to take place in Braga, it was planning to organize its 2018 meeting in Lisbon. Under such circumstances, the section's board clearly wished to answer the call, proposing the organization of the RCSL 2018 in Lisbon, and from the outset involving in this project the main Portuguese research units active in socio-legal research. We are extremely happy and grateful to the RCSL Board for having accepted our proposal, enabling us to upgrade the planned national 2018 meeting to a world meeting. This gives us the opportunity both to take advantage of a fantastic stimulus for the sociology of law and justice in Portugal, and perhaps also to contribute, on the basis of recent experiences of law and rights in Portugal, to the development of sociology of law at an international level.

### **Sociology of law in Portugal – A Short Historical Outline**

The Sociology of law and justice in Portugal has been deeply shaped by the country's recent history. In April 1974, the "Carnation Revolution" put an end to an authoritarian regime that had lasted almost fifty years<sup>1</sup>. Before the Revolution, social sciences had to deal with intrusive governmental control, and sociology was not admitted at Portuguese universities. Under these circumstances, during the 1960s, one of the most vibrant periods in the history of sociology of law – when RCSL, the Law and Society Association, as well as the *Law and Society Review* were created, and when conditions were generated for the launching, in the 1970s, of several other journals: *Sociologia del Diritto*, *British Journal of Law and Society*, *International Journal of Sociology of Law* – in Portugal only a few publications addressed socio-legal issues, and no significant scientific initiative was taken in this domain. After the Revolution, however, the international development of sociology of law had a significant impact in Portugal, mainly through the work of Boaventura de Sousa Santos. At the moment of the Revolution, Santos had recently finalized his PhD dissertation on informal dispute resolution mechanisms in a Brazilian Favela (Santos 1974) and had established robust links for cooperation with American colleagues. Thanks to this background, he made an energetic contribution to the revival of social sciences and to the establishment of sociology in

Portugal, setting up in 1978 a productive research unit, the Centro de Estudos Sociais (<http://www.ces.uc.pt/>) and creating the influential *Revista crítica de ciências sociais* (<http://www.ces.uc.pt/rccs/index.php>). As part of this effort for developing sociology and social sciences in general, he also promoted the sociology of law, notably by hosting in March 1985 a European Meeting on Critical Legal Studies in Coimbra, and by publishing in 1986 a special issue of his journal on "Law in Society" ([http://www.ces.uc.pt/rccs/index.php?id=296&id\\_lingua=1](http://www.ces.uc.pt/rccs/index.php?id=296&id_lingua=1)).

For decades, however, socio-legal studies in Portugal were seriously conditioned by the gap existing in the universities between social sciences and jurisprudence. This gap exists everywhere in the world. In Portugal, however, it is widened by the fact that jurisprudence and social sciences have completely different histories. Jurisprudence played an important role in the Portuguese universities before the Revolution. Marcello Caetano, head of the government from the moment that Salazar ceased to rule the country, was actually a major author in the field of administrative law. On the other hand, social sciences in general, and specially sociology, played an important role in the re-identification of the country after the Revolution. This partly explains why sociology of law could be established as a teaching topic in 1984 and maintained since then in particular at ISCTE, a university institute created in Lisbon a few years before the Revolution, specializing in management and social sciences, with no autonomous jurisprudence department.

These circumstances made it difficult also to carry out empirical research on the Portuguese justice system. So it took several years until Boaventura de Sousa Santos succeeded in obtaining, in the early 1990s, the funds required for carrying out a comprehensive inquiry on the performance of Portuguese courts. This project led to a book, *Os Tribunais nas Sociedades Contemporâneas* (Courts in Contemporary Societies, Santos et al. 1996) and to the setting up of a Permanent Observatory for the Portuguese Justice System ([http://opj.ces.uc.pt/site/index.php?id\\_lingua=2](http://opj.ces.uc.pt/site/index.php?id_lingua=2)), which was for a long time the main player in the field of socio-legal research in Portugal.

### **A Recent Step: Sociology of Law and Justice at the Portuguese Sociological Association**

This last development, however, took place in a period during which research in social sciences in general had become very competitive. After Portugal joined the European Union – at that time, 1986, the European Community – numerous national and European calls for research projects linked to the integration process obliged Portuguese research units to give priority to the defence of their positions in the new quasi-market of academic research. In this context, cooperation between units and between researchers from different units faced rather adverse conditions. This was one of the main reasons why for many years there was no network likely to group together at a national level scholars interested in socio-legal issues.

In 2004, the Portuguese Sociological Association, founded in 1985, started to encourage the formation of thematic sections, structuring its regular conferences according to thematic areas. In this process, a thematic section “Law, Crime, Dependencies” was created. It took some years, however, for this area to attract a significant number of researchers. At the 2012 and 2014 Conferences (Oporto and Évora) of the Portuguese Sociological Association, it eventually gathered nearly 40 contributors. In the face of this favourable evolution, the participants in the 2014 Évora Conference decided to take the necessary steps for the creation of a thematic section, which was formally established in December 2014. How important it was for this research community to have a formal framework facilitating regular meetings, academic debate on socio-legal issues, and the development of cooperative links, was revealed by the number of participants in the first meeting organized by the new section. It took place in January 2016 in Coimbra, in cooperation with the Centro de Estudos Sociais, under the heading “Rights, Justice, Citizenship – Law in the Constitution of Politics”, and it gathered about 120 participants ([http://www.ces.uc.pt/apssdj/index.php?id=12697&id\\_lingua=1&pag=12698](http://www.ces.uc.pt/apssdj/index.php?id=12697&id_lingua=1&pag=12698)).

The second meeting of the section will take place in Braga in 27 and 28 January, organized in cooperation in particular with the research unit CISC-UMinho (<http://www.lasics.uminho.pt/apssdj2017/>). Under the heading “Justice, Law/Rights, Institutions”, its programme includes about 70 papers.

#### **Main focus of interest for Portuguese socio-legal research**

Apart from more classical domains of interest, such as legal pluralism, sociology of family law, sociology of crime and prisons (Cunha 2015), Portuguese socio-legal research still pays attention to a topic promoted already in the 1980ies by Santos: how the semi-peripheral position of Portugal in the world-system impacts both law and its practice (Guibentif 2014). The main argument may be summarized as follows. In Portugal, state and official law developed with a narrow connection with the development of state and law in the centre of Europe, while other social structures – families, local communities, small business – display features comparable to those found at the periphery of the world system. As a result, there is a particularly large distance between the contexts where legislation is produced and public policies are designed, and those where the law should be applied. And this has consequences on the effectiveness of legal rules, on the lay understanding of legislation, and on the potential of law to be mobilized by social actors in processes of social change.

Recently, two issues have acquired relevance, which may be considered as variations on this topic. One is the debate about the consequences in Portugal of the recent financial crisis. The Memorandum of Understanding signed in 2011 between the Portuguese Government and the “Troika”, which conditioned the financial assistance to the country, had a major impact on the Portuguese legal system. It forced

reforms in particular of the judicial system and of labour law, and challenged constitutional principles, leading to tensions of a new type between the constitutional court and the government (Ferreira 2012; Guibentif 2016; Hespanha 2012). The impact of this process on the perception in Portugal of the national and of the European legal systems and their significance for the citizens has still to be assessed. The fact is that, in this process, being peripheral acquired a new meaning.

Another issue is the effective functioning of institutions (see the heading of the 2017 Braga Meeting). This may also be interpreted as an advanced questioning of the semi-peripheral condition. What is at stake is to understand the mix of cultures and representations that guides the practice of the institution’s agents, and that shapes their relationship with other people. And to better understand how law and rights participate in this mix.

These issues could well connect with the research interests of the international socio-legal community. Among other questions, one will certainly gain relevance in the next years: how legal mechanisms are challenged by other means of action and communication, in particular, globally, at the level of international relations; and, locally, in large rationalized organizations. Law might be losing its position of main instrument for structuring social action. Such an evolution has to be watched carefully by the Sociology of law. Its discussion could be a valuable complement to the debates that will take place in July 2018 in Toronto, at the XIX World Congress of Sociology, where RC SL also organizes working sessions, under the general heading of the congress: “Power, Violence and Justice: Reflections, Responses and Responsibilities”.

#### **Where the RC SL 2018 Meeting will take place**

The meeting will be hosted by ISCTE-IUL (<http://www.iscte-iul.pt/en/home.aspx>), already mentioned in this note, a public university based in Lisbon. Main responsible entity will be Dinâmia’CET-IUL (<http://dinamiacet.iscte-iul.pt/>), one of the ISCTE-IUL research units. This unit has a long record of initiatives in the socio-legal domain. It is multidisciplinary: gathering together economics, sociology, architecture, jurisprudence and other social sciences. The main research focus is social change, analysed as resulting from the impulse of individual and collective actions, from the reciprocal shaping of these actions and of territories, and from governmental efforts to stimulate, channel, and regulate these actions. There certainly will be affinities between this research focus and the themes to be addressed at our RC SL Meeting. To use a word which recently invaded all our programmatic statements: there should be favourable conditions for the 2018 RC SL Meeting to be one more exciting moment for co-producing sociology of law!

#### Endnotes

- 1 How important this transition was for the country can be vividly experienced in the day I

am writing this note, the day when Mário Soares, former president of Portugal passed away. His crucial role in the setting up of the Portuguese democracy and the relevance for the country of the period after the Revolution are the main motives in all the tributes paid to his memory.

- 2 For a review of Portuguese sociology of law in Portugal at that moment, see Beleza (1990).

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Pierre Guibentif  
pierre.guibentif@iscte.pt

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## The LSA and RC SL Joint Meeting in Mexico City, June 20 – 23, 2017



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*The following text is derived out of the presentation that Svensson and Larsson held at the common sessions of the 3rd ISA forum of Sociology, July 13, 2016, titled “Law in a Digital Society: Code, Norms and Conceptions”.*

#### LAW AND DIGITAL SOCIETY

What are the reasons for calling for a specifically digitally focused sociology of law, a Law & Digital Society, if you will? We have considered elsewhere how the strength of social norms can be measured (Svensson, 2013; cf. Hydén & Svensson, 2008) and used it specifically for a digitally mediated case, the issue of file sharing of copyrighted content (Svensson & Larsson, 2012). Given the scale of the behaviour and the weakness of the social norm corresponding to the legal rule protecting the copyrighted content, the case of file sharing proved a fruitful case in terms of targeting questions of normative change and new technology on a global (cf. Larsson, Svensson et al., 2012b) as well as national level, in countries like Sweden (Larsson, Svensson et al., 2012a), Australia (Larsson, Wnukowska-Mtonga et al., 2014) and Hungary (Larsson, Svensson et al., 2014). This focus on normativity however only provides us with one possible way to address legal challenges in a digital society, and we therefore seek to expand our scope and attempt a wider argument concerning the sociology of law and the implications of new technology.



We have briefly addressed elsewhere the potential for sociology of law in a digital society (Larsson, 2013), in the form of an attempt to provide for a reinterpretation of classic socio-legal thought with regard to digitally mediated phenomena such as social media, directed towards the notion of code, that is, digital design and architecture, as law, that is, a very relevant regulatory force (cf. Lessig, 2006). While much of the “early” legal thought on digital issues concerned the regulability of “cyberspace” (remember John Perry Barlow declaring the “independence of cyberspace” in 1996 as a space that does not lie within the borders of established governments, forming its own social contract and governance “according to the conditions of our world, not yours.”) there is today little question that the digital realm is very much a part of social, legal and governmental concern. The discussions have moved from regarding the entire characteristics of “the virtual” and “online” space to reach a state where the digital is a natural part of our everyday lives, how we consume media, socialise and are part of markets and the economic structures that needs to be balanced and regulated. There are however a number of fairly recent developments of particular regulatory relevance that we would like to address further from a socio-legal point of view, linked to new types of markets, driven by user and consumer data in a way that heavily shifts the balances both within states, and between states, as well as between citizens, states and private corporate interests.

This digitally mediated and data-driven development, we argue, further stresses the need for socio-legal scrutiny. We have chosen to focus and briefly outline socio-legally relevant aspects of the “sharing” economy, that poses a number of conceptual issues on how we understand and regulate innovative platform based ventures. This also arguably underscores a number of issues relating to the role of consumer and user data and the implications of this “datafication”, not least in terms of questions of accountability and balancing of both powers and privacy in a data-driven world that often is described as a “black box” (cf. Pasquale, 2015) in the sense that much of the automated processes – such as the workings of algorithms and third party trade of consumer data – is withheld from insight and transparency.

### **Socio-Legal Implications of a “Sharing” Economy**

Digital phenomena often express some sort of conceptual renegotiation in the sense that they express a large need for concepts, and a labelling of them in order for us to talk, think and regulate them. Arguably, how we understand digital phenomena metaphorically and conceptually is important for how we regulate (Larsson, 2017; cf. 2013). Much of this labelling is done through a reinterpretation or extension of a precursor, often a physical artefact that is already conceptually established, such as the way the book lends its name and concept to an e-book, or how the regulatory notions of a physical copy are lent to its digital counterpart. They often share some characteristics – such as the book’s cover, the pages, the length of musical albums, etc. – but also clearly does

not share other characteristics – such as costs for reproduction, the possibilities of long distance sharing etc. This arguably creates some sort of conceptual path dependence where the regulation of the new phenomenon will be affected by how the established and conceptually linked phenomenon is already regulated (cf. Larsson, 2017). This type of conceptual renegotiation is also present for more complex issues than such artefacts, and in order to clarify, we address a few fairly contemporary examples. For example, we look at some recently contested entrepreneurial ventures:

- Is Uber, the “software company” that owns no vehicles, a taxi company? and, if so, is it an employer with employment liability for the drivers that the app-driven service moderates?, and should it thereby be taxed accordingly in each and every of the over 66 countries it operates in?
- How should Airbnb be regulated, when it owns no real estate, but is the world’s biggest accommodation provider?
- Why should Facebook be regarded or not as a news outlet with accompanying responsibilities for content, when mediating news in so many ways for its 1.79 billion monthly active users (in the third quarter of 2016).
- Was The Pirate Bay, the infamous file sharing site, linking millions of file sharers to movies, TV series and music, an entrepreneurial venture? a passive infrastructure (mere conduit)? or a storage device, implying direct liability for the copyrighted content shared (Larsson, 2017)?

These examples are part of what media and communication scholar José van Dijck call a “platform society” (cf. Andersson Schwarz, 2016), and the legal answers to all of these examples are not simple, and not yet fully comprehended, studied nor understood, but likely to be dependent on a mix of political, conceptual, legal, social and economic stances. Furthermore, they all come with major implications not only in any stricter and limited legal sense, both for the regulation of markets – not the least important for the corresponding and competing taxi businesses, hotels, media and cultural industries – making the regulatory field highly political and affecting relations between nation states, companies and individuals (cf. Erickson & Sørensen, 2016). Uber, for example, reportedly had 50 lawsuits filed against them during 2015 in U.S. federals alone (Brown, 16 June 2016). This legally founded conceptual renegotiation, we argue, is of the uttermost importance for law in a digital context, underscoring the need for a developed “Law & Digital Society” discourse. Much of these examples have spurred not only legal court cases and calls for legal amendments but also caused politicians, academics as well as the EU commission to more carefully address the dilemmas and promises of a “sharing” or “collaborative” economy. It is not farfetched to argue for the need for a socio-legal study of these or similar phenomena.

### **The Centrality of Data**

Digitalization is often described as both a fantastic enabler and a great potential threat, largely depending on whose perspective it is seen from. However, much of contemporary digitally enabled innovation is completely depending on user and consumer data to be collected, analysed and traded. This means that our societies at large not only become digital in terms of communication and infrastructure but also what is sometimes referred to as increasingly datafied (cf. Mayer-Schönberger & Cukier, 2013). This does not only mean a large scale quantification of a vast amount of human activities which a few years earlier was not quantified, which is of great interest from a number of social scientific perspectives in its own right, but it also radically shifts the balance between service operators and users/consumers/citizens. We have elsewhere discussed this in terms of an increasing information asymmetry (Larsson, 2016), which in other words affects the distributions of power, for example of clear relevance for legal fields of consumer protection, privacy issues and data protection.

To be more specific, the sources of data include internet activity (social media, search engines, e-mail use, cookies) and sensors of various types (RFID tags and GPS-enabled devices such as cameras, smartphones and so called wearables). Furthermore, purchase history is a useful resource, administered for example through loyalty cards and club memberships. In addition to the well-known large-scale corporate giants in the digital and data-driven economy, such as Google, Facebook, Microsoft, and Amazon, there are also less well-known companies that specialize in collecting and trading in consumer data, which is often partly collected from public sources, the so called data brokers.

### **Algorithmic Accountability**

In the wake of vital societal functions – such as the distribution of news, the individual calculation of health insurance costs and credit scores – growing more dependent on user, consumer and citizen data that is algorithmically sorted and automated with predictive analytics, concerns have been raised about how to address questions of accountability and liability for the outcomes of these practices. This includes the problems of lack of insight, as in the mentioned “black box” of how consumer data is collected, used and where it travels (Pasquale, 2015); mapping out the policy concerns of algorithmic decision-making (Zarsky, 2016); and how to redress predictive privacy harms (Crawford & Schultz, 2014), to mention a few. This has led researchers like Tarleton Gillespie, mainly found in academic fields relating to media and communication studies, mixed with data scientific insights and sometimes legal thinking, to argue for the need of “critical algorithm studies”. Albeit the algorithms are only one specific technique and part of the data driven development we currently face, it further stresses the importance of addressing this development from a socio-legal perspective, that often is

lacking in the approaches of media scholars in the field.

### **Conclusion**

From an academic perspective, we need to improve our knowledge about these relatively new and data-driven developments and their socio-legal implications – this means empirically as well as conceptually where we see that the classical tenets of sociology of law in their interdisciplinary approach hold promise of being a suitable arena for adding to such much-needed knowledge. More so, given that contemporary data-driven enterprises in a “sharing” economy are arguably rewriting the balance between states, private corporations and citizens, the role of law is likely to be changing. This, for us, is further spurring the need for socio-legal scrutiny that can add to clarity in the complexities of regulatory approaches on accountability, liability, and the balancing of privacy and utility, in the meeting of algorithm-dependent, platform based and digitally mediated societal changes.

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Stefan Larsson and Måns Svensson  
stefan.larsson@luu.se  
mans.svensson@soclaw.lu.se

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*The Newsletter is continuing its series on the state of lay participation around the world with a contribution by Claire M. Germain (University of Florida, Gainesville) outlining developments in Belgium and France. Members of RCSL are encouraged to contact the editorial committee if they wish to write about another county.*

## LAY PARTICIPATION IN THE CRIMINAL JURY: FRANCE AND BELGIUM

The participation of lay citizens in the French and Belgian criminal justice systems has ebbed and flowed during its long history, and particularly in recent years (overview in Hans and Germain 2011). The focus here is on the criminal jury and on lay jurors who are drawn at random from the general

population, as contrasted with citizens in France who are recruited on the basis of their interest and competency in a particular field, who judge minors at the Tribunal des enfants (Court for Children), or those yet who are semi-professional juges de proximité (similar to U.S. magistrates for small claims), or even volunteer lay jurors who are also sometimes chosen because of their desire to participate in the Criminal Court of New Caledonia.

Juries in France and Belgium exist at the Cour d'assises level and only hear the most serious criminal cases, not civil cases. These cases represent a small percentage of criminal court outcomes. In France, this means some 3,200 cases per year, mostly rapes and murders. In Belgium, it is only 80-90 cases per year (Service d'appui du Collège des cours et tribunaux 2016, 34). Early on, both France and Belgium decided to declassify crimes into lesser offenses so that they would not go to the Cour d'assises, but instead be adjudicated in the criminal courts with professional judges only. This practice, which became common, is called “correctionalization” of crimes into lesser offenses called délits.

### France

The French Cour d'assises itself was inherited from the French revolution as a reaction against the judges of the time. Concurrently, the standard of proof was changed, and the concept of intime conviction (inward conviction) replaced the rigid system of legal proofs used previously to convict people. The respective roles of judges and jurors also have evolved over the years. At first, jurors sat and decided cases independently. However, in the 19th and early 20th centuries, they were perceived to show too much leniency, and in 1942, a law was passed whereby jurors stopped sitting alone in judgment. Since that time, lay citizens in France sit with professional judges on the Cour d'assises and adjudicate severe crimes only, mostly rapes and murders. This mixed jury model of lay citizens and law-trained judges is referred to as échevinage. Lay jurors and judges deliberate on the facts and the law and decide both the verdict of guilty or not guilty, as well as the sentencing. Any decision of guilt requires a majority of votes by secret ballot. After the Cour d'assises decides on the criminal verdict, the professional judges, without the jurors, rule on the request for damages, if they have been requested by the partie civile against the accused, or by the defendant against the partie civile. The Cour d'assises is not a permanent court, but sits at regular intervals. An Appellate Cour d'assises was instituted in 2001, under the influence of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocol on the right to appeal. Statistics show that over a two-year period, some 1,262 appeals were heard. Of those, 5% who appealed were successful and were acquitted, but when the prosecution appealed the acquittals, 57% were overturned.

A short-lived pilot program introduced by then President Sarkozy in 2011, extended lay participation to criminal courts beyond the Cour d'assises, The main objective of the 2011 Law was to involve French



citizens in the judging of particular offenses<sup>1</sup>. It extended the participation of lay citizens not only to judge crimes (rapes and murders), but also serious offenses, such as theft, fraud, assault, and involuntary homicide. Two lay jurors sat with three professional judges at the criminal court (Tribunal correctionnel) and two citizens and three judges at the appellate criminal court (Chambre des appels correctionnels). The pilot program was conducted from 2012 to 2013 in Dijon and Toulouse and was well received by lay citizens, but criticized for its cost and the mistrust of judges. The extended participation of lay citizens was ended in 2013 under the new Socialist government. Another part of the 2011 law provided for the reduction of the number of lay citizens in the Cour d'assises and appellate Cour d'assises. This reform remained on the books, an unfortunate consequence of the law. Therefore, since 2012, the number of lay jurors in the Cour d'assises has been reduced from nine to six with three judges. The verdict needs a majority of six votes. The influence of the lay jurors is thus lessened compared to the previous system. In a similar fashion, the number of lay jurors at the Appellate Cour d'assises level was reduced from twelve to nine, with three judges. The verdict needs a majority of eight votes. Another part of the reform stipulates that the presiding judge now must summarize the facts, issues, and questions to be answered both for the prosecution and for the defense. All decisions have to be reasoned, pursuant to a challenge by the European Court of Human Rights, both as to conviction or acquittal, as well as length of sentence.

### **Belgium**

The situation in Belgium is different (Goffinon 2011). Belgium inherited the jury because Napoleon exported it to countries under his domination. It was suppressed in 1814, but then put into the Belgian constitution in 1831 after independence. The institution was never liked much by judges and the legislators, but the institution of the criminal jury is enshrined in the Belgian Constitution. Up until the 2016 reform, it functioned as a "true" jury, in the sense that only twelve lay citizens participated in the jury, no professional judges. Art. 150 of the Constitution states: "[T]he jury is established in all criminal matters and for political and press offenses, with the exception of those inspired by racism and xenophobia." However, starting in the 19th century, the notion of extenuating circumstances allowed the courts to declassify the crime into a *délit* to prevent the use of the Cour d'assises and send these cases to the criminal courts instead, without a jury. The justification by the Council of State legislative section was that the application of extenuating circumstances was part of the criminal public policy of the legislature to individualize sentencing and to let the judge have discretion and decide sentencing within the limits of the law. In addition to the correctionalization, the legislature allowed criminal courts to impose heavier sentences. A simple majority is enough for a verdict, but the judge can send the case to another court if he/she feels that the jury erred. After the jury gives

the guilty or no guilty verdict, the jury gets together with the judges to establish the sentence and to provide a reasoned verdict. The reasoned verdict is a recent reform, pursuant to a 2009 law. The 2016 transformative reform orchestrated by Justice Minister Koens Geens, fundamentally changes the Cour d'assises, because it allows for the correctionalization of all crimes, with very few exceptions, meaning that they can go to the criminal courts, unless the prosecutor or the Chamber of Indictment decides to take a case to the Cour d'assises. Additionally, from February 2016 on, judges deliberate with twelve lay citizens on guilt (*culpabilité*). Confronted with the wording of the Constitution, the Council of State's interpretation is that it is up to the legislature to define criminal matters.<sup>2</sup> The reform also lengthens the sentences of criminal courts to forty years or life imprisonment. The rationale behind this reform is for budgetary reasons. The first legislative proposal reserved some cases for the Cour d'assises, such as crimes against the police or minors. However, the Council of State decided that it would be discriminatory. Then, Justice Minister Geens decided that all crimes should be within the jurisdiction of criminal courts, the Tribunal correctionnel. The only exception is if the Chamber of Indictment decides that, because of the extreme gravity of facts, the accused must absolutely go before a Cour d'assises. The problem is deciding what criteria the Chamber will use, for instance, the absence of extenuating circumstances.

This reform is, of course, controversial. Critics argue that Art. 150 of the Constitution needs to be revised before these changes occur; that the jury is a democratic institution, a protection against the abuse of the powerful; that it guarantees citizens' rights; and that the public is in favor of the jury for most severe crimes. However, the Justice Minister, the Judges' Union, and the High Council of Justice are all for the quasi suppression of Cour d'assises. Their rationale is the high cost, five times more than the criminal court, the complexity of cases, and the difficulty in providing a reasoned verdict.

As recent developments show, the situation is still fluid. In September 2016, Justice Minister Geens announced plans to end the Cour d'assises after December 2016 and replace it with a new Cour d'assises model, called "assises 2.0," which would consist of a criminal court with six jurors (rather than twelve), along with experts (psychologists, criminologists) who would sit next to the professional judges and assist them. The trial would be shorter, but would include open debates and testimony by witnesses and experts, in a way similar to the current Cour d'assises. The decisions could be appealed, which is still not the case in Belgium for Cour d'assises verdicts, as contrasted with France. This project is currently under discussion, will be debated in commission, and if adopted, may take effect within the next two years (Wauters 2016).

In sum, rather than the Cour d'assises being suppressed, it could reappear in a different form. These developments may be related to some strong negative reactions to the announced suppression of



the Cour d'assises. In the summer of 2016, the Belgian Bar (avocats.be, Francophone and Germanophone sections) introduced an action before the Constitutional Court against some articles of the Law Pot Pourri II,<sup>3</sup> arguing that the quasi-suppression of the Cour d'assises violated Art. 150 of the Belgian Constitution (La Tribune 2016). The Court will rule at the end of 2017.

### Future of lay participation

Historically, as a product of the French Revolution, the French and Belgian juries were seen as a way to fight arbitrary justice. In today's world, even though France and Belgium follow the rule of law, with independent professional judges, the participation of lay citizens retains an important symbolic and practical value that allows citizens to have a direct voice in the resolution of criminal trials. Public opinion is largely in favor of it and the public is attached to the institution of the jury. Citizens need to be involved in the justice system. The assises 2.0 model recently presented in Belgium offers a potentially useful alternative, with a mix of lay citizens, experts, and professional judges who can benefit from each other's perspectives and experience.

### Endnotes

- 1 Law 2011-939 of August 10, 2011, on the Participation of Citizens in the Functioning of Criminal Justice and the Adjudication of Minors.
- 2 Projet de loi, modifiant le droit pénal et la procédure pénale et portant des dispositions diverses en matière de justice, 23 octobre 2015. Avis du Conseil d'Etat. Chambre 3eme session de la 54e legislature, at 266, available at <http://www.dekamer.be/flwb/pdf/54/1418/54K1418001.pdf>.
- 3 Loi Pot Pourri II of February 5, 2016, published in Moniteur belge, February 16, 2016.

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Claire M. Germain  
germain@law.ufl.edu

## NILAY KAVUR'S ANALYSIS OF THE TURKISH JUVENILE JUSTICE SYSTEM

In her Ph.D. thesis "Revisiting Remand Imprisonment within Biopolitics: A study on Turkey's Juvenile Justice System through Legislative, Judiciary and Executive Powers" Nilay Kavur, of the University of Kent School of Social Policy and Social Science Research and the Eötvös Loránd University, Department of Criminology, Faculty of Law and Political Sciences (defended on June 2016) is concentrating on a question which has not been treated before in the Turkish context. Through empirical work<sup>1</sup> without forgetting statistical as well as historical accounts she aims at understanding the roles of remand imprisonment in the juvenile justice system. In Turkey young remand prisoners represent a very high proportion of prisoners (for instance, for the year 2014, with regard to the statistics of the Ministry of Justice, nearly 62% of the total juvenile prisoners and for the year 2016, 69% were remand ones). Kavur does not analyze this phenomenon only as a means of "responding to various aspects in governing the young population" (225) and "as a tool for segregation, categorization and control" (233) but also as a space for questioning citizenship; more precisely, the citizens' security in this context of "the accumulation of the justice system's long-term structural deficits" (229). Instead of "problematizing remand imprisonment in the human rights discourse and discussing the right to liberty, presumption of innocence and fair trial", (229) she opts for combining an interpretive approach, social constructionist approach to human rights, and Marxist critique of rights discourse. So, rather than viewing remand imprisonment as an indispensable part of the bureaucratic criminal justice system that could be eased with human rights interventions, the thesis situates it in penal theory and revisits remand imprisonment as a significant 'social control' and 'crime control' mechanism that is tied to the understanding of citizenship. This permits the author to develop a solid base from which to discuss the notion of "individual responsibility" in crime as a "social action", criticize the individualization of crime and in this way to re-question the Turkish juvenile justice model with respect to other systems. Moreover, this work provides important findings with respect to juvenile prisoners' experiences. In Turkey, the studies dealing with this issue are few. And (except one – but this one focuses more on the juvenile prisoners' perceptions of poverty), it is even more rare to have research which draws attention to the diversity among these juveniles in terms of their economic, social and cultural capitals. Kavur does this well and without ignoring the weight of the type of offence in these categorizations. Among others, especially two findings (which are also inter-related) seem to me quite important to mention: Self-perception with respect to the type of offence and differences in "experiencing pains of imprisonment". Here, we observe that "political offenders" have a tendency to consider them as "different". This is interesting in the sense that similar results were

obtained among the adult prisoners. As the author points out, among these juveniles, there is a conception of a “common/collective future”. In this regard, the way they experience their pains seems to differ from the other young defendants. Kavur replaces the notion of “pains of imprisonment” which is employed in the literature with “pains of remand imprisonment” in the context of her study.

In my view, the strengths of this thesis are not limited to those evoked above. This work which has mainly the objective of understanding remand imprisonment by taking into account legislative, judiciary and executive powers via the inclusion of a variety of actors<sup>2</sup> also makes it possible to reassess the role of legal culture (and culture in a wider sense) in the use of some models/concepts (such as types of managerialism, the sense of pre-trial detention, etc.). This seems to be meaningful not only for unveiling the particularities of the context studied, but also enlarging their definitions.

As a conclusion, firstly, this work should be considered as an important contribution to the existing juvenile penal justice literature in Turkey. Secondly, it can inspire research in the domain of criminal justice for adults where remand imprisonment constitutes also a very frequent phenomenon in the Turkish case. Thirdly, even if it is not one of the purposes of the thesis, the sections devoted to the prosecutors, lawyers, social workers and judges provide important elements in terms of study of the legal professions which has been also a very recent domain of investigation in Turkey. Lastly, Kavur situates her thesis in the intersection of sociology of human rights, and cultural and global criminology, several passages suggest that this is also a work that contributes to the sociology of law and justice as well. I find this particularly gratifying when I take into account the fact that in Turkey, systematic and critical analysis concerning the relationship between law, society and justice are still emerging.

#### Endnotes

- 1 This work which covers 88 interviews (50 with young prisoners in 6 prisons and 38 with legal professionals including also social workers), 65 hearings in 3 courtrooms as well as court observations, examination of court files, analysis of legislations and voluntary work with NGOs was conducted in 2014.
- 2 At this point, I would also like to express that it is particularly welcome to see that the author puts penal politics, welfare state, citizenship, individual, family, and state in relation to each other. This allows us to reflect upon the definition of crime, the place of the child as well as upon the expectations formulated by state, society and legal professionals vis-à-vis the family; and which in return, gives the possibility to reconsider each time the “remand imprisonment” without forgetting its ties with legislative, judiciary and executive powers in order to

“weight” better the “govern-mentality” and “security”.

Verda İrtiş  
verdairtis@gmail.com

#### THE EFFECTS OF BREXIT ON SOCIO-LEGAL SCHOLARSHIP

On 24 June 2016 it is fair to say that the UK socio-legal community was in shock at the result of the previous day’s referendum, in which a narrow majority of those who participated voted to leave the European Union. I had gone home the night before full of confidence and smiling at my fellow citizens on the train, proudly wearing our ‘I’m In’ badges. The next morning the mood in the workshop I was attending had changed dramatically, to one of incomprehension, disbelief, gloom and despair. How could this have happened? What did it mean? And what kind of world would we now find ourselves living in?

Almost six months later, and despite lengthy and detailed analysis in a wide variety of fora, the answers to these questions are not necessarily much clearer. But we can probably say three things about the effects of Brexit on socio-legal scholarship. One is about the attitude of the socio-legal community towards Brexit. The second is about the impact on UK universities. And the third is about the opportunities for socio-legal analysis of the Brexit vote and the process of exiting the European Union.

Colleagues in the RC SL should be assured that the referendum result does not signal a retreat into isolationism by UK socio-legal scholars. Far from it. Come what may, we will continue to collaborate with EU research partners, participate in EU research meetings and focus on EU subjects of socio-legal study. We will continue our involvement with and support for the Oñati International Institute for the Sociology of Law, including our contributions to teaching and examining in the Oñati Masters programme. And we will continue to participate actively in RC SL working groups. To the fullest extent possible we will continue to welcome EU PhD students to UK universities. Whether or not we cease to be EU citizens, we have no intention of retreating from our many fruitful, socio-legal engagements with the EU.

The future situation for UK higher education institutions, however, remains uncertain. The British government has thus far refused to commit to any assurances that existing EU staff in UK universities will be able to remain in the UK following the UK’s departure from the EU. While it has announced that studentships awarded to EU students for study in UK universities commencing in 2016/17 will be honoured for their intended duration, it has made no statements concerning the situation of prospective EU students applying for studentships from 2017 onwards. And while it has committed to underwrite research projects funded by the EU prior to the UK’s exit, any ongoing access to European research funds for UK researchers will be decided as part of the UK’s exit

negotiations, and there has been no commitment by government either to seeking continuing access to these funds, or to maintaining an equivalent level of research funding at national level into the future.

The latter is a matter of particular concern as Horizon 2020 and previous Framework Programmes and the European Research Council have funded a number of significant socio-legal research projects. The possibilities for UK participation in future funded collaborative socio-legal research, and for the level of funding available to outstanding UK socio-legal scholars, are thus in doubt. The withdrawal of funds may limit the research options of at least some UK socio-legal scholars, which would be a matter of great regret. The House of Commons Education Committee is currently conducting an inquiry into the impact of exiting the European Union on higher education which will report in 2017. The SLSA will be involved in lobbying on this issue through the Academy of Social Sciences and in gathering evidence from members about actual and anticipated impacts.

But while the capacity to engage in research may be hampered by Brexit, the process of exiting the European Union itself is likely to prove a fruitful subject of study by socio-legal scholars. The level and nature of support for Brexit highlighted significant social divides. People aged under 35 overwhelmingly voted to Remain, while a clear majority of those aged over 45 voted to Leave. Remain voters tended to be in paid work, to have university degrees or be in full-time education, to be non-white, and to support liberal/left political parties, while Leave voters tended to be not working, to have completed formal education in secondary school, to be white, working class and to support conservative or right-wing parties (see, for example, Lord Ashcroft Polls 2016). In a post on the SLSA blog, Roger Cotterrell (2016) analysed 'Brexit Through a Community Lens', applying socio-legal theory to the EU referendum campaign and result. Other scholars have examined the socio-legal hopes and fears underpinning the referendum vote (see, for example, El-Enany 2016).

It is also clear that law will be a central player in debates about the process and terms of the UK's departure from the EU. Litigation concerning the process of triggering Article 50 of the Lisbon Treaty has already reached the UK Supreme Court, and along the way has given rise to unprecedented press attention to both the individual judges hearing the case and to the role of the judiciary in general, providing ample material for a socio-legal analysis of the current state of British legality. Coverage of the Supreme Court hearing has also provided a very visible reminder that the senior judiciary in the UK, as well as the senior members of the legal profession appearing in front of them, are overwhelmingly white and male, which in turn has prompted renewed reflection on the process of judicial appointments (see, for example, Karemba 2016).

In 1999 Eve Darian-Smith published *Bridging Legal Divides: The Channel Tunnel and English Legal Identity in the New Europe*. It is not difficult to foresee the Brexit process generating equally incisive and illuminating socio-legal scholarship. I'm sure articles,

books and PhD theses are already being planned and written. Although Brexit itself has cast a cloud over the socio-legal community, the possibilities it creates for socio-legal scholarship may well be the silver lining.

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Rosemary Hunter  
[rosemary.hunter@qmul.ac.uk](mailto:rosemary.hunter@qmul.ac.uk)

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#### RCSL MEMBERSHIP AND FEES RENEWAL

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 Please send the completed form to our membership office:  
 Manttoni Kortabarria Madina ([manttoni@iisj.es](mailto:manttoni@iisj.es)).

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#### A CONFERENCE ON WOMEN IN THE LEGAL PROFESSION: HOW DOES THE INCREASE IN THE NUMBER OF FEMALE LAWYERS REFLECT ON THE LEGAL PROFESSION?

The conference "Women in the Legal Profession: How does the increase in the number of female lawyers reflect on the legal profession?" organized by the Human Rights Law Research Center (Bilgi University, Turkey) in collaboration with the Turkish Union of Judges and Prosecutors (YARSAV), was held in May 2016 in Istanbul. The objective was to question the gendered construction of the legal profession in Turkey by synthesizing the point of view of both researchers and practitioners. While the first section focused on the experiences of female judges, the second section problematized being a female lawyer in Turkey.

In the first section, researcher Seda Kalem, who has adopted feminist methods to interrogate the



professional experiences of female judges, shared preliminary findings from her research. Firstly she described the proportion of women in the legal profession as 35% according to statistics from 2015. But this statistic is barely observable in the female representation in higher level positions. For example, no female judge has been promoted to the presidency in criminal chambers of the Supreme Court of Appeals. Kalem considered that the common discourse is produced by prejudices. It attempts to explain the lack of progress by female judges in the judicial hierarchy based on two facts: choice and meritocracy. According to these arguments, first of all, the female judges do not choose to be in high level positions, in order to avoid the resulting difficulties in working life. Then, female judges are perceived as not able to practice this profession because of their female characteristics such as sensibility, irrationality, affection, etc. Kalem emphasizes that this discourse nourished by gendered patterns serves to consolidate the dominant male culture in the legal system and to discourage the female judges to be candidates for higher positions.

In return, the female judges Leyla Köksal and Nesli Tunç Emeklioğlu expressed that they suffer from professional and personal challenges due to their femininity. The discrimination faced by these female judges during their career is described by them as a result of the patriarchal representation of both the legal profession and state power in the eyes of their colleagues and public. At one point, they also said that their femininity provides an advantage when making decisions or analyzing the cases because being woman, as part of one of the disadvantaged groups in the society, broadened their perspective and keeps them more open-minded.

The second section dedicated to experiences of female lawyers in Turkey started with the speech of Filiz Kerestecioğlu, feminist lawyer and deputy of People's Democratic Party (HDP). Kerestecioğlu, who was a candidate in the presidential election of the Istanbul Bar Association, claimed that the Bar Association in Turkey absolutely needs a women's policy in order to improve their working conditions, prevent discrimination due to their femininity and empower the female lawyers' position vis-à-vis the male justice system.

Gökçeçiçek Ayata, another female lawyer, considered the matter from a different angle: lack of practice in legal education. She emphasizes the fact that legal education is presented in a theoretical and idealistic way in Turkey. According to her, the legal education system has a perspective which excludes the real experiences of attorneys that are formed by power struggles between different actors in the judicial field and its gendered mentality. Thus, the female students, who became or will become lawyers, are unable to develop strategies against gendered practices of law and a discriminatory legal culture.

In conclusion, this meeting, which coincided with the 10th anniversary of the foundation of YARSAV, aimed to create a discussion on the different dimensions of the patriarchal legal culture and the difficulties that female lawyers have to face in Turkey. YARSAV, the

oldest NGO in the judicial field, has been closed during the state of emergency. Since its foundation, YARSAV has been known in the judicial field by its actions which emphasized more particularly the foregrounding of gender equality and the persistence of basic principles of law such as independence, impartiality, respect for human dignity, etc. After the close of the conference, discussions on the evolution of legal professions in Turkey are continuing both in the judicial field and in public opinion.

Gözde Aytemur Nüfusçu  
aytemurgozde@gmail.com

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*The Newsletter starts a new series of articles which introduces major centres of socio-legal research that offer opportunities for guest scholars.*

**"LAW AS CULTURE", OR: (RE-)FRAMING LAW FROM A HUMANITIES PERSPECTIVE**  
AN INTRODUCTION TO THE KÄTE HAMBURGER CENTER FOR ADVANCED STUDY IN THE HUMANITIES "LAW AS CULTURE", UNIVERSITY OF BONN, GERMANY

The Käte Hamburger Center for Advanced Study in the Humanities "Law as Culture" was founded at the University of Bonn by sociologist, legal scholar and artist Werner Gephart in 2010. It received funding from the German Federal Ministry of Education and Research (BMBF) for a first project period from 2010 to 2016; following a successful first phase, the Center received a positive evaluation, which granted the Center funding for a second project period from 2016 to 2022. For this second period, Werner Gephart has been joined by co-directors Nina Dethloff, a legal scholar with a special focus on family law, and Clemens Albrecht, a cultural sociologist. There are currently ten Käte Hamburger International Centers in the Humanities which are part of the BMBF initiative "Freedom for Research in the Humanities" and seek to "support cutting-edge humanities research in Germany and to promote networking between German and international humanities scholars."<sup>1</sup> They are based on the guiding principles of transdisciplinarity, internationality, and comparativity and bring together high-ranking scholars from various fields and cultural backgrounds to form temporary learning communities which – in contrast to other centers for advanced study – focus on a common, overarching topic.

The Käte Hamburger Center "Law as Culture" in Bonn strives to establish innovative ways to analyze the law by mobilizing the conceptual, theoretical and methodological tools of the Humanities in general and of cultural sociology in particular. In doing so, it seeks to contribute to a deepened understanding of the role of law in contemporary societies which are marked by rapidly progressing processes of globalization or transnationalization, and not least by legal orders

moving closer together than ever before. It aims at a better understanding of different legal cultures and the dynamics of their encounter; their manifold interconnections, hybridization, and partial fusion; and the twofold role of the law both as a potential source (and site) of conflict and as a means of societal regulation and reconciliation. On average, ten scholars per year are invited to tackle these questions from a large variety of disciplinary perspectives ranging from the sociology of law and culture to the numerous branches of legal studies as well as other fields including anthropology, philosophy, religious and literary studies, musicology, and architecture.

### **First funding period (2010-2016)**

During the first period of funding, the Käte Hamburger Center for Advanced Studies "Law as Culture" systematically and comparatively developed a multi-dimensional framework for the analysis of the law that

- 1) understands law as a complex cultural fact,
- 2) takes law's entanglement with the religious sphere into account,
- 3) focuses on the altered conditions of law in the context of globalization processes and
- 4) the increasing risk of a clash of legal cultures resulting out of these,
- 5) follows the traces of the law in the realm of aesthetics (especially literature, painting, film, sculpture, music, and architecture), and thereby
- 6) finds answers to the questions of how, in today's world, particular interests and legal concepts, on the one hand, and normative orders with fundamentally universal claims, on the other, are to be balanced, thus determining to what extent "culture" can be considered a source of validity or comprising a relevant legal argument without undermining the binding character of legal normativity in general.

Conceiving law as a cultural fact firstly stresses the importance of transcending the idea of law as a normative system and takes into account its fundamentally symbolic dimension, its living side and ritual character, and the diverse ways in which normativity is translated into social life by organizational means (Gephart 2006). Furthermore, this perspective also includes the assumption that the inner logic and societal significance of law cannot be understood and explained by referring to power structures, religious sources, or aesthetic practices alone, but only by linking these partial perspectives in a systematic manner. Finally, it seems unsatisfying and even dangerous to derive law's validity exclusively from cultural sources. It is, however, a pressing question of our time how – and to what extent – the tendentially universalistic claims of law can be reconciled with particularistic normative ideas, cultural preconditions, and conditions of legal orders. This multilayered understanding of law as culture at the same time embraces and links insights from related fields of research, such as 'law and literature' (in the wider sense), the 'law and society' movement, as well as comparative legal studies and research focusing on both the individual inner logic and the encounter, mingling, or even clash of different 'legal cultures'.

During the first funding period, a book series with publisher Vittorio Klostermann (Frankfurt am Main) was established in which parts of research results from the Center are published.<sup>2</sup> Besides individual works of the Center's fellows, directors, and re-searchers, the series is also comprised of edited volumes of papers presented at the Center's annual workshops and conferences and in the bi-weekly "Forum Recht als Kultur", an open space for discourse on ongoing research works. Previous events covered diverse topics such as the role of tribunals on crimes against humanity in law and literature, the many facets of guilt, the transition processes in North African societies after the so-called 'Arab Spring', and the role of Sharia law both in predominantly Islamic as well as European societies. Other conferences dealt with normative and legal aspects in John Searle's social ontology, the sociologies of law of Weber and Durkheim, and the general relations of law and religion (a joint conference of the sections 'sociology of law' and 'sociology of religion' of the German Sociological Association). Large scale conferences were also devoted to the study of "Family Law and Culture in Europe: New Developments, Challenges and Opportunities", and "The Normative Complex: Legal Cultures, Validity Cultures, Normativities", which allowed participants to elaborate on a genuine concept of 'validity cultures' that seeks to address the complex interactions of competing normative orders (such as law, religion, customs, and even fashion) in different societal figurations (cf. Gephart/Sakrani 2012).

In addition to these largely conventional scientific activities, the Käte Hamburger Center for Advanced Study "Law as Culture" also seeks to continuously transcend the boundaries not only between legal dogmatics and the humanities, but also those between scientific thinking, reflections on the aesthetics of the law, and aesthetic practice itself. In order to encourage such endeavors, the Center has established a yearly Georg Simmel Artist Stipend that allows one renowned artist per year to spend time and apply oneself to one's work at the Center in steady exchange with the ongoing scientific discourse. This artist-in-residence fellowship is open to artists from every kind of genre (painting, sculpting, writing, photography, etc.). During the first funding period, it drew recognized artists to the Center such as sculptor, graphic artist, and stage designer Alexander Polzin and sculptor and visual artist Tim Shaw. The latter worked together with kinetic artist Giles Walker on an installation entitled "The Birth of Breakdown Clown", a moving, 'robotesque' figure that reflects and speaks about fundamental questions of existence, man-machine relations, and the functions of rules and legal norms. Projects such as "Breakdown Clown" have accompanied scientific research at the Center from the beginning and have contributed significantly to the multidisciplinary discourse on law maintained there, with scholars and artists mutually profiting from this intellectual and practical exchange. It is also in this very spirit of linking scientific reflection and aesthetic practice that the works of founding director Werner Gephart visualize the intertwined histories of sociological and legal thought, as can currently be

seen in the exhibition “Some Colours of the Law” at the Dickson Poon School of Law at King’s College, London.<sup>3</sup>

### **Second funding period (2016-2022)**

After its positive evaluation, the Käte Hamburger Center for Advanced Study “Law as Culture” will now, in its second funding period, look even more closely at the social embeddedness of law. Building on the insights gained and the concepts sharpened during the first six years, the Center and its fellows will now explore, in a biennial cycle, the interaction between the juridical and other societal spheres: Law and Politics (2016-2018), Law and Economy (2018-2020), and Law and Community (2020-2022). Following the basic assumptions of the Center’s program, it is obvious that these spheres, just like the law, have to be dealt with as complex cultural phenomena in themselves: politics, economy, and community are likewise approached from a humanities point of view, and hence appear as political cultures, economic cultures, or communities in specific cultural contexts including family cultures.

The focus will be placed first on the relationship between law and politics and on how they interact, for example, in different constitutional settings in and across legal cultures. Of course, the political cannot be reduced to the institutional perspective regarding its inner logics of decision-making or organizational settings, but must also be analyzed with respect to its complex symbolic representations, ritual forms, narrations, and epistemologies. Treating both law and politics – and their relationship – comparatively by way of cultural analysis then opens up a multitude of problems that point to very fundamental value questions. If, for example, political cultures differ with regard to the issues they consider to be politically resolvable in the first place, the attribution of phenomena to either law or politics already becomes a difficult task – with models of parliamentary sovereignty (such as in the UK) competing in sensitive constitutional matters with models of the absolute primacy of a constitutional court (as in Germany). At the same time, legal-political orders differ largely regarding the extent to which political demands are translated into legal language, which becomes even more obvious – and increasingly debated –, for example, in the case of human rights discourses.

In a second step, the connections between law and economy will be dealt with, i.e., the legal-cultural conditions of economic action and the economic foundations of various legal cultures (not to be confused with the research field commonly known as ‘Law & Economics’). From this perspective, law is not to be reduced to technical constraints on ‘rational’ economic practice. Similarly, in this case, economy is not properly understood as a system of cash flows and markets alone, but also relies on legal, political, and also religious and ethical conditions and involves its own symbolic and ritual realities. What is considered a legitimate extension of market logics, for example, is highly dependent on culture-specific ideas and even religious worldviews; and the question for the possible monetarization of certain goods, ser-

vices, values, and so forth has to be reflected in such cultural horizons – the prohibition of receiving interest in Jewish and Islamic business ethics is but one classic example. In a more general sense, there is a huge cultural and historical variation in ideas about the extent to which the law should (or is permitted to) regulate economic activity. This has become a prominent issue recently in the debate on the legitimacy of arbitration courts that could emerge alongside and in competition to state institutions, a debate that tells much about different culturally-grounded ideas of the law.

In a third step, the Center will address the relationship between law and community and consider – among other things – various family cultures and the corresponding cultures of family law. Questions will also be pursued relating to the borders of the legal community and the relationship of the law to the ‘Other’. According to Weber (2010: 195, 361), the legitimacy of law often rests on legal communities (as “*Einverständnismgemeinschaften*”) that share a “belief in commonality” (Weber 1980: 237). The potential conflicts that arise from such a close linking of law and community (which always refers to both inclusion and exclusion) are not difficult to seek and become even more obvious in the discussion on legal pluralism. However, the very competition of normativities may also lead to an overarching adherence to the law and legal ‘projects’ such as the positivization of a universal culture of human rights, which does not take anything away from its fragility. Not least for reasons of social proximity and emotional entanglement, the family stands out in this context as a particularly important type of community. While family law typically reflects changed forms and ideals of family cultures, the family remains a central social setting in which the normative resources of a society are produced, even in times of globalization and pluralization of life forms. In this context, the diversification of family structures reflects both transformations and differences of societies and their normative foundations, which can in turn be used as a starting point for cultural comparison.

While these three main topics split the six-year period into distinct research phases, three intersecting dimensions of analysis will guide research during the entire second period: The first dimension consists of the innovative concept of cultures of differentiation and the program’s overall basis in a comparative approach towards various legal cultures. The investigation of the interaction between the law and other societal orders is thus embedded within a general social theory and a comparative framework that allows the Center’s research to overcome the limitations of a solely occidental perspective.

It is the specific differentiation pattern of each society that gives it its own form and shape. From the Center’s perspective, societal differentiation in fields or spheres is not a single structural pattern that diffuses all over an increasingly homogeneous ‘world society’, but a general principle that takes many different manifestations in the regions and cultures of the world. Boundaries between societal domains are fuzzy, versatile, and contested (Witte 2015). Which



topics should be discussed as economic issues and which ones as moral issues? Where does law end and religion begin? Which trajectory do formal and material rationalization processes take? Which facts are politicized or even aestheticized, and to what extent? And to what cultural foundations do these and other types of demarcation point? The only way to answer such questions is by way of a comparative analysis of differentiation patterns in their respective embeddedness, or: cultures of differentiation. This approach, of course, has serious implications for the place and the scope assigned to the legal sphere. What is coded as “law” in different cultural contexts, and with which spheres is the law competing directly or indirectly for the prerogative of interpretation in each case? Might the law also be considered a “guardian” of the differentiation system or the medium in which boundaries are drawn and negotiated between spheres? And, if this is the case, how can the law be designed as the form and medium of these negotiation processes and as a relatively autonomous field at the same time? Against this backdrop, the examination of law as culture as a comparative project begins with a comparison of how the respective legal spheres relate to politics, economy, and community, which show cultural variance with regard to models of social order that might be based on religious ideas and identity-establishing worldviews to varying extent, or even differing ‘ethics of differentiation’.

As such, the “legal analysis as cultural research” conducted at the Center is also particularly relevant to jurisprudence here, in which the relationship between the comparison of legal cultures, on the one hand, and classic comparative law, on the other, is becoming increasingly decisive. Juridical comparative law, originally known as ‘*législation comparée*’, has now been accompanied by the approach of ‘comparative legal cultures’, whose proponents, however, are sceptical of standardizations of law on the whole precisely because of its cultural relativity. Unfortunately, the jurisprudential debate on this has so far barely connected to the humanities and social science discourse: There has been very little overarching theoretical and methodological reflection to date on the corresponding questions arising with regard to harmonization, approximation, and standardization of legal regulations. Thus, another goal of the Center’s research is to engage this juridical discourse and the comparison of legal cultures in a more intense conversation, which seems of great importance not only on the levels of legislation and setting legal precedents, but also on the levels of application and enforcement of the law.

A second interconnecting dimension is comprised of the human rights discourse and questions regarding field-specific claims to autonomy. Human rights form a highly contested field of the law. Not only are human rights questioned regarding their philosophical foundations, but also their very legal nature itself is far from undisputed. In what way can human rights be considered law, and to what extent do they have to be regarded hybrids of law, political interests, and moral reflection? It seems that human rights cannot be ad-

ressed as an autonomous field of law; rather, they form a transversal field of multi-normativity that touches on key issues of community, political participation, economic security, and social justice. As such, the debate on human rights, like few other subjects, is marked by the tension between universalism and particularism. In an almost paradoxical way, “culture” enters the human rights discourse from an opposite end: While human rights are deeply rooted in cultural worldviews and play a crucial role in the protection of religious freedom and the recognition of indigenous rights, they are also questioned for being partial to specific cultural traditions and conceptions, and are increasingly questioned in the very name of culture, too. In addressing human rights, the Center puts these issues center stage and attempts to deepen our understanding of the moral, political, and cultural paradoxes at the bottom of this conflict. It follows the assumption that treating law as a cultural phenomenon is essential to our understanding of the field. At the same time, this field must deal with religious patterns of reasoning and a global diversity of religious orientations, as well as a universal claim to validity that happens to collide with cultural relativisms in many cases. Lastly, cultural motives and arguments not only play a role in the foundation of human rights, but their implementation and enforcement also has to deal with a plurality of diverse legal contexts that often hamper the transformation of normative into empirical validity.

Not the least in a human rights context, the tension between the individual and the community as well as the autonomy of the person placed in a plurality of social fields and normative orders become core issues for the cultural analysis of the law. Political, philosophical, and juridical dimensions of the notion of “autonomy” are closely interconnected; and the perspective of differentiation theory scales up the problem to the level of semi-autonomous legal fields and their protection against competing fields and their respective claims to validity. Complicating the matter even more, these problems arise prominently both at the level of modern constitutional states and beyond the nation state. In this regard, the establishment of supranational legal orders is closely connected to questions for the possibility conditions of autonomy guarantees, with the emergence of a European legal culture constituting an important field of research. Inside the legal sphere, the freedom of choice of law is one of the key expressions of private autonomy, as parties are not limited to the choice of state law in arbitration courts. As a result, religious law can be chosen and then enforced by the state, making it necessary to pay particular attention to the tensions between religious freedom, individual autonomy, cultural identity, and women’s rights in, for example, family law, and to address issues of legitimacy and acceptance in dialogue between different disciplines. It seems evident that personal autonomy may be coded in various ways, fundamental rights are interpreted and fleshed out differently, and the focus might tend toward either the individual or communal autonomy according to different cultural contexts. Likewise, differences in dealing with the principle idea

of autonomy of the person can be observed in a wide range of fields – from patient and reproductive autonomy, to gender and sexual identities, to children’s as well as elderly and disabled persons’ rights. Again, problems that may arise from these vital issues have to be treated theoretically and practically on both the national and the transnational level, thus rendering a perspective even more important that remains sensible to cultural differences regarding ideas about the relation of the individual and the collective.

Finally, the third analytical dimension highlights the emotive foundations of the law and the elementary question as to the binding force of law. The question concerning the role of emotions for the functioning of the law reaches back into the history of moral philosophy and can be traced into contemporary discussions. This being said, whether – and in what sense – they should play a role with regard to the validity, the legitimacy, and acceptance of normative standards, and with regard also to the finding of justice and for jurisdiction in general, has traditionally been discussed in a highly controversial manner. Different types of belief in the law may be pervaded by emotions, as, for example, the validity of the law may be based to considerable extent on a sense of justice. But how universal is the language of emotions, and would that lead to the question regarding ‘cultures of a sense of justice’ (*‘Rechtsgeföhlskulturen’*)? And should this be the case, what does it imply for transnational legal orders that need to take these variations into account and, at the same time, seek for normative standards that are conceived as legitimate across cultures? The introduction of international courts, for instance, can hardly be understood without taking into account fundamental human emotions, moral and affective indignation with severe violations of human rights, and the suggestive power of individual cases. However, a more differentiated evaluation requires that we consider the economic, political, and communal spheres as well. It seems necessary to look further than the general significance of emotions in the law and old discussions about the relevance of the *“Rechtsgeföh!”* in order to address patterns of emotional foundation that affect different spheres of the social (e.g., the political, the economic, etc.) more than others. In addition, it seems necessary to go beyond the well-known importance of emotions and affects for penal law, national or international, and address possible emotive foundations of law in other legal fields as well. Finally, we should be concerned with the question of how the relation of law and emotion might be re-measured with regard to transnational legal orders that are tied much more loosely to actual social communities and aggravate references to feelings such as empathy or solidarity. Tribunals might be a way to archive certain forms of *“remote justice”*, but understanding and maybe even improving their efficacy could require looking more closely at the way they deal with a complex landscape of emotions underlying what we call *“transnational law”*.

At the same time, the binding force of law and the adherence to it may meaningfully be treated as

variables for a comparison of legal cultures. The rivalry between law and other normative orders has long been the core issue for studies on legal pluralism; but while these have traditionally focused on the Global South, similar questions may also arise for Western societies. The nation state, for example, is increasingly questioned as the sole point of normative reference; and religious communities, social movements, or milieus demand adherence and validity for particular claims just as much as transnational institutions put national law under pressure and competition. Cultural affiliations may clash with universalistic ideas, such as human rights, on a multitude of levels and fields. At the same time, individualization goes hand-in-hand with aspirations of self-empowerment more and more often, at times leading into conflicting normative expectations. A multitude of local, national, and transnational collectives nowadays challenge the authority and legitimacy of political bodies and legal orders; and old questions for the acceptance of the law re-emerge. In this context, adherence to the law may also be interpreted as a question of *‘representative culture’*, a term that refers to claims of validity extending beyond particular group affiliations (Tenbruck 1990). Wherever the authority of the law is called into question more generally, recognition beyond enforcement becomes a vital question that points to the significance of social ties and cultural belongings as one important source of validity.

The cross-linking of three thematic fields of research and three intersecting dimensions connects the Center’s new foci of exploration (law and politics, law and economy, law and community) with overarching interests and analytical concepts (cultures of differentiation and comparing legal culture, human rights and autonomy, the emotive foundations and the binding force of law). In structuring the second period in such a manner, the Center aims to ensure continuity between different topics, avoiding the disintegration of its research activities into three unconnected phases that simply follow upon one another. As during the first funding period, regular conferences and workshops will play a vital role in the implementation of this program. While one-to-two day workshops are largely intended to be internal working sessions, conferences are usually scheduled over two-to-three-day periods and address a broader public. For the first year, a workshop on *“Cultures of Differentiation”* will take place in December 2016 and will also constitute the launch of the second period of funding. The workshop will give room to discuss and elaborate an innovative sociological concept that will serve as a basis for research during the entire second period of funding. The first annual conference will follow in the summer of 2017 and will deal with *“Constitutional Cultures in Comparison – Differences in Relations between Law and Politics”*, advancing a comparative cultural perspective on constitutions as sites where law and politics intersect. For the second year (April 2017–March 2018), a workshop is planned on the question of *“Emotions in Law and Politics: Old Prejudices and New Research Perspectives”*. An annual conference on the question of to which degree

we can consider “Democracy as Culture” and the possible consequences of this for an analysis of the “Discourse and Politics of Human Rights” in a global perspective will follow in March 2018.

### **Fellowships and Applications**

In accordance with the Center’s principles, outstanding researchers are invited on an annual basis to develop their individual research projects and, in exchange with the permanent researchers, to also contribute to the main research topics of the Center. Fellowships are announced every year and invite excellent scholars of the fields involved in the Center’s research to submit applications and research proposals that fit the respective biennial research focuses. Fellowships are divided into regular and junior fellowships and run up to twelve months. They include an individual salary and free accommodation in the city of Bonn. Besides these regular calls for application, excellent scholars with research interests in the thematic focus of the Käte Hamburger Center for Advanced Study “Law as Culture” are invited to submit applications at any time. In general, the Center’s common language is English, with occasional events being conducted in German, French, or multilingually. For more information, please visit the Center’s website.

### Endnotes

- 1 <http://www.kaete-hamburger-kollegs.de/en/index.php>.
- 2 Cf. <http://www.klostermann.de>.
- 3 Cf. <http://www.kcl.ac.uk/law/about/visarts/Honorary-Artist-2016.aspx>

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### Links

- <http://www.law-as-culture.com>  
<http://www.recht-als-kultur.de/en/>  
<http://www.kaete-hamburger-kollegs.de/en/index.php>

Daniel Witte  
 witte@uni-bonn.de

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## **REPORT OF THE SCIENTIFIC DIRECTOR** INTERNATIONAL INSTITUTE FOR THE SOCIOLOGY OF LAW, OÑATI

First of all, I wish to express my warmest thanks to the Governing Board of this Institute for appointing me as scientific director for the term 2016-2018. This is a great honour for me and also a special pleasure, since I have been involved in the activities of the IISL since its very beginnings in 1988-1989 and I feel strongly committed to his future. This Institute has played a decisive role in enhancing the studies in the area of law and society for more than 25 years already. Its name is known world-wide and its reputation has always been high within the most diverse schools of thought and academic communities. Such achievements were the effect of the activity performed by all my predecessors, among whom I wish to remember, in particular, André-Jean Arnaud, who gave life to the Institute, and Volkmar Gessner, who was also, jointly with Kiko Caballero Harriet, the person who had the original idea of founding it. Nor should I forget the substantive contribution offered by the super-efficient staff which has done and still does the day-to-day work.

It will be my duty to keep pace with this rich tradition and to do my best to strengthen the role and the image of the IISL over the next two years. Excellence is the *mot d'ordre* of the academic activity currently, all over the world. Academic communities strive for setting its standards and academic institutions feel increasingly engaged to comply with them, sometimes with more than of hint of anxiety, in view of the size and the quality of the performance required to get a recognition as a high class research and education centre. I have personally felt this atmosphere quite vividly, and increasingly, for a long time, as dean of Milan University Law Faculty, Rector’s delegate at international academic institutions – mention, especially, of the League of European Research Universities – and, most recently, as a member of the panel of social sciences at the European Research Council. I should leave aside some excesses into which the academic bureaucracies, and especially the legislators around the world, often incur in their races, sometimes producing a sense of suffocation. Besides this, the battle is hard and harsh, especially in a phase of economic stagnation, budgetary cuts and continuous shrinking of public resources. Under such circumstances, which are not likely to change in the next future, our Institute is called upon, on the one side, to confirm its mission, as it was established throughout its not-too-young history, but also, on the



other side, to adapt it to a cultural and political atmosphere that has changed substantively in comparison with our starting point in the late Eighties. The master course, which is highly reputed internationally and happily awards, through to the University of the Basque country, a correspondent and official academic degree in Spain – and therefore in Europe – should maintain its level as far as the quality of both students and teachers is concerned. This implies accepting the best applicants, as has been done so far, while taking into account the diversity of their respective backgrounds. As far as teaching is concerned, its high quality has never been a matter of doubt. I would just recommend that more attention be given to methodology. Especially those students who come from law schools are not enough familiar with it. A law-and-society degree does not only imply an in-depth knowledge of social theorizing and a skillful experience of the life of law, but also the capacity of moving onto the road, or to “cellars”, as Lawrence Friedman uses to say, to observe or reconstruct social events, opinions and motivations to action. This is a fundamental task of social scientists, especially if they keep a critical attitude towards the object of their study. Critique means, basically, unveiling what is not immediately visible. Yet such activity implies a profound knowledge of research techniques and a measure of ethical detachment of the researcher with regard of her/his own ways of looking around. Criticism is first and foremost self-criticism. It means challenging oneself and laying down testable hypotheses that a rigorous method of observation may lead to correct or refute. Our master course can be a formidable opportunity for young scholars to become fully-fledged researchers in the field of law and society, where – needless to say – a lot should be unveiled.

Our workshops have also acquired a high reputation. A wide amount of good literature has come out and still comes out of them. They are also a great opportunity for people from the most different areas of the world to meet and strengthen or even establish scientific relationships. No doubt, they should continue. What I think would be recommendable is a light turn in two directions.

Firstly, efforts should be made in view of a higher measure of interdisciplinarity. Our study field is interdisciplinary *per se*. Still, if our mission as law-and-society scholars is that of looking at what lays behind the surface of legal rules and jurists’ doctrinal constructions, we cannot repeat the mistake that is so typical of legal theorists, i.e. being self-referential and ignoring what specialists of the various areas of social life happen to say about what law tries to regulate. I do think that discussing with such scholars as economists, biologists, or experts in ‘hard’ sciences, is of paramount importance, if we wish to make socio-legal theory advance in such fields – say – as global commerce, bio-ethics or environment protection, just to mention some of the topics which raise the utmost attention, amongst others, also of the financing institutions around the world.

Secondly, I would recommend to use our workshops, also, as an opportunity for setting up research teams

and promote international and intercultural research projects. That the Institute cannot do field research by itself is known, with very limited exceptions, may be connected to the its position in the Basque country and the opportunities that may arise within our hosting community. Yet, it can play an important role as convener of scholars who wish to be involved in research activities. By the way, this has been a mission of the Research Committee on Sociology of Law since it was created in 1962.

I am convinced that such turns in the area of workshops might allow us to further improve our publications, which are already quite well known and quite widely diffused.

Special attention should be paid by the scientific director to the Institute’s library. This is said to be the world’s widest one in the field of law and society, in terms of both richness and coverage of cultures and languages. It is therefore a fundamental asset of the IISL, something of great value for students, teachers and, I would stress, a not negligible number of visiting scholars. Efforts should be made to keep the library updated, even though we know quite well that this has become an increasingly difficult task. Books are expensive and the trend toward a gradual monopolization of the *ad hoc* market, internationally, makes things even more problematic. There is no easy solution for this problem. One thing to do is to diffuse among the different centres of studies in sociology of law the feeling that IISL’s is ‘their own’ library, as is the case of national libraries in each country, and invite them to supply a free copy of all their publications by default. We should not, either, forget that the current tendency is to favour e-books rather than paper books. I guess that the Institute should gradually move toward this direction too. This question is particularly serious for journals, whose ‘paper’ life will be increasingly weak. Large libraries have cancelled the majority of subscriptions, trusting on downloads only. Whether and to what extent should we go along this same way, without losing our primacy, is a matter of discussion.

Throughout its first years, the Institute has entered a wide number of agreements with the most different academic institutions around the world. This was important under the viewpoint of the recognition of the Institute as a trustable scientific partner. On many occasions, however, such contacts have not gone beyond the signatures put under a formal document. Although making the IISL better known is important, I think that here again we should be selective and combine our relationships with specific projects. Besides the institutional link with the University of the Basque Country, which is vital and should be even fortified as far as possible, a good example has been that of the agreement with the University of Milan, which has proved to be fruitful for both the master course and the “Renato Treves” PhD Programme in Law and Society. The latter curriculum was discontinued as a perverse effect of the Italian University reform, passed in 2010. I think, anyway, that we should make endeavours for putting a new project of the same kind on the road. May I remember that the League of European Research Universities, in 2007,

formally acknowledged that our master course was an example of good practice for its institutional links with doctoral courses, such as Milan's.

One final point concerns the place we live in, i.e. the Basque Country. Even though the IISL is a truly international institution of high culture, we ought not to forget that, besides any other remark, this land is a formidable source of both theoretical reflection and field investigation, for its specific culture, customs, developed economy and, no less, social ties. Doing research here may be a tempting adventure for a social scientist. I am therefore convinced that our links with the local communities could be fortified decisively.

Thank you for your kind attention.

Vincenzo Ferrari  
ferrari@iisj.es

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*The newsletter continues its series of excerpts from socio-legal books with a text from Joachim Renzikowski's contribution "Contemporary Problems of Labour Exploitation" the the book "Slavery as a Global and Regional Phenomenon", edited by Eric Hilgendorf, Jan-Christoph Marschelke and Karin Secora (Heidelberg, Universitätsverlag Winter 2015). The editors would like to expressly thank Jan-Christoph Marschelke for assistance. Readers are encouraged to send in suggestions for excerpt to be printed in future editions of the newsletter.*

## LABOUR EXPLOITATION: PROBLEMS AND DEFICITS

In practice there is little enforcement of German criminal law in this area by the tasked enforcement authorities. (cf BKA). Two major reasons for the unsatisfactory level of enforcement are the complexity of the subject matter and the complexity of the law. The complicated constituent elements require complex investigations which are often significantly hampered by referrals to foreign authorities. The resources available to law enforcement authorities and the courts are also notoriously scarce. This opens up gateways for plea bargaining deals in criminal proceedings – as is also the case for other kinds of economic crime. (Kestermann et al. 2012: 83 f.)

Criminal prosecution hardly ever benefits the victims of labour exploitation. Victims often avail themselves of human trafficking in order to escape social inequality and extreme poverty in their countries of origin. The unfortunate fact is that there is a perception among victims that exploitation is more attractive than the alternative: exploitation is better than hunger. Those who cooperate with law enforcement authorities are sawing off the branch on which they sit as they may face removal to the economic

situation they desperately wanted to escape from and the concomitant loss of income which this would entail. It remains a simple truth: labour exploitation cannot be solved solely by stricter criminal laws and restrictive immigration laws. On the contrary, restrictive immigration laws only make the victims more vulnerable and worsen their bargaining positions vis à vis their exploiters. A liberal approach to labour migration, especially for the low-wage sector, not only for engineers and IT specialists, is a more viable solution.

Another reason for the – alleged or actual – divergence between reality and criminal law practice is that politicians previously focused on human trafficking rather than labour exploitation. This approach does not do justice to the complexity of the phenomenon, as it is likely that "forced labour" cases do not occur frequently. Rather, the patchwork of uncoordinated different rules in the current criminal law needs to be replaced by a systematic approach to labour exploitation. The designation "labour", for a start, would more adequately represent the phenomenon. There is no reason why socially harmful exploitation in employment only incurs criminal liability if the victims are third country nationals without residence permits or work permits, while German and EU workers may lawfully be exposed to the same unfavourable working conditions. Labour exploitation is not an exclusive, or even primarily a problem of – illegal – immigration.

In addition the – one-sided – focus on criminal law and immigration law may actually reduce awareness of how important it would be to develop a concept of core working standards<sup>1</sup> – although that would be more effective in the prevention of exploitation within German society. This idea is expressed cogently in Article 15 of the *African Charter on Human and Peoples' Rights*:<sup>2</sup> "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work." Work under the conditions of freedom, equity, security and respect for human dignity is a human right. Nevertheless, there is no definition, i.e. list of criteria, either at national and international level for what "decent work" means.

Disparity in employees' wages is one of the most important and most manageable criteria for determining whether exploitation exists. For some time, the two-thirds of a normal wage threshold has been gaining acceptance in German jurisprudence. Using this criterion, an employee's wages would be contrary to public policy, if the disparity exceeded more than a third of the standard wage (see § 612 German Civil Code), which is usually the official wage. (Cf. BGHSt 1998: 53,60; BAGE 2010: 338 et seq., commentary by Kohte 2010: 551 et seq.; BGH 2010: 1973 et seq.) But what rule applies, when the reference salary itself is below subsistence level? This happens much more often than one would expect. A recent study by the Hans Boeckler Stiftung (a foundation allied to the German trade unions) showed that 6.9 % of all employees in Germany receive

wages below the poverty level despite working full time. (Lohmann/Andreß 2011: 178 f.)<sup>3</sup> In spite of *European Social Charter*<sup>4</sup>, Article 4, which “recognizes the right of workers to remuneration such as will give them and their families a decent standard of living”, income at the two-thirds threshold would hardly be enough to survive, if the wages for full employment were below the subsistence level.<sup>5</sup> On the contrary, the European Social Charter refers to a minimum wage, which is based on the means necessary for subsistence.<sup>6</sup> A calculation taking account of a fair price for labour, but also the individual needs of the victims – is needed to ensure an adequate living standard. This has been the subject of debate since the reception of Aristotle in medieval times. (cf. Langholm 1992: 168 et seq.; Hecker 2008: 39 et seq. with further references)<sup>7</sup> A broader human rights based approach (for a detailed treatment, see Munro 2009: 367 et seq.) has to concentrate more on the victims of labour exploitation. This means, on the one hand, that the victims shouldn’t be regarded as lawbreakers. They shouldn’t be reduced to their illegal resident status. On the other hand, the aid and support given to victims should be given independently of any status they might have as defendants in criminal proceedings. Linking the two issues would ignore the fundamental importance of human rights issues in such cases. Human rights – especially the right to health and personal integrity, the right to liberty and security and the right to fair trial (cf. art. 2 to 6 ECHR) – are not a bonus for good behaviour. Every person has these rights – by virtue of being a person. Therefore, solely on the basis of human rights, victims of human trafficking should have a right to financial help and other assistance. But the help must not be dependent on their status as legal or illegal aliens or their willingness to cooperate with public authorities. Up to now Germany has had no humanitarian right of residence like the Italian “T-visa”,<sup>8</sup> which has proven to be a very good idea. With regard to the demand for appropriate accommodation or medical and material aid, Germany should provide much more assistance.<sup>9</sup> Victims should themselves be able to claim compensation and damages against whoever has trafficked or exploited them. The current law does not protect trafficking victims from removal. Creating such a humanitarian right of residence would be a way to deal with human trafficking as part of a comprehensive human right based master plan on legal and illegal immigration. Nevertheless, it needs to be emphasized that sexual exploitation and employment exploitation are in no way simply cross-border issues.

#### Endnotes

- 1 On respective concepts at EU level cf. ILO 2008. For further information see Anker et al. 2002; ILO 2007.
- 2 For more details on the so-called “Banjul-Charta”, see Flinterman/Ankumah 2004.

- 3 According to the expert group on Art. 4 § 1 European Social Charter the poverty level is income below 60 % of the average income. (cf. Samuel 2002: 73 f.); regarding the entire topic see the empirical study by Strengmann (2003). A list of collective labour agreements having hourly wages under € 6 can be found in Deutscher Bundestag (2004), pp. 14 et seq.
- 4 In Germany the European Social Charter came into force under the statute of 19 September 1964 (Deutscher Bundestag 1964), and the bulletin of 9 August 1965 (Deutscher Bundestag 1965) on 26 February 1965 – except Art. 4 § 4, art. 7 § 1, art. 8 § 2 and 4, art. 10 § 4. Furthermore since the – insofar not decisive – reform of 1996, it is binding in Germany (see Deutscher Bundestag 2001, 2001a).
- 5 For further information, see Nassibi: 2012: 99 et seq.
- 6 Likewise see Peter 1995: 120 et seq.; Nassibi 2010: 204 et seq.; Bayreuther 2007: 2024; BAGE 2005; for a critical treatment see Franke 2003: 110 et seq.; with the statement that art. 4 § 1 European Social Charter doesn’t aim at limiting personal autonomy but aims at the fair distribution of goods.
- 7 Later for example Fichte (1979: 216): “Es ist Grundsatz jeder vernünftigen Staatsverfassung: Jedermann soll von seiner Arbeit leben können” (“It is the principle of any reasonable constitution: Everybody should be able to feed himself from his own wages”). From the current discussion in Germany, a few of many articles: Bieback 2000; Waltermann 2010; Wank 2010.
- 8 For details on the Italian “T-Visa”, under Art. 18 Decreto legislativo n. 286/98 of 25 July 1998 (Parlamento della Repubblica Italiana 1998); see Pearson 2002; Petrini 2002.; Monzini 2005; for further information see: [www.ontheroadonline.it](http://www.ontheroadonline.it).
- 9 So far support and assistance for trafficking victims has been financed under the Asylbewerberleistungsgesetz (AsylbLG). The main purpose of this law is to deter persons, who want to claim the higher social benefits in Germany, from simulating reasons for asylum. The cap on payment for medical treatment for acute diseases (§ 4 Abs. 1 AsylbLG) has led to traumatised victims not being given long-time therapy. If the women involved need to change their residence several times for security reasons, disputes between local authorities and departments arise, cf. BKA 2003, p. 16. Often substantial resources administered by the specialised centres for trafficked persons are locked up because their personnel have to cut through piles of red tape created by a multitude of authorities



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Joachim Renzikowski  
Joachim.Renzikowski@jura.uni-halle.de

**"SOCIOLOGIA DEL DIRITTO" ON INTERSECTIONALITY, LAW AND SOCIETY – A SPECIAL ISSUE**

Intersectionality has become a key concept to understand identity, inequalities and power relations in law and social sciences. The Special Issue "Intersectionality, Law and Society" of *Sociologia del diritto* (n. 2/2016, Franco Angeli Publishers), guest edited by Letizia Mancini and Barbara Giovanna Bello, involves leading scholars who have been committed to the study of intersectionality in Law and Society in different cultural and local contexts for many years.

This thematic issue of *Sociologia del diritto* starts with the editors' interview to US professor and activist Kimberlé W. Crenshaw, who coined the term 'intersectionality' in 1988. This is followed by nine essays, which delve into theory and practice of intersectionality in law and society. The first and second contributions concern European (Dagmar Schiek) and international law (Nora Markard); the following ones relate to different national contexts: Germany (Susanne Baer, Sarah Elsuni & Anna Lena Göttische), United Kingdom (Iyiola Solanke), Sweden (Eva Schömer), Switzerland (Tarek Naguib), Spain (María Angeles Barrère & Dolores Morondo), and Italy (Barbara Giovanna Bello).

Barbara G. Bello  
barbara.bello@unimi.it

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The call for papers with research results to be presented at the 2017 edition of *Sociology of Law* is open. The event will take place between 01-03, June, 2017, at Unilasalle, Canoas. Papers must be submitted between 02/15/2017 and 04/21/2017, according to the following criteria:

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**Newsletter address for correspondence and  
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Stefan Machura  
School of Social Sciences  
Bangor University  
Bangor  
Gwynedd LL57 2DG  
United Kingdom  
s.machura@bangor.ac.uk

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