

*Gardens*  
*of*  
**JUSTICE**

**CRITICAL LEGAL CONFERENCE**  
**STOCKHOLM, 14-16 SEPTEMBER, 2012**



**G**ARDENS of **J**USTICE  
CRITICAL LEGAL CONFERENCE 2012  
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## GARDENS OF JUSTICE - CRITICAL LEGAL CONFERENCE 2012

Stockholm, 14-16 September, 2012

The conference venue is Kungliga Tekniska Högskolan (KTH), Stockholm.

### THE CRITICAL LEGAL CONFERENCE 2012 IS ORGANISED BY:

Skolan för datavetenskap och kommunikation, KTH

Juridiska fakulteten, Lunds universitet

Juridiska institutionen, Göteborgs universitet

The conference has received generous support from the Swedish Science Council (Vetenskapsrådet).

### ORGANISING COMMITTEE:

Matilda Arvidsson

Merima Bruncevic

Leila Brännström

Leif Dahlberg



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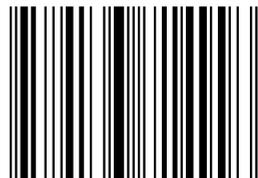
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# GARDENS of JUSTICE

## CRITICAL LEGAL CONFERENCE 2012

STOCKHOLM, 14-16 SEPTEMBER, 2012

The theme for this year's Critical Legal Conference is "Gardens of Justice". Although the theme may be interpreted in different ways, it suggests thinking about law and justice as a physical as well as a social environment, created for specific purposes, at a certain distance from society and yet as an integral part of it. The theme also invites you to think about justice as a concrete metaphor rather than an abstract concept. Just like any ordinary garden, legal institutions affect both people working in them and people who are just passing through their arrangements.

The theme "Gardens of Justice" further suggests a plurality of justice gardens that function together or that are at times at odds with each other. There are for instance well ordered French gardens, with meticulously trimmed plants and straight angles, but that also plays tricks on your perception. There are English gardens that simultaneously look natural – un-written – and well kept, inviting you to take a slow stroll or perhaps sit down and read a book. There are closed gardens, surrounded by fences, and with limited access for ordinary people. There are gardens organized around ruins, let's call them Roman gardens, where you can get a sense of the historical past, but without feeling threatened by its strangeness. There are Japanese stone gardens made for meditation rather than movement. There are zoological gardens, where you can study all those animal species that do not have a proper sense of justice, no social contracts, no inequality and social injustice, and no legal systems. There is, indeed, the Jungle, a real or imaginary place outside the Gardens of Law.

The conference venue is Kungliga Tekniska Högskolan (KTH) in Stockholm. The conference is organised by Skolan för datavetenskap och kommunikation, KTH; Juridiska fakulteten, Lunds universitet; and Juridiska institutionen, Göteborgs universitet. The conference has received generous support from the Swedish Science Council (Vetenskapsrådet).

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# CONFERENCE PROGRAMME

## FRIDAY, 14 SEPTEMBER

11.00-13.00	REGISTRATION	ATRIUM, LINDSTEDTSV. 5
13.00-13.30	WELCOME	LECTURE HALL D1, LINDSTEDTSV. 5
13.30-15.00	PARALLEL SESSIONS 1	
15.00-15.30	COFFEE	ATRIUM, LINDSTEDTSV. 5
15.30-17.00	PARALLEL SESSIONS 2	
17.00-18.30	PLENARY LECTURE 1: <b>PANU MINKKINEN</b>	LECTURE HALL D1, LINDSTEDTSV. 5
18.30-21.00	RECEPTION AND BOOK LAUNCH	ATRIUM, LINDSTEDTSV. 5

## SATURDAY, 15 SEPTEMBER

09.30-11.00	PLENARY LECTURE 2: <b>SUNDHYA PAHUJA</b>	LECTURE HALL D1, LINDSTEDTSV. 5
11.00-11.30	COFFEE	ATRIUM, LINDSTEDTSV. 5
11.30-13.00	PARALLEL SESSIONS 3	
13.00-14.00	LUNCH	ATRIUM, LINDSTEDTSV. 5
14.00-15.30	PARALLEL SESSIONS 4	
15.30-16.00	COFFEE	ATRIUM, LINDSTEDTSV. 5
16.00-17.30	PLENARY LECTURE 3: <b>MARIANNE CONSTABLE</b>	LECTURE HALL D1, LINDSTEDTSV. 5
19.00-23.00	CONFERENCE DINNER	

## SUNDAY, 16 SEPTEMBER

09.30-10.00	COFFEE	ATRIUM, LINDSTEDTSV. 5
10.00-11.30	PARALLEL SESSIONS 5	
12.00-13.00	LUNCH	ATRIUM, LINDSTEDTSV. 5
13.00-14.00	GENERAL ASSEMBLY	
14.00-15.30	PLENARY LECTURE 4: <b>ANGUS MCDONALD</b>	LECTURE HALL D1, LINDSTEDTSV. 5
15.30-16.00	CONCLUDING SESSION	LECTURE HALL D1, LINDSTEDTSV. 5



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## PLENARY TITLES & ABSTRACTS

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## Law and the Geopolitics of Territory

Panu Minkkinen, Faculty of Law, University of Helsinki

As the etymology of the word already suggests, the socio-spatial dimension of a garden (O.E. *geard*, as in “yard”) is an enclosure. As such, gardens are also geopolitical formations. By way of geopolitical readings, the presentation will suggest a reinterpretation of territory and law that touches upon phenomena commonly perceived to be the challenges of globalisation. Although globalisation can be understood as a process that puts both the factual and conceptual boundaries of territory into question, perhaps those borders and boundaries were never as fixed and stable as traditional liberal legal theory would have us believe. Every boundary is an attempt to contain something that aspires to transgress, every garden or enclosure an exercise in confining an expansive force: the will to power.

## Tending the Salt Gardens: Existence, Resistance and International Laws

Sundhya Pahuja, Melbourne Law School, University of Melbourne

This paper uses the allegory of tending the salt garden as a way of understanding current global struggles over land and resources, not only as a matter of resistance to empire, but as a matter of lawful relations.

## How Does Your (Justice) Garden Grow? The Fertile and Imperfect Ground of Language

Marianne Constable, Rhetoric Department, UC Berkeley

One often thinks of gardens as domesticated or civilized places that we have made from the wild or natural. This talk explores language as the ground of gardens and of other places in which that old chestnut, justice, grows – and dies. Grounded in local soil, law and justice – gardens and chestnuts – are both enabled and constrained by the possibilities of the language in which they find themselves. As ground, language offers us not only the soil out of which things grow, but also the pathways we take through them. To everything there is indeed a season: gardens and chestnut trees are no exception. Although some aspects of a garden may be said to be complete, gardens are never really completed or perfect. Law shares with

gardening – and with speaking – the grammatically imperfect temporality of the incomplete, continuous, habitual, routine, interruptable ways in which we usually engage (or are engaging) with one another and the things in our world. Particular acts or specimens of law can go wrong in all sorts of different ways; those that succeed manifest themselves as “future perfect,” others have argued. Thinking about how “gardens of justice” grow allows one to see that such legal acts succeed only against the incompletely articulable or “imperfect” ground of language. And just as gardens require more than ground to grow, so too claims of justice involve conditions that cannot and need not all be named.



## Critique As Avocation

Angus McDonald, Law School, Staffordshire University

### 1. BORGES' "THE GARDEN OF FORKING PATHS" – PHRASES

#### 2. CRITIQUE AS AVOCATION

1.

... all things happen, happen to one, precisely *now*. Century follows century, and things happen only in the present.

did not suspect that I possessed the Secret – the name

If only my mouth, before it should be silenced ... could shout this name in such a way that it could be heard ... My voice, my human voice, was weak. How could it reach the ear ...? ... the ear of that ... man who knew nothing ... of me except that we were in Staffordshire.

A man who ..leafed infinitely through .. papers, looking in vain for news from us. Vaguely I thought that a pistol shot can be heard for a great distance.

... the one person capable of passing on the information. He lived in a suburb of Fenton

The truth is that ... I felt infinitely visible and vulnerable

From my weakness I drew strength that never left me.

*Whosoever would undertake some atrocious enterprise should act as if it were already accomplished, should impose upon himself a future as irrevocable as the past.*

His novel had no sense to it and nobody ever found his labyrinth.

For an undetermined period of time I felt myself cut off from the world, an abstract spectator.

“No doubt you want to see the garden?”

“The garden?”

“The garden of forking paths.”

Something stirred in my memory

Tireless in the interpretation of the canonical books ... Yet he abandoned all to make a book and a labyrinth. He gave up all the pleasures of oppression, justice, of a well-stocked bed, of banquets, and even of erudition

At his death, his heirs found only a mess of manuscripts ... the executor of the estate ... insisted on their publication

Such a publication was madness. The book is a shapeless mass of contradictory rough drafts

An invisible labyrinth of time.

The book and the labyrinth were one and the same

“I leave to various future times, but not to all, my garden of forking paths.”

I also imagined a Platonic hereditary work, passed on from father to son, to which each individual would add a new chapter or correct, with pious care, the work of his elders.

Bifurcating in time, not in space.

In all fiction, when a man is faced with alternatives he chooses one at the expense of the others.

He chooses – simultaneously – all of them. He thus *creates* various futures, various times which start others that will in their turn branch out and bifurcate in other times.

..waste thirteen years labouring over a never ending experiment in rhetoric.

“In a guessing game to which the answer is chess, which word is the only one prohibited?”

“The word is *chess*.”

“Precisely”

To eliminate a word completely, to refer to it by means of inept phrases and obvious paraphrases, is perhaps the best way of drawing attention to it. This, then, is the tortuous method of approach preferred by the oblique...

..an infinite series of times ... This web of time .. embraces *every* possibility

I have yet triumphed! The secret name ..got through

..my problem was to shout, with my feeble voice, above the tumult .. the name

I had no other course open to me than to kill ... that name

my infinite penitence and sickness of the heart

*(A reading of the Borges text in advance of the talk is strongly recommended.)*

2.

Max Weber, Munich, 1918, *Politics As a Vocation and Science As a Vocation*

Angus McDonald, Stockholm, 2012, *Critique As Avocation*





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## CRITICAL IMMIGRATION, ASYLUM AND REFUGEE LAW STUDIES

Conveners: Thanos Zartaloudis, Birkbeck College, University of London & Satvinder Singh Juss, King's College, University of London

This stream gathers academics, graduate students and practitioners with an interest in immigration law and policy, asylum and refugee law (as well as refugee and migration studies more generally) in order to inaugurate a discussion within the CLC on legal provisions, policy, forms and practices of critique with and against the currently available legal provisions and jurisprudence. The stream entails papers on the general topics listed below and beyond:

- Immigration Enforcement, Detention, Refugee Camps, Deportation and Resistance;
- Capitalism & Human Waste Production in the time of Perpetual Crises;
- Criminalization, Privatization and Militarization;
- Theories of Movement Controls and the Society of Control;
- Critiques of Legislation and Case Law;
- Internally Displaced Persons & Environmentally Displaced Persons: Current and Future Perspectives.

## PAPER ABSTRACTS:

## Death Zones and Comfort Zones: LGBTI Decriminalisation and the Refugee Question

Eddie Bruce-Jones, School of Law, Birkbeck College, University of London

This paper examines the contentious contemporary discussion among lawyers, scholars and activists engaged in two strands of advocacy, sometimes simultaneously: expanding the coverage and accessibility of refugee claims based on sexual orientation and gender identity on one hand and supporting the global decriminalisation of same-sex sexual activity on the other. While such a framing of these areas of advocacy suggests a dichotomous relationship, one that is mirrored in the discursive practices that ground policy advancements in these areas, the two areas are deeply interwoven and underlie an integrated geo-bio-politics at the core of contemporary discussions on human rights, racism, gender violence, citizenship and colonialism. The article suggests that advocates must be wary of all of these issues to both best appreciate the broader political circumstances that help constitute dichotomous thinking around local legal reform and refugee law reform and to identify common lessons that may help critique and reform critical LGBTI advocacy more generally.

## Migration Law & the Territoriality of Capitalism

Amaya Castro, Faculty of Law, Vrije Universiteit, Amsterdam

As is well known, immigration states play a double game in the context of labour migration. On the one hand they are intent on keeping irregular migrants as marginalized as possible within (certain areas of) the labour market, in the ostensible effort to--as the current slogan used by the Mitt Romney campaign puts it--“encourage irregular migrants to self-deport”. This comes in addition to varying efforts by state agents to perform controls on employers in certain industries. On the other hand, immigration states are also very eager to attract so-called skilled workers and to make their lives as comfortable as possible, sometimes even offering them tax breaks. At the same time, some immigration states are developing so-called “circular migration” schemes to be able to satisfy their thirst for (cheap & unskilled) labour. A growing phenomenon in the context of this double game is the increasing delegation of the contact between immigrant and host state to the employers themselves. In other words, it is increasingly common for corporations (or employers in general) to be the ones responsible for handling the bureaucracy of immigration procedure, as well as for controlling the continued presence and employment of the immigrant. Put very bluntly, and with due consideration for the problematic dimensions of the public/private distinction, this can be seen as a

progressive privatization of migration law. More practically, it also entails a shift in the legal position of legal immigrants, who are now (even) more reliant on the good faith of their employers. These shifts in legal labour migration and in irregular labour migration, which both involve the increased exposure of immigrant workers, happen against a background in which national workers see their ability to collectively bargain for employment conditions diminished. This has led many labour unions to struggle to bring irregular as well as regular immigrants into the fold of their political struggle. The regulation of migrant labour presents itself as a regulation of migration, and its regulatory effects on labour move to the background. At the same time there seems to be a structural dimension to the changes imposed on the global labour market, a shift that may also be understood as an instance of the shifts between liberalism and neo-liberalism. It would seem that this development marks a new phase in the age-old connection between the state and capitalism. The objective of this paper is to expand on this analysis, and to elucidate the role of the law of labour migration in the on-going transformation of the state as part of the global capitalist system. It seeks to explore the intersections between law and the trans-boundary flow of labour. Can labour law, and the ways that it has been fragmented across various domestic jurisdictions, be seen as an international normative framework for the migration of labour? Can labour law regimes, in the way that they contain various forms of privileged and underprivileged, visible and invisible, regular and irregular labour regimes, be seen as part of the overall normative framework of the neoliberal regime? This paper explores these and other questions through the optic of Foucault's analysis of neoliberalism. How does the neoliberal art of governmentality help produce the flourishing new panoply of migrant labour identities?

## 'Sunk deep into the mud': Immigration law and Roma in the EU

Emma Patchett, University of Münster

Using marshlands as metaphor, this paper considers the impact of recent immigration law on Roma within the EU, focusing particularly on issues of EU enlargement, internment camps and forced eviction. I will argue that the metaphor of marshlands provides a useful framework in which to examine the issues of excess in terms of contemporary citizenship and national sovereignty, as well as the paradoxical stagnation and dynamism of the legislative approach to definition. I will consider how policies of exclusion antagonize illusory concepts of free movement, where the land becomes saturated and sodden with the paradoxical threat of claims to citizenship entitlement and rights discourse. Starting from the refraction of migration law in literature from within the Roma/Gypsy diaspora, I will draw on post-colonial legal theory to reflect that just as marshlands are necessary to ensure the stability of the surrounding land, migration law has constructed these peripheral bodies in order to relegate the Other in/between the borders. Different national

and transnational legislative contexts determine the condition of the marshlands, from the humid swamps of expulsion to the drier conditions of assimilation; looking at recent expulsions in France, internment camps in Italy, Kosovan refugee status and Roma classification in the UK, I will argue that such 'marshlands' represent the waterlogged stasis of dynamic ambivalence, where emergency powers devalue minority rights protection and Race Equality Directives (Article 18 TFEU), and Citizenship Laws expose the weaknesses of European treaties on free movement (Articles 21 TFEU) and the narrow definitions of CJEU case-law.

## In search for asylum

Nanda Oudejans, VU University Amsterdam

It is a badly kept secret that somewhere between the lofty humanitarian ideal to "assure refugees the widest possible exercise of [their] fundamental rights and freedoms" and the actual practice of asylum, the system of refugee protection is falling apart. States sure do factor in the negative when it comes to refugee protection, continuously seeking to circumvent obligations they themselves voluntarily accepted. However, this paper explores yet another explanation for the current failures in refugee protection. It will be demonstrated that the lack of a general agreement on the meaning of asylum and the subsequent vagueness of the institution comes at the detriment of refugees. In virtue of the intellectual fog surrounding asylum we face the conundrum that we do not know what, exactly, the refugee is claiming in claiming asylum. An inquiry into the meaning of asylum seems particularly pressing in light of current policies of non-entrée, the containment of refugees in their countries of origin and the on-going explorations of extraterritorial asylum policies. First, this paper traces down a possible explanation for the conundrum of asylum, arguing that the presumed difference between the refugee problem and the problem of statelessness is at the root of the riddle. The distinction between de facto and de jure statelessness that conceptually underpins the difference between the refugee and the stateless person holds, I submit, the refugee out of legal sight as an unplaced person. Second, this paper aims to clear the haziness surrounding asylum. If, as will be argued, the refugee not only suffers from a factual lack of protection as is commonly believed, but also suffers from the loss of a legal own place, then the claim to asylum must be understood as a claim to an own place where protection can be enjoyed again. If the 1951 Refugee Convention is still relevant today, it is because the basic rights it affords to refugees such as housing, education, work and freedom of movement, require the legal emplacement (instead of seclusion) of refugees within host societies. This account of asylum is an invitation to strike a more fair and equal balance between the durable solutions of return home and local integration.

## On Pragmatism and Legal Idolatry: 'Fortress Europe' and the Desertion of the Refugee

Nadine El-Enany, Brunel Law School

This paper argues that we are presently witnessing both an attack on the refugee on several fronts as well as her desertion, even by those who have traditionally stood behind her. There is an identifiable assault on the migrant, whatever her motivation for moving, being launched by those in power who seek both to blame the harms that result from the prescribed 'age of austerity' on the migrant and to deflect attention from the deficiencies of neo-liberalism and capitalism that have recently become so grossly apparent. This paper adopts a critical approach in analysing the practice of restriction as an accepted, or indeed 'the only' solution, in both policy and legal scholarship, to the problematised refugee. The wall of restrictive practices that comprise the EU's migration policy include visa requirements, safe country concepts, the operations of the European Borders Agency, as well as policies of 'containment' or the extra-territorialisation of protection. These practices hinder access to European territory for the refugee and pose methodological and epistemological challenges to progressively minded policy makers and researchers. Contesting the existence of these restrictions, on moral and/or legal grounds, means – crudely – arguing for the outright removal of restrictions on the one hand, or accepting their presence and working instead towards incremental improvements in refugee protection. This choice creates three conditions that can result in the desertion of the refugee. Firstly, acceptance leads to the emergence of 'legal idolisers' on the one hand and 'pragmatists', on the other. The first cling to protective legal measures, while overlooking their exclusive function. The second argue that a realist approach to 'Fortress Europe' must be adopted to further the protection of refugees. In this way, the field becomes vulnerable to opportunistic research, which is designed to be palatable to policy-makers who are attracted to pragmatist literature. This creates, thirdly, a sinking ship for those who argue for the removal of restrictions whereby contemporary academic scholarship and public debate paints critics of restrictive immigration and refugee policy as naively adopting a 'cuddle policy' towards 'illegals' or 'bogus asylum seekers' and at the same time abstracts the migration discourse from broader structures of domination and questions of global justice. In this way, the voices of critics are marginalised in favour of those of pragmatists in particular, which can unwittingly contribute to the entrenchment of racist and xenophobic attitudes towards refugees. The result is the effective replication in theory and policy of racialised power structures, which subordinate the refugee in the dominant host society. The conceptual restriction, fed and maintained by opportunist production of knowledge, supports the maintenance of the policy of restriction. The paper argues that greater awareness and understanding is needed of the reasons for shifts in analysis and discourse on refugee rights and the dangers that come of accepting trends in argumentation divorced from such an understanding.

## Governing Through Morality – Asylum Law and Policy of the European Union

Magdalena Kmak, Erik Castrén Institute, University of Helsinki

The analysis of asylum law and policy of the European Union reveals a dominant perception of third-country nationals seeking protection in Europe as bogus asylum seekers, that is, as unethical subjects violating the immigration rules of Western States. This behaviour is considered as due to their moral shortcomings, rather than as being a result of the strict regulations which limit the possibility of those seeking protection to access the EU territory. On the other hand, other discourses – present in the EU – portray asylum seekers as those who are able to take an informed decision about the country to which they want to migrate. This approach serves as a justification for even more strict migration laws, which then deter asylum seekers from looking for protection in a particular country. Even though, as pointed out by Michel Foucault, the self-interested behaviour of third-country nationals corresponds with the dominant neo-liberal subjectivity of the *homo oeconomicus*, the right to be an entrepreneur of one's self is denied by the neo-liberal Member States to those seeking protection. The analysis of EU law and policy towards asylum seekers shows therefore that it is guided by some sort of moral schizophrenia leading to the condemnation of behaviour otherwise desirable in the case of its own citizens. This moral schizophrenia serves as a constitutive element of a particular technology of governing migration (a technology of morality) and makes use of contradicting discourses in order to, in fact, produce irregular immigrants.

## Social Rights for Irregular Migrants: Is the European Court of Human Rights Putting Irregular Migrants at Risk?

Sylvie Da Lomba, University of Strathclyde, Law School

It is well-established in the case law of the European Court of Human Rights that the European Convention on Human Rights has a social dimension. In this paper, however, I posit that the significance that the Court attaches to States' immigration policy and resource considerations undermines the level of protection that the Convention could afford irregular migrants in the social sphere. In its case law on the expulsion of the seriously ill, the Court unqualifiedly endorses States' view that concerns over resources and migratory flows may legitimately constrain the level of protection granted to people who have no right to remain. States object to distributing limited national resources to people they do not regard as members in the national community. Consequently welfare provision for irregular migrants is set against competing national priorities and societal interests. States' opposition to social rights for irregular migrants finds further support in their assumption that

welfare provision encourages irregular migration. Yet international human rights law confers basic social rights on irregular migrants. This gives rise to a regrettable, albeit predictable, tension between States' exclusionary policies and their human rights obligations. What is more disconcerting, however, is that this tension has permeated the European human rights system. I argue that the importance that the Strasbourg Court accords to immigration policy and resource considerations undermines fundamental principles on the interpretation and application of the ECHR, brings inconsistency to the European Human Rights System and puts it at risk of falling short of international standards. Worryingly, the Court's approach gives credence to the idea that irregular migrants are outside the national community and consequently outside the protection of the law in the social sphere.

## Human? /Person? /Life?: The Human Shapes of Deportation

Jutta Gsoels-Lorensen, Altoona College, Penn State University

In the context of immigration, asylum and refugee law, the idea of a horticulture of justice seems almost ludicrous given the topology of contemporary restrictionist immigration policies in the Euro-American nomos: militarized border spaces; detention centers; extraterritorial processing camps; potentially deadly seas. In view of these brutal practices of space, the image of the garden does not seem to have anything to say. And yet, in the specific context of failed asylum applications and deportation proceedings, it might well serve, in the vein of one of Foucault's heterotopias, to focus our critical acumen on the relationship between space, juridico-political, as well as – importantly – administrative power structures, and the human being expunged from the political community one more time. If we take the garden as a space for letting live (as well as letting die), sovereign actions par excellence, then the horticulture of justice-think might not appear so far-fetched. Accordingly, the guiding questions of my paper could be phrased as follows: What kind of “gardens” does contemporary European human rights jurisprudence cultivate for the *homines sacri* of the 21st century? Does the referenced “human” at the base of its legal work not rather take the form of a deliberately cultivated “life,” of a species of living, than that of a “person” as the traditional bearer of rights? Or, to say it with Agamben: Is it possible that the “relation of the ban” is a carefully maintained garden with species cultivated and “let live” in the yonder (rather than a camp-space)? In my paper, I trace these questions in the context of the recent, much publicized, deportation case of the Zogaj family in Austria. What becomes immediately clear upon reviewing the Asylum and Constitutional Court decisions, which were principally concerned with articles 3 and 8 of the ECHR, is that the demand for a viable life under the threshold of “unbearable treatment,” became a complex judicial narrative not about the “person” and his or her rights, but about livability, or a species of livable life, post-deportation in Kosovo. In this context, the conference theme provokes us to think about “deportation,” which, etymologi-

cally, emphasizes the singular moment of being placed outside the doors, in terms of a forcible “transplantation,” with everything this tropology entails, – though not into a “garden of justice,” but into what at times looks, distressingly, like a jurisprudential human rights hydroponic um.

## Immigration Detention – A view from the ground

Usman Sheikh, Solicitor

In this paper, I will examine the detention of migrants and asylum seekers in the UK. Detention in these circumstances has been controversial. There has been much criticism, in the media and in the courts, of breaches by the Government of the human rights of detainees. These have focused for example on the death of detainees, the detention of victims of torture and racist abuse of detainees by guards. This critique has operated, implicitly or explicitly, within the context of 20th Century State repression. The detention of immigrants by totalitarian regimes in the 20th Century is the example that the Government is urged not to follow. In this paper I will attempt to demonstrate the inadequacies of this critique and to move beyond it. In particular, I will argue that while such incidents do occur, they remain relatively rare and this critique therefore fails to address the more typical reality of immigration detention in the UK. I will point out that detention centres in the UK are often not managed by the State but instead by private companies. In general, a wide range of sport, music and religious activities are provided to detainees. Indeed, one centre describes itself as “pre-departure accommodation” and denies that it involves detention at all. Superficially, therefore, the reality of UK immigration detention seems to involve little or no repression at all. However, in my paper I will argue that this in fact points to the insidious character of immigration detention. In particular, the blurring of the distinction between detention and liberty is in line with other developments in UK immigration law. The legal framework for business, student and family migration involves ever increasing levels of surveillance of immigrants formally at liberty. It also seeks to move responsibility for this surveillance from the Government to private sponsors of immigrants. Formal detention therefore appears the culmination of a process of monitoring and control that begins when the migrant first sets out on their journey to the UK. By examining immigration detention within this wider context I hope to provide an alternative critique that examines this aspect of 21st Century repression in a more comprehensive manner than is typically encountered in the literature.

## A State of Limbo: Incorporating the 1954 Stateless Convention into Australian Law

Vicki Zi Jun Toong, University of Melbourne

The “Migration Amendment (Complementary Protection) Act” was implemented in 2011 and contains important amendments pertaining to Australian refugee law. The Act, however, fails to accommodate stateless persons; thus there is still no specific legislative basis upon which stateless persons may remain permanently in Australia. The fundamental problem is the reliance on the 1951 Refugees Convention, and the complementary protection which flows from it, is inadequate in protecting stateless persons. This inadequacy stems from the separation of the categories of stateless persons and refugees. Since separation of those categories has resulted in the focus of Australian refugee law on obligations arising from the Refugees Convention – as opposed to obligations arising from both Refugees and Stateless Convention – and therefore excluding stateless persons from the purview of Australian refugee law. This exclusion has been accepted by Australian courts, and has ramifications for the human rights of stateless persons who are subject to, among other things, mandatory detention. This paper explores the obligations imposed by the Stateless Convention and reveals that Australia is in breach of its international obligations for failure to accommodate stateless persons in its domestic legislation. This paper also looks to other State practices (especially that in the EU) for guidance on establishing legal mechanisms to determine statelessness, from which fundamental rights and freedoms would flow. A comparative study, such as this, is important as it establishes the international standard of the treatment of stateless persons. In drawing from comparative law, this paper attempts to provide recommendations on the implementation of a legal framework in Australia within which statelessness may be identified, and the problems of the Stateless Convention may be overcome.

## The new EU Directive on trafficking: a challenge to the human rights of victims?

Ryszard Wilson Piotrowicz, Aberystwyth University, School of Law

The paper will outline briefly the principal measures contained in Directive 2011/36/EU, which will be the legal basis for much anti-trafficking activity at the EU level for the foreseeable future. The Directive also establishes clear obligations for all EU member states (except Denmark). The paper will consider these measures critically, both from the perspective of the balance between criminal law and human rights protection in the Directive, and in light of states’ obligations under human rights law towards those who have been trafficked as well as persons at risk of being trafficked in the future.

## Undocumented migrants and regimes of power

Samuli Hurri, University of Helsinki

Migration law and the authorities' right to control aliens are considered to be the last bastion of nation states in today's world society. Whereas the worlds of communication and capital, for instance, are increasingly becoming united, populations are still relentlessly held apart; this basic problematic has allowed an entry to the field of globalisation and its discontents. My paper will try to provide a different view. This is a view to the general field of power that is not about states and globalisation. I experiment with a special problematic of migration law, that of undocumented migrants, to study that field. Members of the general field of power are not States and sub-state or supra-state global organisations, but 'regimes of power'. Regimes of power are ways of thinking and acting that function in different practices, rituals and places in society (industries, labour organisations, police, church, and so on). Economic concerns and security concerns, for example, may be seen as constituting specific regimes of power. The general field of power is a site for these regimes to form connections and confrontations with each other, also with the legal regime. Through the problem of undocumented migrants, however, one can see what happens in the general field of power when the law is screened off and other regimes may work without it. Hence, the idea is to learn about the law where it does not exist.

## Deportation: is it in the 'public interest'?

Khadija Rahman, Barrister; Law School, Birkbeck College, University of London

The 'public interest' in the deportation of foreign criminals is an undefined legal concept. It purports to prevent the individual from committing further offences, deter others from committing them, express society's condemnation of serious criminal activity, and build on the public confidence in the treatment of foreign citizens who have committed them. The courts are required, in assessing proportionality, to balance this interest against the private and family life rights of the foreign criminals. There is a striking media campaign in support of the exile of foreign criminals. It is believed Judges are failing to uphold the public interest, and foreign criminals should have no opportunity to challenge deportation. Through the analysis of case law on deportation, this paper argues that the courts undertake an intensity of review that gives a high degree of deference to the 'public interest' when they evaluate human rights of foreign criminals. The government response has been to change the Immigration Rules to make the 'public interest' a paramount consideration. Recent changes dictate how the balance should be struck, and on the premise that these rules are human rights compliant, they focus on the gravity of the offence and restrict judicial adjudication on human rights. Far from changing primary legislation – the Human Rights Act 1998 and UK Border's Act

2007 – these legal developments represent a major shift towards an authoritarian approach to controlling immigration. It also underscores the importance of ‘citizenship’, and that the civil liberties of law abiding citizens take precedence over the human rights foreign criminals.

## Refugee Law. Sexual orientation, and the right to live freely and openly

Satvinder Juss, King's College, University of London

What is refugee law for? The question is timely in the light of the judgment of the Supreme Court in “HJ (Iran)” on homosexuality. Yet, should refugee law be a humanitarian project designed to relieve the suffering of those who have been forced to leave their countries? Or, should refugee law simply reflect national self-interest, pursued in the name of sovereignty? If we have allowed for homosexuality and LGBTI rights in general, why leave it there? Why not extend the argument to cover cases of domestic violence, forced marriages, and population polices as well? Is asylum an appropriate response to these issues? “HJ (Iran)” brings these issues into sharp relief. Lord Rodger, in giving the main judgment of the UK Supreme Court, is notable for the enunciation of the principle that what is being protected here, “is the applicant’s right to live freely and openly ....” This paper considers this dictum in the context of the modern function of refugee law and asks whether its traditional basis has now altered irrevocably.

## Migration control outside the territory after Hirsi: Human rights to the rescue?

Bernard Ryan, University of Kent, Law School

The judgment in *Hirsi v. Italy* (European Court of Human Rights, 23 February 2012) saw the extension of European Convention on Human Rights principles to Italian vessels involved in a control operation on migrants between Libya and Lampedusa. The Court held that that operation was within Italy’s jurisdiction for the purposes of the Convention; that Italy had violated Article 3 ECHR by exposing the applicants to inhuman or degrading treatment or punishment upon their return to Libya; that the operation involved an impermissible collective expulsion, contrary to Article 4 of Protocol 4 to the Convention; and that there was a failure to provide the applicants with access to effective remedies to challenge their return, contrary to Article 13 ECHR. At the level of principle, the ruling in *Hirsi* is to be welcomed. In general, it tends to prevent contracting states to the ECHR from avoiding their obligations through immigration control operations on the high seas. In the context of possible return to a state such as Ghaddafi’s Libya, it is significant too that it potentially protects all migrants, and not only those flee-

ing conflict zones. There are however a number of potential risks with the ruling, which this presentation will also explore. One perverse effect of the ruling may be to reduce the availability of rescue services for irregular sea migrants. There is also a risk that immigration control will simply be projected forward, into the territories of transit states, where the application of the ECHR is more problematic. The wider point is that a ruling such as *Hirsi* cannot offer more than a partial and uncertain answer to a complex problem such as irregular migration. Instead, a political solution – in this case, involving other EU states and transit countries – is required, if a genuinely protective regime for migrants is to be achieved.

## Defining and comparing 'crimmigration' in the Netherlands and the US

Jo-Anne Nijland, University of Utrecht

Over the past few years, the underlying tone of the debate on immigration has gradually changed in the Netherlands, from relatively tolerant and human towards punitive and securing. Ways to regulate migration control are more often sought in the criminal legal sphere, i.e. legal instruments to enforce criminal law are deployed to control migration. The punitive turn indicates a new trend: the criminalization of immigration law. This 'crimmigration' trend as coined by Juliet Stumpf, is defined as the intersection of immigration control and criminal law in both substance and procedure. Up till now, legal-theoretical analyses of crimmigration control have mostly been undertaken by scholars from Anglo-Saxon countries. The crimmigration trend has been little researched in the Netherlands despite comparable signs demonstrating the merger of immigration law and criminal law. The purpose of the paper which I want to present is twofold. Firstly, I want to provide insight into the crimmigration trend in the Netherlands by drawing a legal comparison with the United States. Secondly, I want to stimulate discussion on the definition of crimmigration. Especially in continental Europe, crimmigration is a fairly new academic concept. However, a thorough discussion on what constitutes crimmigration and how this phenomenon should be studied is still missing amongst scholars. I would like to take this conference as an opportunity to invite other scholars in this field of research to reflect upon the concept of crimmigration.

## An ever timely death: A discourse on welfare and the asylum-seeker

Patricia Tuitt, Birkbeck College, University of London

How is human suffering identified? When are we prepared to acknowledge homelessness, hunger or precarious health? The point of this paper is not to attempt an answer to any of these questions but to contemplate how by de-coupling these questions from the reach of the state and from the ties of citizenship of the state, the condition of the asylum-seeker can only hope to produce increasingly high levels of tolerance of human suffering. Examining commentary surrounding instances of the drowning and asphyxiation of asylum-seekers *en route* to places of territorial asylum, the paper argues that a welfare sensitivity cannot thrive except against an understanding that death, though inevitable, is always untimely.

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## CRITICAL LEGAL EDUCATION: PERSPECTIVES AND METHODS

Convener: Ubaldus de Vries, Utrecht University

Most law degree courses start with one or more introductory course to law. It is within these courses that students get acquainted with law, where it comes from, what it does and how a legal system is organised and structured. Usually, the focus is on positive law – the existing law of the particular jurisdiction in which the student is studying law. It means that introduction to law courses are really introduction to current Dutch positive law, English positive law, etc. This stream seeks to explore the ideas behind such courses. It does so on the presumption that in these courses the tone is (or can be/should be) set as regards the academic attitude we expect from students: an inquisitive, critical perspective on law, what it is and what it does. What are the perspectives taken on law in these courses and what methods are explored in teaching students to study law inquisitively and critically? Is it by contextualising law through social theory (the age of technology in modernity, post-modernity, liquid modernity, second modernity?), through emphasising a philosophical basis of law and how law pertains to power structures and the political? Is there a shared critical pedagogical ideology within critical legal studies and if so how could it be formulated?

## PAPER ABSTRACTS

## First session: methods and perspectives

## Alternative Methodologies

Bal Sokhi-Bulley, Queen's University Belfast

This paper addresses the problematic and troubling reality that many law students are not aware of and misinformed about the term 'methodology'. The term is widely seen as a rather irritating requirement of dissertations/theses and often merits only a few contrived sentences of attention. The paper explores the relation between 'theory' and 'methodology' – how the former tends to frighten many law students and even faculty (such that in some cases legal 'theory' is not taught as a compulsory course on Law undergraduate programmes and 'methodologies' does not feature as a compulsory part of taught postgraduate programmes). The paper also looks to the absence of a canon of 'legal research methodologies', which is in stark contrast to other (related) disciplines such as IR and political theory. Why is this? And why is there generally an aversion to 'alternative' methodologies (beyond the traditional jurisprudential approaches) in teaching and education? How can we better integrate 'alternative' methodologies into legal education? These are some of the questions that this paper seeks to explore as it advocates the importance of critique and of 'knowing' ones own 'approach' to it.

## Blooming English garden or withering over trimmed flowers planted on the desert. Duncan Kennedy, Alan Hunt and Pierre Schlag on the critical legal education

Jakub Lakomi

The aim of this paper is to reconstruct and analyse two different models of the legal education. One which stems from the positivist concept of law and one proposed by critical legal philosophy, and its adherents, especially: Duncan Kennedy, Alan Hunt and Pierre Schlag. I would like to make my own interpretation of the theme of "Gardens of Justice". Blooming English garden is a metaphor depicting the model of education advocated by CLS proponents. Garden represents law school, gardeners are law schoolteachers in this vision, plants, flowers and trees represent students. Gardening work i.e. nourishing and caring for plants illustrates the efforts to educate. The English garden in its bloom is a good metaphor in this context compared to French formal garden with its overly constrained, trimmed and planned environment. My thesis is that the main tenets of the critical legal education – studying law critically and inquisitively, contextualizing law through social theory, philosophical basis of legal institutions, asking questions on how law

relates to the political – constitute fertile ground and very hospitable environment for flowers to flourish. We must have in mind the fact, how the critical legal education emphasizes the role of legal awareness which is constituted in legal school by instinctively internalizing the legal structures and language. Kennedy and Unger claim that legal awareness not only reflect but also constitute and create legal system and social relations, putting in the result high responsibility on law school gardeners. Therefore – not only students, but also justice itself thrives. In the second part of the paper this vision is contrasted with legal education model based on legal positivism. Second metaphor from the title is elaborated here.

## Anarchic education

Ubaldu de Vries, Utrecht University

This paper addresses an experiment I am conducting on self-organisation in the classroom, where students take control and responsibility for their learning. The essence is that the class discusses primary literature among themselves where one small group takes responsibility for organising the session. My involvement is restricted to selecting the texts, explaining the format and observing the proceedings. One question that remains for me is the extent to which I must give feedback, both on contents and form. The paper reports on the experiment and seeks to theorise self-organisation in group-learning form a variety of educational perspectives.

## Second session: methods and perspectives

### Critical legal education and the humanities in the aftermath of apartheid

Karin van Marle, Department of Jurisprudence, Faculty of Law, University of Pretoria

The starting point of my paper is the need for critical legal education in the present South Africa. Two documents, the ASSAF report on the State of the humanities and Social Sciences and the Charter on the Humanities and Social Sciences, were recently published on the state of the humanities at South African universities. I shall engage critically with these two documents and reflect on how they could affect the future of critical legal education taking into account amongst others curriculum design, postgraduate study and research. A further aspect that I want to raise is the claim often made that legal education must be primarily directed to what is useful for legal practice/ the legal profession. I respond to this claim by drawing on Derrida's reflection on the "future of the profession or the unconditional university."

## A Crit's Critique: Exploring the Limits of Myself with Lorca

Can Öztas, Birkbeck College, University of London

This paper is a self-reflection, in other words questions aiming to better understand the crit in me. It is a personal take on what I got from my days at Birkbeck College in London after having worked 15 years in various fields of law and politics. It is also about what I hope to give back. The questions related to what I got and what I hope to give back are closely related to legal education, a topic of constant discussion with colleagues in different universities and colleges that I have been to. The paper talks about my experience having entered the world of crits, seeing how some can combine radical politics and radical law or how some stick their heads in heavy theory not noticing what really happens outside of their windows or not realising what could be another interpretation of events that they base their theory on. The paper reflects on different aspect of legal education and also tests personal limits. My way of testing and trying to pass limits as an academic goes through arts, usually combining legal texts with literature. For this occasion we will be listening to Romance Sonambulo by Federico Garcia Lorca, reflect on law and education.

## Law against common sense: critical reflections on the study of law

Jo-Anne Nijland, Faculty of Law, Utrecht University

From the perspective of law defined as a set of rules, the object of study for most legal students has been exploring the application scope of positive law. Consequently, the social and political context in which law is constructed is being ignored. However, was it not the greatest suffering that was possible behind the curtain of legal organization? The limited scope of my legal scholarly debates generally demands little creativity and alternative ways of thinking. The idea that the law defines and limits responsibility is a deeply rooted assumption in the legal education of Dutch students. However, the responsibility of legal actors as depicted in the legal books does not always correspond with the responsibility and forms of justice in reality. In this paper, I would like to assess the value of critical theory for the study of law. The ideas that I put forward are based on insights gained during the intensive, interdisciplinary programme of the School of Critical Theory at the University of Utrecht. Firstly, I will use Scott Veitch's analysis in *Law and Irresponsibility* as a starting point for rethinking the widely accepted role of the law as an instrument which organizes a responsible and just society. Through discussing Ulrich Beck's theory of the world risk society and Michael Hardt's concept of the common, I want to demonstrate how the study of law can profit from critical theorists that rethink the notions of responsibility, the legal system and the organization of society.

## The Role of Hierarchy, Example, and Language in Learning. A Confrontation between a Liberal and a 'Critical' Understanding of Legal Education

Bart van Klink, VU Amsterdam

In *The Voice of Liberal Learning* (a collection of essays published in 2001), Michael Oakeshott characterizes learning as a strictly non-instrumental activity. In schools and universities, knowledge is acquired for its own sake: “learning here is not a limited undertaking in which what is learned is learned merely up to the point where it can be put to some extrinsic use; learning itself is the engagement and it has its own standards of achievement and excellence.” Learning is an adventure: it does not follow a preordained plan and has no final destination. According to Oakeshott, learning is liberal, because it has to be “liberated from the distracting business of satisfying contingent wants.” Obviously, this liberal understanding of education differs fundamentally from a ‘critical’ notion of education as advocated by members of the CLS movement (among whom Duncan Kennedy and Alan Hunt). From a ‘critical’ perspective, Oakeshott’s conception may be seen as yet another attempt – typical for liberalism in general – to depoliticize the process of knowledge production and reproduction and to conceal (and thereby to strengthen and legitimize) its effects on the distribution of power, wealth, status and so forth in society. In my paper, I will confront both views with each other, especially within the context of legal education. First, I will clarify Oakeshott’s notion of liberal learning. Second, I will show in which respects this understanding of education can be contrasted with and criticized from the view point of critical legal education, mainly building on several writings of Duncan Kennedy (such as “Legal Education and the Reproduction of Hierarchy”, originally published in 1983). Third, I will attempt to refute this critique, in particular by arguing that it is based on false assumptions about the role that hierarchy, example (both in the sense of role modelling as in the sense of exemplifying) and language play in teaching. Finally, I will explore whether this critique could be used in order to strengthen the critical impetus of liberal learning. My general purpose is to develop a notion of sceptical or detached legal education, which is to a large extent based on Oakeshott’s understanding of liberal learning but which relativizes its insistence on the non-instrumentality of learning and reinforces its critical potential.

## Third session: Discussion

This session is meant as an open session for whoever is interested to exchange ideas on teaching, curriculum, course content and related issues. Topics for the open discussion:

### A. How to introduce law?

- As a narrative as well as or instead of a system of rules (with its doctrinal research method)?
- As an arena of dissent and power?
- As a means of emancipation?

### B. Methodology:

- Law and ... movements
- Doctrinal research method

### C. Pedagogy and didactics:

- Socratic
- Case study method (see JBW)
- Self-study
- Anarchic education: self-organisation and control

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## CRITIQUE AND THE CRISIS OF THE 'EUROPEAN' HUMANITIES

Convener: Can Öztas, Birkbeck College, University of London

The metaphor of 'gardens of justice' in the CLC call for papers refers to French and English gardens, which are orderly, well kept, intriguing, and which invite one to take a stroll, read a book in; and then unthreatening Roman gardens with history that enriches one without being troubled by strangeness. However, with the change of geography, and a move beyond European examples the imagination of the possibility of justice moves beyond the purview of law. The Japanese gardens are made not for this world (they are for meditation) and limit one's freedom (not for movement); then there is reference to zoological gardens where a proper sense of justice (whatever it means...) does not exist. And finally, after rather limited horticultural and zoological wanderings, one reaches the 'jungle' outside the 'Gardens of Law'.

Mills developing on the concept of Fanon made a similar comparison using the concept of gardens, but in an opposite way: "The non-European state of nature is thus actual, a wild and racialised place that was originally characterised as cursed with theological blight as well, an unholy land. The European state of nature, by contrast, is either hypothetical or if actual generally a tamer affair, a kind of garden gone to seed, which may need some clipping but is already partially domesticated and just requires a few modifications to be appropriately transformed – a testimony to the superior moral characteristics of this space and its inhabitants." (Mills, *The Racial Contract*, 1997) Whatever else we might think about the metaphor of gardens of justice, it does rehearse a familiar Eurocentric and orientalist gaze, which places Europe's others outside the law, and beyond the familiar. Gardens and gardening is a powerful metaphor of modern colonialism associated with John Locke's privileging of certain modes of cultivation. This putatively validated European conquests and the appropriation of land. Culture, cultivation, the city, civility are deployed interchangeably to constitute the Euro-American *nomos*. Debates around culture, multiculturalism, racialised exclusion, and political-theologies continue to be animated by oriental logics.

This stream would like to organise discussions around the following two broad themes: (1) Rethink the ambit of critique and how it is associated with Europe Colonising itself: How was colonialism born in Europe, then exported to the rest of the world, and brought back to Europe today? What modes of critique are called for in this time of crisis, resistance, and revolution? What are the modalities of "the constituent other" for national legal regimes in Europe or at the European Union level? (2) The problem of universality and human rights: The fact that there are "others" in society, politics or law is not news. What are the mechanisms, techniques and procedures of their exclusion and the role of inclusionary mechanisms?

What are the racialised limits of the reach of humanity in constructing the individual/self and in questioning the principles of freedom (autonomy) and universality? How do universal and inclusionary principles, such as human rights, humanitarian law, etc. at the same time exclude the other?

## PAPER ABSTRACTS

## As If: The End of Sovereignty, in North Africa, in the World

Stewart Motha, Birkbeck College, University of London

Revolution can be thought through the trope of the 'wheel' – as Derrida did in relation to the nature of democracy (Derrida, *Rogues: Two Essays on Reason*). The 'wheel' invokes turning around, return, tradition, a desire for another world, but also torture, terror, and violence. This double movement is why, in a tradition as old as Hegel's response to the events following 1789, revolution and revolt cause such excitement and consternation among philosophers. What events of revolt, rebellion, resistance, and revolution are deemed worthy of fidelity by the philosopher? Implicit in this question, in phenomenological terms, is the distinction and relationship between thought and action, the ontic and ontological, techné and being-in-the-world. Recent events concretise these philosophical anxieties. "What do the Arab people signify to us?", asked Jean-Luc Nancy in the wake of the military intervention in Libya in 2011. He suggested, in remarks that gave rise to a fraternal spat among European philosophers, that we cannot on the one hand announce the 'end' or dissipation of sovereignty in a globalised world (*un monde mondialisé*), and then invoke it when a regime is overthrown by globalised forces. At stake in these discussions is the finite and infinite character of sovereignty in the world. One aspect of this paper is to give an account of the in-finite nature of sovereignty in a time of revolution and revolt. Recent revolts and rebellions in North Africa have also seen the space of the public square, and communication through electronic social-networks placed at the centre of political transformation. This gives rise to a range of questions regarding the nature of the 'social' and the 'political' as a space of freedom. To what extent is this distinction between the social and the political, which Hannah Arendt insisted on, important? In what sense do the North African revolutions initiate an "other heading" in Europe? Revolution and rebellion are seldom if ever an "inheritance without testament" (René Char) or absolute rupture (Benjamin). Exploring the in-finite character of sovereignty, this paper examines how rebellion and revolution more often than not call forth another law centred on the fictive 'As If' at the heart of a juridical order and political mobilisation.

## A Law of Alterity

Kathleen Birrell, Birkbeck College, University of London

The evocative theme of this conference, Gardens of Justice, contemplates a diversity of spaces and elements in which and with which justice may be contrived, made manifest and enacted. This paper will compare literary and juridical renderings of law and justice in the context of two particular 'gardens'. These gardens are illustra-

tive of the contrasting juridical landscapes of the laws of the coloniser and the colonised – specifically, of Australian non-Indigenous and Indigenous law – and, indeed, one may be conceived as superimposed upon the other. That is, the straight lines on the maps of the coloniser as superimposed upon the songlines of Indigenous Law, traced geographically through lands, waters and sky. Drawing upon the works of Jacques Derrida and Walter Benjamin, a broader reading through a law and literature paradigm, and a close reading of the novels of two acclaimed Indigenous authors, I will describe these gardens as governed by mythic and divine laws. The former garden is conceived as apparently impenetrable, built around and in conformity to an inanimate statue, and the latter as an open and ostensibly ‘wild’ terrain, replete with unruly ‘weeds’ and untamed animals. While the former appears complete, defined and refined, however, I will suggest that its apparent order is mere contrivance, its superficiality revealed by the emergence of subversive jurisprudences, including that appearing in Indigenous authored literature. That is, a law of alterity, Indigenous Law, which troubles, deconstructs and (re)constitutes the law of the coloniser with the emergence of the indeterminate, divine and revolutionary within the literary.

## Gardens of (In)justice: Detention without trial in the British Empire

Aoife Duffy, Irish Centre for Human Rights

The key claim underpinning British colonial expansion, i.e. that they were bringing civilization and justice to backward and primitive people, is revealed as a paradox if juxtaposed to the methods used to achieve imperial control. According to Diceyan theory, rule of law meant equality before the law and that no one was above the law. But in the colonies, ‘natives’ were regarded as ‘sub-human’, not deserving English standards of justice, and indigenous customary laws and ways of living were discounted (or even worse, exterminated). Colonisation did not transpose ‘gardens of justice’ onto new territories. Instead, European administrations cultivated gardens of injustice, where native peoples lived and worked, sometimes eking out a living on a miserable plot of land on a settler ranch measuring thousands of acres. When the ‘natives’ demanded land and freedom, the colonial government described the situation as an Emergency, and ushered in a raft of emergency measures, which exposed the true lack of respect colonisers had for the colonised. Executive detention or detention without trial was a common counterinsurgency strategy in the British colonies, which allowed the administration to sever the detainee’s connection to family, community and land, in the absence of any meaningful judicial oversight mechanism. This loss of liberty is in and of itself egregious, but was compounded in the dark pockets of Empire by the specific vulnerabilities of those subjected to colonial rule. In detention facilities, new gardens of injustice

sprung up, for example, plots to be maintained by forced labour in Kenya which led to the Hola massacre (1959), and arbitrary detention on the rubber plantation of Batang Kali, Malaya, facilitated the execution of 25 unarmed 'Communists' by Scots Guards on December 12, 1948.

## Memorial Laws in France, or the Selective Memory of the French Parliament

Louise Amar, Kent Law School

Since 1990 the French Parliament has passed five memorial laws. In July 1990 it penalised the negation of the Shoah; in January 2001 it publically recognized in a single article law the existence of the Armenian genocide; in May of the same year the Parliament declared slave trade to be a crime against humanity. More recently, in February 2005, "the Nation expressed its gratitude towards women and men who participated in the work accomplished by France in its ex-departments in Algeria, Morocco, Tunisia, and Indochina". Finally in December 2011 a law was passed criminalizing the negation of genocides legally recognized by the French Parliament. These laws have since 2005 been called memorial laws. This paper will question on the one hand the association of memory to legislation, and what the legal framing of history means for the Republic. It will on the other hand look at the resulting competition and silencing of memories, and inquire the relationship between memory and history within the French republican postcolonial context. It will thus question to what extent memorial laws are shaping the French political *civitas*. This paper will focus in particular on the work of Paul Ricoeur and especially on *History, Memory, Forgetting*. In this monumental work Ricoeur explains in fact that his aim is not only to engage with reminiscence, or the epistemology of history but that he is "concerned by the troublesome spectacle that too much memory gives here and too much forgetfulness gives there, to say nothing of the influence of the commemoration and the abuses of memory – and of forgetfulness". Ricoeur's work on the matrix of historical knowledge and the issues that it raises will thus help us question the fusion in France of the Parliament with the Pantheon.

## Law and silent otherness

Susanna Lindroos-Hovinheimo, University of Helsinki

This paper focuses on the theme "Europe's others outside the law", which is mentioned in the stream's description. In doing so it questions the way law treats subjects and non-subjects who are outside the law although inside Europe. It is part of a larger project that studies the questions of justice, subjectivity and language. The aim is to study the part of the silent others of law and the focus is here not only on

excluded persons but on non-human animals as well. Animals do not live in and through language in the same way as humans do and law is unable to give them a subject status due to the fact that they are unable to participate linguistically or stand up for their rights. It is interesting that even though there is a fairly general opinion in many countries that the legal status of animals is problematic, it seems to be impossible to change it. This paper claims that an approach that takes into consideration humans and non-humans alike might be able to give us important insights into the way law operates. Also, by thinking about the mechanisms that prevail in society when it comes to the treatment of non-humans, we can perhaps analyse the techniques of the inclusion of certain humans and the exclusion of others from a fruitful point of view. Thus the aim of the paper is to discuss subjectivity and justice keeping in mind animals and the environment, as these themes may prove helpful for a critical evaluation of European law today.

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## GARDENS WITHOUT GARDENERS – GARDENERS WITHOUT GARDENS

Conveners: Oren Ben-Dor, Southampton University, and Andreas Philippopoulos-Mihalopoulos, University of Westminster

We take up the conference theme in earnest, looking at gardens as the place of questioning. We invite you to walk through, dwell in, or simply look at gardens and to share your path.

Gardens are yearned for and yet, the place in which this yearning emerges remains hidden from those who create and maintain gardens. In holding their secrets, in pointing to their secret which is in the garden, gardens continue to unfold as boundaries between the history(ies) within which they emerged and a more ancient remembrance; between the rhythms, songs, cultivations, memory, spaces of the human world, and that of the earth or nature that gently refuses to be gardened, a refusal that precisely enhances the gardenness of the garden as the mindfulness of its creators. A form of boundary, gardens are places where the due of justice dwells, pointing at the question: is there something always earlier than the garden, that remains other than mere representation, punctuation, allocation and indeed perception? Or is the here of the garden all there is to it, in its fullness of presence, without history and origin but just as a lush, viscous now?

Do gardens point to the precariousness and mystery of their beginning or do they let go of that by throwing themselves in an orgiastic blooming? Every garden is grounded yet also hanging. In gardens, humans desire to preserve something that can not be disempowered by their making and crafting. Good gardening lets the garden be, bearing witness to sublime custodianship rather than merely steering and design. Gardens, then, sustain the possibility of being on the way to be reclaimed, presencing something that cannot be designed away. So we ask: what is that which is taken refuge from in the garden? What can be unlearned and what opens up? What is left behind and what is being returned? Is there home in the garden? Gardens demand care, and this latter is located between the crafted sayings of the jurisdictional, institutional adversarial spaces, and the 'open', self-concealing or self-pulsating saying of earth.

## PAPER ABSTRACTS

## Voltaire's Garden: Withdrawal into a private space or the cultivation of the space of being-together

Ari Hirvonen, University of Helsinki

In the end of Voltaire's *Candide* (1759), the main character, Candide, settles on a little farm. His final and normative statement is: "Il faut cultiver notre jardin" ("We must cultivate our garden"). "Crush the horror" was Voltaire's slogan. Does the retreat into the garden offer the only way to crush the evil and infamy that exist in the world? Since one cannot cultivate the public space, which human beings share with each other, should one concentrate on cultivating one's private garden? According to Simon Critchley, a religious disappointment refers to the fact that "the legitimating theological structures and religious belief systems in which people believed are no longer believable". The answer to this is nihilism, which can be passive withdrawal into oneself or active destruction and bringing something new into being. Moreover, a political disappointment refers to "the sense of something lacking or failing arises from the realization that we inhabit a violently unjust world, a world defined by the horror of war, a world where, as Dostoevsky says, blood is being split in the merriest way, as if it were champagne". The political disappointment provokes the question of justice as we ask what justice might be in an unjust world. And this question provokes the need for ethics or normative principles. It seems that in *Candide* we confront a religio-political disappointment. Candide's double disappointment provokes a retreat into the privacy of the garden, a withdrawal from politics and the questions of justice. However, things are much more complicated. First of all, we have to understand the meaning of Voltaire's garden as an ironical answer to Leibniz, who introduced the concept of theodicy (*theos*, god + *dike*, justice) to name the justification of an omnipotent, beneficent and infinite Creator in the face of the evils in the world. Moreover, we have to consider Rousseau's criticism of Voltaire's pessimistic answer to the disappointment. For Rousseau, we should not retreat into the privacy of our gardens. Instead, evil must be faced as a political and moral problem. After all, Voltaire's garden may refer to something else than to the withdrawal into a safe haven of private space. What if Candide's statement provoked by the double disappointment is a demand for a non-metaphysico-theological being-in-the-world, what if the garden is the space of being-together without any theological guarantees and cultivation an attempt to bring justice into this garden?

## Queer gardens

Jaco Barnard-Naude & Pierre De Vos, University of Cape Town

This paper will be presented as a short story about gay space and place in Cape Town, South Africa. The characters are based on “actually existing” people, but fictionalized for purposes of the narrative. We are guided in this endeavour by Hannah Arendt’s assertion that “[c]ompared with the reality which comes from being seen and heard, even the greatest forces of intimate life – the passions of the heart, the thoughts of the mind, the delights of the senses – lead an uncertain, shadowy kind of existence unless and until they are transformed, deprivatized and deindividualized, as it were, into a shape to fit them for public appearance. The most current of such transformations occurs in storytelling and generally in artistic transposition of individual experiences” (Arendt 1958:50). Chronologically, the plot revolves around the process that led to the legalization of same-sex marriage in South Africa. The two main characters are academics who feel interpellated to involve themselves, for different reasons, in the activism that would bring about the enactment of the Civil Union Act 17 of 2006. At different points in the narrative, the notion of the ordering, disciplining and policing of same-sex desire involves a comparison with the two famous “colonial” gardens of Cape Town – Kirstenbosch Botanical Gardens and the Company Gardens in the centre of town. These spaces are placed in juxtaposition with gay spaces in the city that, in one or the other way, “escapes” or disrupts the Victorian narrative of the nuclear family as the preferred ordering of the postcolonial social encounter and organization. The reader finds the characters situated in un-gardened spaces, such as 3rd Beach, Clifton (on the Atlantic Seaboard) and Sandy Bay – the only nudist beach in the city, where they are confronted both with plurality and similarity, with the Self and the Other and also with themselves as Other. It is the confrontation with these spaces and the people who dwell in these spaces, that causes one of the characters radically, but abstractedly, to doubt the productive and empowering potential of positive law, while the other concretely and traumatically experiences the lack at the heart of what it means to live an alternative subjecthood in the postcolonial garden.

## Just gardens? On parks as spaces of law and morality

Peter Bengtsen, Department of Arts and Cultural Sciences, Division of Art History and Visual Studies, Lunds universitet

I will discuss the garden of justice as a physical and social space in which law and morality become manifest. My point of departure is a number of sites like the park Ørstedsparken in Copenhagen, which are, or have been, spaces where homosexual men meet up to have sex. The use of these outdoor spaces as cruising areas connects to the idea of the garden as a space which affords the opportunity to get lost in nature, both in terms of the spatial context and in a bodily (sexual) sense. In

response to this well-known use of specific parks, authorities have cut down bushes in order to expose (and thereby prevent) these scenes of natural, instinctive behaviour – a return to order (law) and potential justice. The desire to expose those who retreat to the garden to break the law – even if they are hidden and are not hurting anyone in the process – suggests that the real problem may be the hiddenness in itself, because it represents a space outside of the law. The cutting thus becomes a physical manifestation of the presence of law. However, the specific targeting of homosexual cruising sites may also point to a moral aspect of justice. Given that it is no longer possible to suggest the removal of homosexual desire in people, could the cutting down of bushes at gay cruising sites be a surrogate way of imposing moral law upon those who fall outside of heteronormativity?

## Missed Appointments: Ethics in the Park (on *El Parque de la memoria*, Buenos Aires)

Vikki Bell, Goldsmiths College, University of London

This paper considers the ethical provocations, promised, actual and potential, of *El Parque de la Memoria* in Buenos Aires, with particular attention to the impulse for justice and its various modalities of engagement. Beginning with a reflection on Plato's comments on mourning as properly external to the city walls, and drawing on theories of Kaja Silverman, among others, the paper considers three aesthetic encounters experiences: the impulse to seek out and touch the names inscribed on the central *Monumento a las Víctimas del Terrorismo de Estado*, reflections on seeking knowledge of past atrocities provoked by the temporary installation of Graciela Sacco entitled *Tension Admisible* which was located in the exhibition space in the centre of the park in 2011, and the dissolving passage of identification into the becoming-minor potentially promoted by Claudia Fonte's sculpture *Reconstrucción del retrato de Pablo Míguez*, one of the youngest of the disappeared, that stands in the water of the Rio de la Plata into which we now know so many were thrown from the military's aircraft.

## The garden of ruins: archi-itecture, building, be-longing as the strife between world and earth

Oren Ben-Dor, Southampton University

Buildings are places where justice is endlessly deferred and awaited for amidst the violence of law as their space inspires 'building' in language: theories, epistemologies, normativity, critiques, deconstruction, all of which constitute contestable re-building of words, that are crafted and related. But buildings always already mourn the possibility of becoming pathetic ruins – ruins where the buildings are reclaimed by something greater than the very gesture of historical control of time and space which continues to be feigned by the building. Buildings can become part

of a garden of ruins that generates pathos about the very metaphysical arrogance and violence of world making and unmaking through building on the earth, indeed territories to be defended and controlled with conceptual cathedrals as their expression of ownership, beginning and belonging. The ruins strangely call for contemplative unlearning some sense of building and perhaps point at re-learning another sense, that of letting, of coming-home to the earth – a sense of place that the finitude of world can evoke. Ruins show that perhaps the essence of building is not the steering design of spaces. Gardens of ruins as the essence of building where decay murmurs, then, are the places that make the very building constantly intriguing, haunting – question-worthy. Gardens are places where there still is some metaphysical thinking that builds but also the letting-be that endures refusal of that crave, a place where world and earth are in strife, the place to which mortals primordially be-long. Reading Heidegger and Rilke as well as contemplating Australian aborigines' notion of gardening as letting the earth be, this paper contemplates a sense of gardening as the origin of architecture. Does architecture point to its strange origin of building as art, letting world-earth strife be, or does it encourage human creativity as craft, namely as historical building? Does not architecture evoke its own ruin as innermost *saying*? Is there not within every steering-building a more subdued call that cannot be disempowered, the desire for the garden?

## Interpretation and Meaning in the International Gardens of Justice: Reflections on Article 31 of the Vienna Convention on the Law of Treaties

Anthony Cullen, University of Leeds

The focus of this paper is on Gardens of Justice created by institutions of international law. It explores the development of international law and the different approaches applied to the interpretation of international law. In doing so, the rules of interpretation provided for in Article 31 of the Vienna Convention on the Law of Treaties will be examined. Article 31 of the Vienna Convention states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” As the interpretation placed on the “object and purpose” of a treaty is pivotal to its orientation, this paper probes the scope of Article 31 and its application to instruments of international law. In doing so, questions are raised about the parameters of valid interpretation, the fragmentation of international law, and the different approaches taken by those Gardens of Justice cultivated by the international community.

## The Legal System, Depoliticisation and Governance: From Hanging Gardens to the Desertshore

Jiri Priban, Cardiff University

Theories of governance imagine the world without polemics and political conflicts. They imagine global society as the functionally differentiated and heterarchical post-polemical society without the centre and periphery and engaged in problems of administration and distribution of resources and products rather than conflicts of power and sovereign states. According to this view, enchanted nostalgia for politics of the sovereign state allegedly gives way to rational arbitration of public choices at transnational level of global society. The differentiation between politicization and depoliticization thus equals the Weberian difference between enchantment and disenchantment of politics. Power is perceived as a medium of political enchantment drawing on premises of grand theoretical designs, identities, struggles and conflicts to be won and will to be imposed on subjects. Nevertheless, depoliticized expert knowledge of professionals liberates politics from the logic of power and turns the whole political enterprise to the problems of calculation, distribution, administration and arbitration. Governance theories thus strikingly resemble Condorcet's original rationalist vision of the emergence of the new society to be guided by the scientists who, through impartial reasoning, technical competence and economic calculation, can guarantee the decisions and legitimacy of public bodies. They commonly disguise power and decisions as 'reason' and thus replicate the typically modern mistake of conflating reason-giving and decision-making.

## Japanese Gardens

Laurent de Sutter, Vrije Universiteit Brussel

Japan has developed a unique and very sophisticated understanding of the art of gardening. As Watsuji Tetsurô has shown in his 1935 classic book *Fûdo*, the central idea behind this understanding is the idea of 'mohan'. 'Mohan' designates the model of gardens from which new gardens will be developed. Such a model, however, has nothing to do with a set of rules to be obeyed. On the contrary, 'kisoku' (or rules) are what from which every 'mohan' tries to detach itself: models provide inspiration rather than obligation. Such a distinction between 'rule' and 'model' is not confined to the art of gardening, in Japan. Or, to be more precise: it is like this distinction, coming from the art of gardening, expresses a more profound way of dealing with normativity, proper to Japan. The question then is: can we learn something from it? Can we learn from the separation of models from rules - let us say: of 'ius' from 'lex'?

## Derrida's bestiary: a reading of *The Beast and the Sovereign*

Jacques de Ville, University of Western Cape

Derrida's Seminar *The Beast and the Sovereign*, Vol. 1 abounds with animals: wolves, lions, goats, dolphins, monkeys, lambs, and foxes are some of the animals to be found there. If the Seminar is to be thought of as a zoological garden, it would have to be one of which the boundaries, whether in the form of cages, fences, walls, or ditches, have been demolished. The focus of this paper will be Derrida's reading of Hobbes's *Leviathan* in session 2 of the Seminar. One of the strands that will be followed is Derrida's pointing to the fear Hobbes speaks of as motivation for instituting and maintaining the Commonwealth. Hobbes, as we know, does so with reference to the phrase *homo homini lupus*, which can be traced back to Plautus and Montaigne. Hobbes tells us that the alternative to the Leviathan is a war of all against all, a return thus, to the state of nature where man is a wolf to man. In a close reading of these and other texts, Derrida suggests that the fear at stake here is perhaps not simply of one's fellow man, but in the first place of the wolf within the self, which is both desired and feared. This analysis is in turn relied on by Derrida to show that sovereignty has no existence in itself, but that it has to be thought of in terms of an economy of forces. The positing of sovereignty, similar to the self, ultimately involves a domestication, the imposition of a limit in other words, between itself and the beast.

## A bundle of sticks in my garden

Sue Farran, University of Northumbria

The English law of property is often described as a 'bundle of sticks' in which each 'stick' represents a particular right. Gardens challenge these rights and wreak havoc on the 'bundle of sticks'. This paper looks at the twenty-first century manifestations of community engagement with ground and explores how 'gardening' is undermining concepts of ownership, possession and management of land and how the fence between what is private and what is public is being encroached and challenged by community and individual initiatives to cultivate. The garden in this paper is therefore a place of questioning and redefining traditional legal concepts, but it also reflects contemporary concerns which go beyond the confines of the garden and the boundaries of the law. At the same time however, the garden represents a continuum between past struggles and ideals and future hopes, and so the cultivators of today are located in a continuing evolution of law, land and people. By considering the various ways in which people are engaging with land outside of the usual private land/person context and their motives for doing so, this paper places present gardening in its historic context and analyses the challenges that various forms of gardening pose for established legal principles. In particular this paper asks if present gardening demands a re-examination of property law and a re-evaluation of what is understood as 'property' if the 'bundle of sticks' is unpacked.

## The Modern University, Ltd.

Tom Frost, University of Newcastle

In 307 BCE Epicurus bought a house with a garden just outside Athens. This private space was in contrast to the public settings of other philosophers. The Garden, a private space, became a symbol for the detachment and hedonism of the Epicurean school. What does this Garden represent? What is the relationship between the Epicurean garden and the modern academy? The UK has seen a move towards bureaucratisation and commercialisation of higher education. With the publication of the Browne Report and the introduction of higher fees and competition for places, does this mean that higher education has moved from the Epicurean Garden to nothing more than a series of normalising and productive knowledge relationships? This paper contends that the modern shift to commercialisation in the university is in fact nothing modern, but can be traced back several hundred years. From the early universities with their ecumenical patronage, through the marketisation and bureaucratisation of higher education in the German states in the seventeenth and eighteenth centuries, state control and involvement in rationalising learning has been constant. ‘Academic freedom’ forms part of this network of power relations, designed to produce compliant learners and teachers. What this indicates is that far from being the hotbed of revolt and revolution, the university is an embodiment of what many academics in their politics aim to overthrow. This paper aims to present some thoughts on exactly what academic freedom means today, what it is taken to mean and, more importantly, how it relates to the idea of the academy as representative of the Epicurean Garden.

## The Death of the Court

Petr Agha, Centre for Law and Cosmopolitan Values, Faculty of Law, University of Antwerp, and Institute of State and Law, Academy of Sciences, Czech Republic

The European Convention on Human Rights is by many seen as a ready-made dictionary of human rights that can give answers to difficult and controversial questions. The margin of appreciation doctrine that the European Court of Human Rights invokes in dealing with issues like euthanasia, abortion or freedom of expression, is seen to undermine human rights by allowing the member states to limit their scope. Human rights for many represent namely universal truths with cemented meanings and the Court delivers authoritative exegesis of its one true meaning in concrete circumstances. I would like to present a different account of the ECHR and of the Court, one that assumes that the provisions therein contained can only be explained by reference to other sources. A text does not consist of a line of words, releasing a single meaning, it is rather a space of many dimensions. The notion that the text of the Convention must mean something specific and refer to something outside of the domain of the political undermines the

emancipatory power of human rights. The refusal to assign the text of the Convention an ultimate meaning liberates an activity which we might call counter-theological (and properly revolutionary) adjudication, because to refuse to arrest meaning is to refuse hegemony. The true locus of the meaning of human rights lies not with the Court but with the polity. When an individual application is submitted, the text of the Convention enters into dialogue with its author (the *polis*) and this very nexus becomes an opportunity for generating new and sophisticated legal language which was inexpressible before. But, the power of the Convention is not in its single meaning with universal applicability, it is in its destination, its purpose, the empowerment of social mobility and change. The margin of appreciation is often indispensable in this respect, precluding the stabilization of hegemonic regimes by highlighting the distance between present and certain juridico-political configurations that are presented as ideal that need to be approximated. With every individual application under the margin of appreciation doctrine, human rights gain a new use and new political possibilities.

## After Eden: Law and Literature in a Secular Age

Anderson Matthew, Department of English, University of New England

This paper begins by leveraging a close reading of Baudelaire's celebrated lyric, "Le Cygne", and its manuscript variants, to open up a sense of a structure of feeling that registers, in the form and language of the poem, the cross-pressure of on the one hand the secular legal order of the Second Empire (which censored the first edition of *Les Fleurs du mal*), and on the other the sacred, religious, Judeo-Christian imaginary that suffuses Baudelaire's sensibility. This brief reading of "Le Cygne" sets the stage for a consideration of poetry critic David Orr's review, in *Poetry magazine* (USA), of the recently-published edited collection, "The Poetry of Law". Orr's review provides an opening for a comment about how we might conceptualize the relationship between law and literature in a secular age.

## Rainforest Gardeners

Alice Harrison, University of Southampton

Walking in a temperate rainforest, which is quite literally the only way to travel; human senses are embraced in the magnificence of nature, stretching those senses to different boundaries. Ancient trees, on older rocks and soils, shape the new landscape; their mighty canopies distort the light, illuminating stunning arrays of forest shade and colour, which provide nourishment, protection and shelter, for forest loving species. Rain washes life giving nutrients through thick carpets of lush vegetation, cloaking multiple layers of rich old growth with pungent adornment. Other plants, reach across boundaries for foods, spreading them further through

the forest ecosystem. Insects and mammals play their part, mobilising nutrients as they hunt, hide and shelter under the protection of the forest. The majestic structuring of tree shaped gardeners cocoon the forests internal space in peace and tranquillity, absorbing and obscuring the sights, smells, feelings and sounds of the world beyond the forest. The beautiful rainforest teems with the vibrant forest enabled life of subordinate plant and animal gardeners. In the midst of the rainforest it is hard to see the destruction inherent in the rainforest garden(er)s. The dominant gardeners whose roots break through rock to reach down through the soil for sustenance; arms stretched wide to capture the first taste of moisture or sunlight, depriving other plants of the same; putting up an exclusionary canopy, which ultimately creates the rich rotting cradle of their demise; where dead (gardener) trees still nourish, protect and shelter smaller, vital to the forest gardeners, long after their death. Perhaps tree gardeners are not so different to human. Perhaps we could learn something from the ancient rainforest about supporting nature to sustain and enrich life. If, as is so often claimed, the goal of law is human enrichment and survival, our cherished human knowledge and capacity to reason demands that we reconsider our place in nature and heed nature's law. Earth's other gardeners will surely fill the niche if we extinct ourselves pursuing the foolish idea of Earth as a limitless resource to exploit, degrade and destroy.

## Nothing means outside of its relations: what does ANT say about space?

Matt Howard, University of Kent

The conceptualisation of space has been challenged by the advent of screen-technologies; new spatial dimensions are introduced and proliferated by these technologies. They pose a challenge to typically held ideas of space and the role it plays in mediating activities and regulating conduct. Such screen-technologies, along with other technological innovations, have also allowed the question of regulation of space to be broached in more general terms; that is, is it problematic to suggest that space is/can be regulated? This paper seeks to develop this question, demonstrating that the way screen technologies are used as an entirely new and separate space challenges the scalar conception of regulation; something cannot be governed or regulated remotely, but regulation pervades associations and is contingent on how things relate. A more useful expression to understand this in single level terms is ordering, rather than regulation. Actor-Network-Theory (ANT) provides useful analytical tools and a similarly useful vocabulary that facilitates this particular understanding of ordering and how it generates regulatory and legal effects. It is perhaps most useful, however, when it is understood as a series of stories that challenge analytical dichotomies that are often seen as useful. In this respect, it owes much to its Spinozan, Tardian and ethnomethodological heredity,

in particular, the concept of hybridity. Though ANT is relatively unspoken on space, its predecessors and related contemporaries have developed valuable concepts that can be employed when faced with issues pertaining to space. In addition to this, I want to demonstrate that the concepts and vocabulary accessible through ANT can be of use in relation to the issue of the regulation of space.

## Ordering Disorder – A Legal-Ecological Oxymoron?

Henrik Josefsson, Uppsala universitet

Ecosystems are to be brought out of their degraded state by EU legal-ecological objectives aiming for ‘good’ ecological or environmental status. However, can the legal-ecological handle the necessary disorder associated with the irreducible complexity of a ‘good’ state? In other words, can the legal-ecological with its overarching ambitions of ordering, protecting and bringing cross-generational justice leave the ecosystem, lingering, to be and emerge? Or would the legal do violence to itself by promoting the disorder of the irreducible complexity? Can the legal evade its historical pattern of painting yet another normative landscape founded on a desire to produce order? A landscape where diversity and disorder is quenched by the rules of perception, manipulated to fit the order of an ideal recollection creating a common landscape for the harmonized European Union. A garden where lines, colours and places never surprise the eye of the observer, an informing and enclosing structure, painting the same scene over and over again, in perfect repetition.

## Governmentalities of the Garden: Heterotopia and Subjectivity

Andreas Kotsakis, London School of Economics and Political Science

The garden is a heterotopia that constantly enables the manifestation of the city, a spatial representation of the boundary between nature and human civilization understood through its conceptual basis on the word *civilis* and the equation of civilization with urbanity. For the urban to exist, it must manifest a garden as its opposite, and a garden cannot exist without the urban. At the same time, the subjectivity of the gardener has been a fundamental building block of modernity; the caring steward, the gentle maker of shapes out of wilderness, the rational custodian that introduces the technological into the natural. Using the concept of *heterotopia* from Foucault and a Deleuzian interpretation of the concept of the *dispositif*, this paper examines the combined interplay of heterotopia and subjectivity at the space of the garden and illustrates how the apparatus of the garden contributes to environmental thought through the production of the liberal environmental subject.

## Close, yet far away. On spatial integration and segregation in Swedish district courthouses

Eva Löfgren, Göteborgs universitet

The issue of spatial distance and proximity has always been important to those involved in legal proceedings, even though it has rarely been articulated or documented. This paper will expose the on-going friction between two similar spatial polarities, integration and segregation, as they appear through the changes of Swedish rural district courthouses during the last 200 years. The scale of the analysis will vary from an urban planning perspective, to the spatial organization within the individual courthouse and courtroom. By setting out from the 17th century situation where permanent localities still constituted exceptions to the rule of ambulant courts, I will display how the law of 1734 fixed and segregated legal proceedings not only spatially but also architecturally. Nevertheless, as a continuation of past habits, the first dedicated courthouses were still multi-functional buildings, both socially and spatially integrated into everyday life. By the turn of the 20th century though, the court had withdrawn behind hedges and lawns, and all aspects of the courthouse and court's grounds communicated spatial segregation. Finally I will discuss current court architecture and show in what way legal proceedings are, both fundamentally integrated into the urban spatial grid, and fundamentally segregated, secured or excluded – within the city as well as within the actual building.

## Gardens of Extinction

Phillip Paiement, Tilburg University

With the entry into force of the Convention on Biological Diversity in 1993, the realm of international law opened a door to scientific, economic, and political considerations revolving around the protection of threatened, endangered, and rare species. Legal restrictions in the name of species protection is by no means novel, with legal interventions having been made during the well-known extinction processes of the passenger pigeon (*Ectopistes migratorius*) in the 19th Century, and even the European auroch (*Bos primigenius*) in the 16th and 17th Centuries. One could argue that legal systems have been faced with the difficulties of species preservation ever since Georges Cuvier's finding that species extinction is possible. Species protection certainly challenges legal systems to take into account possible futures in its ecological and social environments. The greater difficulty, however, is the legal protection of presently unknown species. While the discovery of species has been a constant in human history, the discovery of (nearly) extinct species – often cause by anthropocentric forces – is relatively new. While it may have been previously written off as the unfortunate yet inevitable uncertainties of jungle and ocean depths, scientific progress such as the recent (April 2012) discovery of a new leopard frog species on Staten Island ruptures the civilization/wilderness divide. Legal protection of unknown

species confronts itself with a new temporal difficulty, namely the need to tend to an unimagined future garden upon whose emergence in the present is already too late. Or alternatively, the law's is capable of fulfilling its role as a gardener of an unknown garden. This paper will investigate predominant legal measures oriented towards species protection to uncover the complexities of protecting the unknown. The difficulties of a possible instrumental legal approach will be uncovered, while ultimately it will be argued that a legal imagination of future species presents a possibility for working towards greater protection of the unknown environments. In the same way that the grave of the unknown soldier is an imaginative reminder of the past, perhaps the striking void of the Kirstenbosch "Garden of Extinction" – an empty garden, and thus a full graveyard – needs to include the grave of the unknown species as an imaginative reminder of law's environmental future. This paper will suggest possibilities for such a legal imagination through the framework of systems theory.

## Seeds of Justice

Andrea Pavoni, University of Westminster

They say that gardens are born out of the purpose-oriented operation of the human, without which we could only have the chaotic spreading of weeds, there to testify for the immoral idleness of the gardener. The spatiolegal architecture of modernity is a gardening operation, the extirpation of complexity out of space in order to plough and sow precise categories. Should we then celebrate the superior vitalism of weeds, the creative chaos of wilderness always sabotaging Law's gardening/ordering project? Or, is it not the chaotic wilderness of the weeds only the hidden presupposition of the project itself, its secret ground? There is no surprise then, that once the disciplinary gardens of modernity are no longer sufficient to keep the weeds outside, both gardens and gardeners disappear, supplanted by the planetary emergence of the impersonal techné of gardening, neither aimed at producing neat gardens nor neat botanical distinctions between what plants and weeds are, but rather at coping directly with their becoming, into the open wild. Gardening without gardeners or gardens – imperatives without imperators (Schutz), this is the immanent form of the contemporary spatiolegal architecture of control, folded onto an impenetrable techné which systematically defuses the potential for justice to emerge. Let us get rid of the tiring opposition (or as much tiring conflation) between chaos and order, plants and weeds, law and non-law, or indeed law and justice – these are 'superficial' oppositions, below which lies the verminous complexity of space, a holey materiality of worms, burrows, voids, organic and inorganic matter vibrating, composting, decomposing. This is not chaos or probabilisable indeterminacy, but a contingent complexity which cannot be merely extirpated and partitioned into transcendent gardens, nor deterritorialised and kept in artificial motion by immanent operations of gardening. It is a complexity which must be let unfold, not through inertia, but rather exceeding the very dichotomy of action and non-action: bio-dynamically, de-activating the ap-

paratases of control, towards an inoperose gardening. The paper seeks to apply this gardening paradigm to the troubled question of spatial justice, through Ai Weiwei and his 100.000.000 porcelain seeds.

## The Normativity of an Animal Atmosphere

Andreas Philippopoulos-Mihalopoulos, University of Westminster

Space, Bodies, Affects: how do they all come together in the open ‘garden’ north of Venice trammelled by animal hunger? What does a nomad do in a garden? What does an animal body tell us about the law? And can we talk about atmosphere in a garden meant to be open and savage? A reading of Valentina de Marchi’s text *Fame d’Erba* (Hunger for Grass) on the Triveneto transhumance yields impressive socio-political and normative insights whose relevance extend beyond the arguably limited world of North Italy’s nomadic shepherds. Employing a broadly Deleuzian approach, I show how a concept of animal normativity emerges that is, properly speaking, embodied in the flocks trammelling the region. The movements of the flocks take place in targeted disregard of private property boundaries, state law limitations, reservation areas and road networks. Rather, it is solely determined by the hunger of the animal and the manner in which the movement must be performed, namely silently and imperceptibly. In discussing this, I introduce the concept of atmosphere as the affective excess that holds bodies together. From this, a normativity comes forth that is neither idealised nomadic nor anathematised positivist but thoroughly material, corporeal and animal.

## Impossible Ethics of the Real

Louis E. Wolcher, University of Washington School of Law

To compare John 8:32’s “The truth shall make you free” with the holocaust denier’s ironic slogan “Wahrheit macht Frei” might seem to be a scandalous or blasphemous act. However, the comparison is actually intended to gesture at the possibility that truth is a much overrated value when compared to the real. Of course, this is not to say that falsity is to be preferred. Rather, if truth were a well-tended garden, then the real would constantly be invading it in the form of what gardeners call “weeds.” Weeds are not exactly false, for they obviously enjoy their own kind of being, but they do tend to interfere with the gardener’s plans. Even if the gardener diligently uproots them, they always leave behind spores that drift away and sprout up elsewhere in the garden. In short, although the real is not identical to the true, it is nonetheless constantly being judged according to the criterion of truth. The first principle of all law – indeed, of all that aspires to be well-ordered and normatively correct in human affairs – is that there is a difference between the real and the true which it is the task of the various technologies of truth to suppress. But

the truth can no more permanently suppress the real than a gardener can get rid of weeds once and for all. To paraphrase Adorno, the real does not go into the true without leaving a remainder that eventually comes to contradict all traditional norms of adequacy. Truth and its handmaidens law and justice purport to know and understand the real, no matter how terrible, by subsuming its particularities in the form of what lawyers call “the facts of the individual case.” But the real cannot be decently transcended in this or any other way. The indecency of transcendence through truth and beauty, no matter how excellently conceived and executed, is the reason why Adorno said that there can be no poetry after Auschwitz, and why Aleksandr Solzhenitsyn wrote, with regard to the Soviet Gulag, that “all those who drank of this most deeply, who learned the meaning of it most fully, are already in the grave and will not tell us. No one will now ever tell us the most important thing about these camps.” This paper is a meditation on the situation of the ethical I (always a “me myself”) in that rare and unique moment when it suddenly awakens from its usual slumbers behind the formal operations of law and justice to behold the tragic spectacle of the real intruding on the jurisdiction of the true. During the short span of that awesome moment it would seem that Lenin’s iconic question “What is to be done?” is completely supplanted by what must be endured. And what must be endured is the impossibility of ethics in the face of the real.

## Gardens of Justice – Gardens of Harmony?

Hanne Petersen, Københavns Universitet

Why are Western images of Justice invariably female? Utopias of Mediterranean and monotheistic desert religions are described as gardens. The title of the conference ‘gardens of justice’ indicates relations and links between the monotheistic religions, their views of paradise, and the role of justice. Justice becomes related to and situated in a beautiful context. When Hu Jin Tao visited Copenhagen in June 2012, one of the outcomes was the establishment of the world’s first Musical Confucius Institute at the Royal Danish Music Conservatory. The Danish Conservatory will cooperate with the Central Conservatory of Music in Beijing, and the agreement will be a take-off for the interplay of Chinese music and the European musical tradition. In a Chinese context ‘harmony’ and ‘benevolence’ are highly valued, and this is reflected in Chinese normative culture – including music, landscape and social order. In China, justice is resembled by an imaginary animal, Xiezhi. What images of order, beauty, the harmonious and the just does the ‘spirit of the future’ hold?

## PAPER ABSTRACTS

## Insiders and outsiders at the garden party

Carin Carlson, Faculty of Law, Lunds universitet

Within labour law, the definition of who is considered as being an “insider” is very important, since it defines who is considered as a subject, protected by labour law. In general, this protection is acknowledged to people considered being employees in an employment relationship. The structure of labour regulation can be compared to a garden party for diplomats, where the outspoken situation is that everyone are of equal positions, but where there are actually different positions of power, depending on e.g. gender, ethnicity and culture. By using an intersectional perspective, one can analyse how gender, class, sexuality, ethnicity, culture etc. effect the level of protection that a person has within the legal system to see who is considered as a subject of the law. The result is that certain people have a higher position of power than others. Michel Foucault argues that by a process of normalization, meaning a creation of identities and dividing people into different groups, certain people are acknowledged as more “normal” than others, hence given a position of power vis-a-vis the divergent group/s. These positions of power, however, are often considered to reflect the natural order of things, and are rarely questioned. One can argue that diplomats, who as a group, are often considered as a class without classes, can be said to be divided into an hierarchic order based on language skills, cultural codes and way of behaving. However, within this group one does not recognize that there is a hierarchy, and therefore tend to pretend that an intersectional analysis is not relevant. The workers serving at the party can initially be recognized as of equal status, but will have different working-conditions based on if they have an international or national working contract. This way, one tries to legitimize different working conditions, by making them inherent to national status. However, by this visual difference, an intersectional perspective can be introduced, adding factors as e.g. gender, culture and ethnicity. As an example, women and men are often given gender-stereotype as well as culture-stereotype tasks, and there is often a difference in salaries. By using an intersectional perspective, my aim is to envisage how labour protection, particularly in Sweden, differ based on whether the worker is white or not, unionized or not, a migrant or a national, or if the work is performed in the formal or the informal labour market. I seek to open up for a discussion on how today’s labour law is excluding people and keeping them outside the legal sphere as a result of its construction.

## The Defense of Political Leaders at International Criminal Tribunals

Fritz Valentin Streiff, University of Utrecht

This paper is based on an LL.M. thesis on the defence of political leaders at international criminal tribunals, which was written in the spring semester of 2011-2012 at Utrecht University. It looks at international criminal justice from a critical angle by firstly pointing out the political or at least extrajudicial features of this international legal regime, including such lofty goals as contributing to peace and reconciliation. The prosecutor ignores these features, or at least shoves them aside, and aims at a purely legal administration of justice. The question is thus: how does the defence handle this obvious tension; how does it react to it? Building on that, a selection of defence strategies are applied to three cases of political leaders who stood/ stand accused at the ICTY in The Hague: Milošević, Šešelj and Karadžić. The analysis of their defence strategies reveals a certain development from defences which are more or less completely built on a rupture with the system and other players in the courtroom (Milošević, Šešelj), to a more balanced, respectful and, almost, legal defence (Karadžić). Their common main goal may be summarized as wanting to correct the version of events as presented in the media and through the jurisprudence of the ICTY. However, while the former pair angrily defended its own cause and version of truth and history, the latter has increasingly adopted the judicial instruments in order to reach his political goals. Eventually, the paper argues that a well-conducted political defence can be a positive contribution to the process at the tribunals. If international criminal justice wants to adhere to its extra-judicial goals, it must tolerate if not welcome a defendant who uses legal instruments in order to be fully heard.

## Human rights violations by non-state armed groups: the secret garden of human rights?

Marthe Van Beurden, International Human Rights Law, Lunds universitet

State Parties to human rights conventions are the main actors in the enforcement of human rights. However in some circumstances they are in the impossibility to make non-state actors comply with the imposed obligations. This can be seen as the secret garden of enforcement, the problem to which the fitting solution still needs to be discovered. The search can be approached in many different ways, I limit myself to two ways. Firstly, human rights should be seen as universal. If we leave the discussion of cultural relativism aside, this can be interpreted as obligations that rest on every individual, either States or non-state actors. This makes that everyone has to comply with these obligations and everyone can be enforced to comply with them, even when they are no State party, nor ratified any conven-

tion. The second approach is the connection between common heritage of mankind and human rights. This is a doctrine, a bundle of rules, principles and theories that is fully in force as positive law. Kemal Baslar describes it as a moral philosophical idea acquiring its existence and legal normativity from, above all, natural law rather than State consent and auto limitation. If this is applied to the situation of violations committed by non-state armed groups, this would entail that the obligations arising from human rights also rest on these groups.

## How to Define A Justice in the Copyright Law?

Nick Zhenyu Ni, International Human Rights Law, Lunds universitet

The emergence of the Open Source Software Licenses and other self-referential contracts like the Open Standard Licenses formed a part of the environment which the copyright law interacted with a silent echo. If this process is a shard of justice existing either in the law or its description to the environment, then the boundary of it can be observed through the allocation of right/obligation presupposing that observation is in front of operation. Luhmann's systems theory will be used in this observation. The distinction of legal/illegal applies a program that draws a preliminary line between legal system and its environment which may be of fundamental importance. On this basis, it would be possible to use other distinctions like the right/obligation to a copyright system and its description of contract environment on other dimensions like time or space to elucidate the border of justice, comprehend the observation and try to find some details on this method. It shall be admitted that maybe little further progress can be achieved on the theory itself and the results would be full of doubt since they are contingent. But a more specific use of the theory may test its scope and find, if any, a further recognition of the copyright law.

## Gender and Judging in the UK Asylum Tribunal

Jessica C Hambly, School of Law, University of Bristol

Insofar as it relates to the conference theme, my paper focuses on the UK Asylum Tribunal as a Garden of Injustice as a result of its gendering processes. This research builds on current work on gender and judging by reconsidering how and why judicial identity matters.

The asylum context creates a particularly fertile environment for considering the role of judicial background and experience owing to the heavy reliance on judicial discretion and 'gut-feeling'. Both academic studies and anecdotal evidence from asylum seekers and practitioners point to a lack of consistency (and as such faith) in judging in the asylum tribunal. This is partially owing to the relative obscurity of this area of law (for example reliance on amorphous categorizations such as a

‘particular social group’) and the underreporting of decisions, but also owing to the variety of different judicial attitudes to asylum appeals and the use of judicial intuition and common-sense. This paper looks at how judicial background, knowledge and experience manifests in asylum appeals by exploring two appeals from lesbian women who find themselves victims of a legal process blind to visions of otherness. The paper uses gender theory from Michael Kimmel and Raewyn Connell, and Keith Hawkins’ methodological device of the surround, field and frame to explore the interaction between structures and agency in the gendering processes at play in the asylum tribunal.

## On the Impurities of 21st Century Comparative Law

Ville Komulainen, University of Helsinki

This paper recites a story about gardeners in the garden of Comparative Law. It is a story about an uneasy coexistence between mainstream gardeners upholding the professional duty which they have inherited from master to pupil for generations, and the new multi-disciplinary botanists who seek to grasp their very own gardens as mere variations of the breath-taking plurality of gardens, pastures and wild lands near and afar. As such, this paper re-examines the recent wave of globally aware and interdisciplinary comparative legal scholarship that has risen to challenge what it often calls mainstream comparative law. The paper reconstructs the original default professionalist “purpose” and limitations of the legal discipline with the help of Immanuel Kant’s *Conflict of the Faculties* and Pierre Bourdieu’s *homo academicus*, both of which vividly illustrate the distinction between the restrained, practical professional faculties (of law and medicine) and the free, less-hierarchical but temporally inferior faculties of philosophy and science. The argument is that this same distinction of identities can be seen internally tearing apart the two “wings” of comparative legal scholarship. From this perspective, the inescapable core question for comparativists is not whether or not new forms of knowledge are useful; the true debate remains whether or not it is appropriate for such knowledge to be pursued under the proper title of “law”. This may be a sad, snobbish question, but nonetheless it remains a painful, restrictive dilemma for comparative legal reality.

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## IN THE GARDENS AND BEYOND: GENEALOGIES OF LAWS AND JUSTICES

Conveners: Riccardo Baldissone, Birkbeck College, University of London & Curtin University, and Marc de Wilde, University of Amsterdam

A Jewish story represented the original happy human condition with the image of a garden. When Xenophon imported into Greek the Persian word *paradeiza*, which defined the imperial enclosed leisure garden, this representation took also the shape of a word: paradise. The Platonic and later Christian duplication of the world into a real and an ideal sphere turned the original garden into a metaphor of perfection. Hence, in our still Platonist split world the image of gardens fits well that one of justice, which is the ideal companion to real law. The Judeo-Christian tradition, then revived in modern progressive thought, exploited the advantages of positing justice as the alter ego of reality. And yet, can we still afford the ethical, social and political costs of constructing law and justice as real and ideal dichotomic counterparts? We propose to evaluate such costs by exploring the intertwining historical processes of production of ideals of justice and legal systems.

These explorations of the legal past could be conducted, for example, as a Nietzschean genealogical reopening of past perspectives. As Foucault remarks, such a genealogical listening to history would help finding behind things either no essence, or an essence fabricated in a piecemeal fashion form alien forms. This finding in turn would allow the opening of theoretical and political perspectives in the present. Another possible approach would be, following Benjamin, the recovery of the political and messianic potential of the past in disrupting the present. This approach would also shift the mere opposition between law and justice towards a more complex mediated relation. More in general, we invite to produce narratives of past justices and laws as a result of human specific practices not only to help questioning current legal theories, systems and their implementation, but also to challenge the priority accorded to ideal models of justice as a theoretical transformative tool.

## PAPER ABSTRACTS

## Sovereignty Forever: The Boundaries of Western Medieval and Modern Thought in a Quasi-Symptomatic Reading of Schmitt's Definition of Sovereignty

Riccardo Baldissone, Birkbeck College, University of London & Curtin University

Schmitt's definition of sovereignty is also an attempt to read against the grain Western legal and political history. And yet, this highly unorthodox reconstruction both reveals and hides the boundaries of Western medieval and modern thought. I will take further Schmitt's reconsideration of the Western postclassical juridico-political framework by using his short text as a series of hints (or quasi-symptoms) to Schmitt's historical context, as well as to more general features of Western thought. In particular, I will propose reading the association of sovereignty with the state of exception as a rationalization of the catastrophe of WWI, and I will suggest an analogy with Freud's post-war construction of death drive. Though Schmitt rightly underlined the contextual determination of politico-legal conceptualizations in the past, he produced a foundational narrative that transcends these very historical determinations. Hence, despite Schmitt exposed the theological roots of Western juridico-political discourse, he still operated within the decontextualized conceptual space structured by medieval theological speculation and re-enacted by modern naturalism, where even the exception is recaptured as a principle. However, I will argue that the Schmittian shift from the juxtaposition of rule and exception towards their identification can be used to better show the claustrophobic horizon of Western postclassical juridico-political thought.

## The Gothic Picturesque Garden and the Idea of a Constitution

Daniela Carpi, University of Verona

The Gothic ruins, as well as Piranesi's Roman ruins, express the idea of a social system which has disappeared but remains visible in its ruins. On these ruins a new system is erected which must take into account past tradition. You never build in a vacuum, even in law, but everything evolves. It is also Burke's idea in *Reflections on the French Revolution*, where he criticizes the fact that the French have done away with their past instead of constructing and bringing about reforms from within a well assessed system. The ruins that appear in Piranesi's engravings convey similar ideas: the ruins may epitomize the Roman juridical system upon which all subsequent juridical systems have been rooted. The Justinian code has been the basis for all systems, even for the Anglo-Saxon one, even if in the course of time it has distanced itself from the Roman system. This symbolic passage from times past to modern times is metaphorised by the Gothic picturesque garden, which plays with a taste for ruins, with the sublime sense of delight, so as to bring about a re-empowerment of a new juridical system.

## The Other Otherwise: Law, Historical Trauma and the Severed Gardens of Justice

Cosmin Sebastian Cercel, University of Bucharest

Historical discontinuity has yet to find a place in the theoretical framework of comparative legal studies. 'Wicked' legal systems, normative structures pertaining to forms of 'tainted law,' residues or re-enactments of authoritarian legal practices seem to introduce a specific fracture in the symbolic construction of the legal discourse. Indeed, when dealing with traumatic encounters of the violence underlying the law, legal theory faces the paradox of discontinuity. Once a legal system has been reduced to its basic features, asserting itself as pure 'force of law,' one which is reified by authoritarian ideologies, it becomes uneasy to be analysed under the category of 'law,' as it appears more as a form of an 'unlawful' normative structure, while in the same time producing 'legal' effects. Such limit cases of law or normative structures, marked historically by their complicity with violence, present themselves as a challenge for the seemingly universal tenets of the liberal democratic *nomos* as well as for its theoretical strategies of legitimation. In this way they represent the Other of our ideological consensus. This paper aims to explore the issue of discontinuity in relation to historical trauma. While drawing on psychoanalytical literature developed around the traumatic status of the Real, it asserts that in order to approach such normative structures a comparative gaze is necessary regardless the apparent cultural and historical unity of such a structure. In this sense, it challenges both the universalist claim of values forming legal discourse, as well as the basic assumption of the unity of a legal system.

## 'God Hath Given the World to Men in Common:' Reflections on the Christian Origins of Locke's Theory of Property

Marc de Wilde, University of Amsterdam

John Locke's theory of property is often invoked by those who claim that individuals have a natural and inviolable right to property, which cannot be limited by the state without the owner's explicit consent. However, as the existence of a rich tradition of Socialist and Marxist readings of Locke suggests, Lockean property is not as immune to state interference as today's libertarians suggest. Indeed, though Locke considered property a natural and unalienable right, he also believed there were important limitations to individual property. He thus argued that individuals could only lay claim to those goods that were necessary for their subsistence and for realizing their freedom. What they did not need for these purposes they could not claim as their property, for God had not made the earth for man to spoil or destroy. Interestingly, these limitations to Lockean property seem to originate from a Christian worldview, more particularly, the notion that God had given the

earth to men in common, such that the poor and needy could claim their share. In this paper, I will trace the Christian origins of Locke's theory of property and show that, rather than justifying the libertarian cause of protecting individual property at all costs, it may provide ammunition for those who believe that a more equal distribution of wealth is necessary and justified.

## Limmeridge Graveyard as a Garden of Justice: Redressing Issues of Legal Identity in Wilkie Collins' *The Woman in White*

Sidia Fiorato, University of Verona

Wilkie Collins' *The Woman in White* focuses on the erasure of legal identity and powerfully counteracts the common law tenets of the Victorian period. In particular, the novel addresses the question of illegitimacy through the parallel yet opposite fates of Sir Percival Glyde and Anne Catherick. The graveyard assumes a central position, as it often constitutes the setting for revelations which will lead to a resolution of the legal issues of the plot. It is in the garden represented by the graveyard that Walter Hartright encounters Anne, discovers that Sir Percival Glyde contributed to have her imprisoned in an asylum and starts wondering about his possible motives and means; it is there that Walter will go at the end of the plot to sanction the recognition of his wife's identity by having her name removed from the stone of her family tomb. On that occasion, after the revelation of the deceitful exchange of identity, the name of Anne Catherick is inscribed on the tombstone together with her date of birth; finally, through such action, she officially acquires her identity as daughter of Mr Fairlie and is included in the Farlies' family tomb, a tangible symbol of their social position. The inscription on the grave reports her own name, Catherick, in an implied recognition and defense of her legitimate social status as a daughter born out of wedlock, thus counteracting the social exclusion and denial of legal personhood of illegitimate sons and daughters. The graveyard configures itself as a garden of justice, the locus where individual voices powerfully pierce common law silence, where the letters of the individual name counteract the letter of the law and ask for a redressing of wrongs.

## Sovereignty, Faith and the Fall

Richard Joyce, Monash University

"The origin is a distancing." Banishment from the Garden of Eden makes possible a certain form of human sovereignty; a sovereignty founded in dissociation from yet emulation of the divine. Paradoxes within this story of transformation and alienation animate Milton's attempt in *Paradise Lost* and elsewhere to reconcile freedom and reason, faith and knowledge in a way which recognises God's omniscience and omnipotence while at the same time preserving the contingency of the

fall. This image of sovereignty as a consequence of sin can be contrasted with that cast by Hobbes, where sovereignty offers a resolution of the chaos of the state of nature. Milton's alignment, at least on one interpretation, of reason (shared by God and humanity) with infallible and unalterable nature also stands in contrast to Hobbes' reason as a fallible human faculty from which the laws of nature stand apart. It is Hobbes' reason, more so than this version of Milton's, which would, as Derrida demands "let itself be reasoned with" and which would, it seems, provide a space within which the pretensions of sovereignty might best be exposed. And yet, for Derrida, that which should ground a critique of sovereignty (along with other concepts) – an "invincible desire for justice" – belongs not to reason alone. Rather, it "belongs from the very beginning to the experience of faith, of believing, of a credit that is irreducible to knowledge." This paper will consider some possible implications of Milton's attempt to reconcile freedom, reason, faith and knowledge for contemporary critical thinking on sovereignty.

## Jewish Law on Jewish Law: Beyond Utopia and Dystopia

Clément Labi

We are inspired by a classical exegesis linking the four levels of biblical interpretation (literal, metaphorical, allegoric and esoteric) with the word *pardes*, of Persian origin, meaning 'garden,' and cognate with the English 'paradise' and its equivalents in Romance languages.

Besides other particularities, Jewish (religious) law is self-reflective and self-evaluative: it describes its own value in *abstracto* as well as its relative value vis-à-vis other (secular, positive) laws. As surprising as it may seem, we find that the assessment of secular laws is not dystopic. The existence of a well-organized system capable of doing justice is recognized as a necessity, especially, but not necessarily, in a post-Diaspora context. In particular, rabbinical exegesis recognizes the establishment of courts of law as one of the seven Noahide laws, whose obeisance allows Gentiles to partake in the 'world to come' in Jewish eschatology. Conversely, the characterization of the realm of Jewish law as utopic is problematic at best. Indeed, we intend on showing that Jewish law was intended for the present world (*olam ha-ze*), and neither for the Garden of Eden nor for the Messianic period. The controversial relationship between Jewish law, both in written and oral forms, and human reason will be examined to support our assertions.

## Weeds in the Gardens of Justice? Legal Survivals as a Symptom in Polish Legal Culture

Rafał Manko, Court of Justice of the EU

The metaphor 'gardens of justice' refers to the source domain of gardening, with orderly French gardens (continental legal tradition) and spontaneous but still controlled English gardens (common law tradition). But what about the gardens of Central European countries, such as Poland? After 1989, Polish legal elites embraced the (neoliberal) transformation discourse, based on the 'return to Europe' metaphor, presenting modern Polish legal history as a circular journey from Europe to 'Communism' and back. As a consequence, links with the state-socialist past are repressed from the collective consciousness of the legal community: according to the official ideology, the Polish gardens of justice contain exclusively western plants, without any weeds from the Soviet Union. However, those weeds return in the form of symptoms – legal survivals, which lawyers tend to ignore or conceal because they subvert the dominant ideological narrative. Simultaneously, their disturbing presence in the legal culture is a prerequisite of its very existence: after the transition from Really Existing Socialism to capitalism it was impossible to create a new legal system *ex nihilo*. Legal survivals of the Socialist Legal Tradition can be identified on all levels of legal culture, including legal grammar and style, legal concepts, legal institutions and individual legal rules. Their pervasiveness, especially in the form of 'hyperpositivism', suggests that the state-socialist origin of the current Polish legal order is the traumatic kernel from which the Polish legal community tries to escape.

## The Dead Horse of Critical Legal Studies

Antonios E. Platsas, University of Derby

One cannot proclaim the death of a subject, as the subjects of epistemology are not matters of the corporeal world (even if they touch upon the world of the corporeal). Nonetheless, as Tamanaha reminds us through his well-known metaphor already since 2000, it would be true for us to state that the very promising at other times horse of critical legal studies is a dead one now or that – at the very least – is still a subject on decline. As such the paper re-affirms the position that, whilst the subject is an academically thriving one in the discipline of law, its effect in the sphere of the real is limited. As such the gardens of justice are – for most intents and purposes – served by law. Law does not trample the gardens of justice, it cultivates them. A position which provides for less law than more law will not necessarily be rejected, even though it will be highlighted that such a position may be based on more pragmatic considerations (as opposed to the more ideological considerations which the school of critical legal studies would forward in its fundamentals).

## Metamorphosis of the Ideal: Law and the 'Transplantation' of Justice in British India

Raza Saeed, University of Warwick

While a genealogical exploration of the dichotomy between the real (legal) and the Ideal (justice) may provide us with an understanding of the historical and ideological relationship(s) between the two, a focus on this dichotomy alone, arguably, may act to conceal the multiplicities inherent in each of these terms. It may be argued that just as there exist multiple manifestations of legalities/realities, these manifestations may correspond to diverse notions of the ideal. And these realities and ideals do not always lay passively side by side each other – they overlap and conflict, but also play a part in the others' creation, transformation or transplantation. A historical glance at the Islamic Law (or Mohammedan Law as it was termed during the colonisation of the British India) in Pakistan, particularly the presently controversial Blasphemy Law, provides us with an insight on how the real/legal emerging from a particular notion of the ideal/justice was mediated through colonialism and became the real/legal manifestation of a different kind, which subsequently created or transplanted in its context a notion of justice that had hitherto been non-existent.

## Nature and Culture: Notes on How the Modern Law Works

Sergio Martín Tapia Arguello, Universidad Nacional Autónoma de México

When we see a garden, we see a natural space. Surrounded by things made by human hands, the garden looks like our last natural area in an artificial world. However, if we look beyond this first impression, we discover that the garden is man-made too. The materials may change, but the biological-synthetic mix just provides a hidden form of human activity. In many ways, this is true of law as well. Legal categories are artificial, but being part of law, they may seem 'natural' to society. This kind of naturalization is especially effective if it finds (or is said to find) its basis in biology, as in the case of gender, age or race. This paper seeks to demonstrate that if the subjects of law are historical beings, the objects and categories of law are historical too. It is, therefore, necessary to reconsider why we regard these categories as natural and whether the 'biological' dimension suffices at all to describe them that way. Just as we do when we see a garden...

## Between Slave-Owners and Founding Fathers: Counter-history in the Courtroom

Awol Allo, University of Glasgow

This paper seeks to investigate the extent to which Foucault's historico-political critique can be used as a conceptual tool for questioning the instituted 'formulas of rights' and the 'imposed order of justice'. If Foucault's 'micro-politics of resistance'

takes off the ground with the possibility of re-politicisation – finding a register for critique within but one that breaks off – counter-history imports a reflexivity essential for the re-politicisation of the juridical realm. By analysing key disruptive scenes in the trial of Bobby Seale (part of the Chicago Eight Conspiracy trial), I will argue that Seale’s deployment of a counter-historical knowledge of enslavement and servitude reveals the juridico-political practices of American sovereignty – including the constitution and the judicial apparatus – as strategic tool used to conceal and preserve relationships of domination established at a given historical moment. I will further argue that as a strategic weapon capable of tapping cracks and incongruities to dislocate the distinction between the legal and the political, a counter-historical knowledge opens up a critical disclosure space that exposes ‘history’ as a discourse that reinforces sovereignty by expunging the fundamental relationship of inequality that undergirds it.

## Deleuze and the nomadic law

Angelos Triantafyllou, Université de Versailles Saint-Quentin-en-Yvelines

Deleuze’s relation to legal theory has many aspects. It is easily traced in his lectures and texts on Spinoza and Kant and on natural law, in his own approach to Kafka’s work. He confesses his interest in philosophy of law. The Deleuzean conception of law is that law is a question of place as expressed in *The Trial*: law catches you when you approach it; it releases you when you move away from it. Deleuze does not put the difference between law and justice, since he doesn’t accept the dualism between surface and depth. The law is the surface, the skin. If there is a difference at all, it would be rather a difference between two types of laws, the law as *nomos* and the law as *polis*. This difference, before becoming an intellectual one, is a territorial difference. *Nomos* is the law when occurs there no motion between two points in the space, but only a perpetual motion. If the codified law is striated, the nomadic law is smooth. It is a difference between two types of space, two types of gardens. A smooth garden facing a streaky garden, a cultivated, artificial garden, facing a nomadic garden. In the first case the law *nèmei*, i.e. divides the space, in the second case the law is the distribution of animals in the space, laying out lines of escape in the space. If the polished law is the Garden of Eden, the nomadic law is but the line of escape from the Garden of Eden, not in the sense that the nomad escapes the law, but in the sense that he deterritorialises the space of the garden, displaces it; so that the garden shifts. The garden of the nomadic law is not a garden of plants but a garden of stones and a garden of sand, a Sahara. This opposition is visible today by the adoption of laws of privatization of the public space, or laws on immigration aiming to found the fortress Europe. Facing these laws, the real movement of populations creates a more and more smooth space, *a garden in motion*.

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## INTERNATIONAL LAW, GENOCIDE AND IMPERIALISM: THE COLONIAL ORIGINS OF HUMAN RIGHTS?

Conveners: José-Manuel Barreto, Goldsmiths College, University of London, Fernanda Bragato, UNISINOS, Porto Alegre & Prabhakar Singh, National University of Singapore

In Memoriam Vincent Keter

Anghie's thesis according to which the "colonial origins of international law" can be found in the context of the Conquest of America and the works of Francisco de Vitoria led to a re-thinking of international law. This thematic has also attracted the attention of critical legal scholars like Fitzpatrick, Kennedy and Koskenniemi, and of Decolonial thinkers like Dussel and Mignolo. What venues does Anghie's thesis open for re-thinking human rights from a non-eurocentric perspective? What consequences can be drawn for human rights from a Decolonial reading of modern *ius gentium* and *ius naturalism*?

The issue of genocide can provide an insightful perspective on *ius gentium* and *ius natura* in early modernity. While Stannard has referred to the Conquest of America as "centuries of genocide", Todorov claims that "the Sixteenth century perpetrated the greatest genocide in human history". On his part, Lindqvist finds in colonial genocide an antecedent for the Holocaust.

The political economy of colonialism can also offer key ideas on the origins of human rights. Marx described the formation of the capitalist economy as a process in which the peasants were separated from the means of production and became wage labourers. Marx also stated that "the discovery of gold and silver in America [...] the turning of Africa into a warren for the commercial hunting of black-skins, signalled the rosy dawn of the era of capitalist production." The first thesis became crucial for the understanding of primitive accumulation, the second has remained marginal. Can the latter help us to understand natural law in the context of colonialism?

In the background of elaborations on Eurocentrism and international law (Mignolo, Koskenniemi), this stream also works as a dialogue between a Third-World standpoint and the European-US perspective. This interdisciplinary stream invites papers on the possibility of constructing an early modern history and theory of human rights by an interpretation of the works of Vitoria, Las Casas, Sepulveda, Suarez and Vieira, and on the basis of the analysis of the questions of genocide and the primitive accumulation of capital in the context of the Conquest of America.

## PAPER ABSTRACTS

## The Contribution of the Thought of Felipe Guaman Poma de Ayala to Rethinking the Dominant Discourse of Human Rights

Fernanda Frizzo Bragato, Unisinos, Porto Alegre

Thinking of human rights in the Post-war legal and political culture presupposes at least two stories and two rationalities: one official and another untold. According to official history, human rights are transplants of a moral, legal and political project invented and matured by Western modernity. Human rights are also seen as natural consequences of the European Enlightenment and its underlying ideas: individualism, Christianity, capitalism and imperialism. After they had been sufficiently developed, they would have been exported to the rest of the world in two different ways: first through the Universal Declaration of Human Rights of 1948, and after, through successive domestic legislation in which several countries now recognise Western human rights in their constitutions and legal systems. From this perspective, human rights have little or nothing to do with the history and rationality of non-Western peoples. These are the basis of the discourse that dominates the enunciation of what human rights are and where they are rooted. However, parallel to this history and this rationality, there are others that remain invisible, reinforcing unilateral and narrow views about human rights. The aim of this paper is to present the political thought of Felipe Guaman Poma de Ayala, an Inca Indian of the Seventeenth century. His “First New Chronicle and Good Government”, probably written between 1615 and 1616, left important contributions to the human rights discourse. Poma de Ayala presents a political conception permeated by the idea of limiting power and respecting the rights of subjects. This interpretation of the work of Poma de Ayala rescues some forgotten elements in the way human rights have emerged and developed in modern times.

## Anghie’s Thesis on Vitoria Revisited

Paulo de Brito, University of Bristol

Richard Tuck rightly affirms that by the early sixteenth century scepticism regarding the European colonization of America was already integral to the Dominican tradition, of which Francisco de Vitoria was a notable example. In *De Indis* Vitoria discusses whether the Amerindians had indeed a true right to occupy these lands even before the arrival of the Spaniards. One would presume the answer to this question to have been negative since the Amerindian peoples were largely held to be pagan and barbaric. However, Vitoria presents a set of arguments, of which forty do not legitimate Castilian power (e.g. true faith could not be imposed by force). On the other hand, Vitoria also postulates de *titulis legitimis*, which, in turn,

might be seen to justify Spanish domination (i.e., the supremacy of an overriding cause for the greater good to which the free circulation of persons and goods and missionary work were essential, and which the Amerindians could hinder). Though in his lifetime Vitoria did come to acknowledge certain rights to the aborigines, he also resorted to the premise of a just war in particular circumstances, which seemed to justify the colonial presence. Therein lies his main contradiction. As Anghie points out, Vitoria did not, in effect, address the question of order among sovereign states, but rather that found among societies belonging to different cultural settings.

## International Law, Human Rights and Colonisation: Reflections on Israel's Settlement of the West Bank, Gaza and the Golan Heights

Anthony Cullen, University of Leeds

This paper will focus on Israel's settlement of the Occupied Territories and consider the significance of characterising the policy of this State as one of colonisation. In doing so, it will reflect on the historic origins of the practice and the role of international law in the protection and promotion of human rights. The paper will be structured in two parts. In the first I will discuss the reasoning that has guided Israel's settlement policy from start of its occupation in 1967 until the present day. In the second, I will examine the body of international law that applies to territory under occupation, highlighting its implications for the Israel's settlement of the Occupied Territories. Overall, the intention will be to consider the significance of establishing "facts on the ground" through the institutionalised transfer of civilians into occupied territory. In doing so, the paper will seek to evaluate the extent to which the existing occupation of the West Bank, Gaza and the Golan Heights has created a "Garden of Justice" comparable to those administered by colonial powers.

## The Conquest of America and the Catholic Principles of International Law: A Critical Exploration

Yolanda Gamarra, University of Zaragoza

The proposed paper consists of an analysis of the social milieu in which Vitoria and other members of the Salamanca School lived and worked, of how it influenced the construct of the theory, and of the ideas on which Vitoria constructed his legal justification of the colonization of America, marked in turn by anomalies. Firstly, the idea of equality between States as subjects equally sovereign was inconsistent with their subjection to law and, at the same time, refuted by the specific inequalities that existed between them and by the dominant role played by the great powers. Secondly, the natural rights of States, from *ius communicationis* to *ius commercii*,

equal in abstract terms, but revealed in practice as being asymmetric and unequal, to the extent that they were transformed into rights of conquest and colonisation of countries in the Second, and later, Third World by countries of the First World. And finally, the doctrine of “just war” as a sanction and upholding of law, which flies in the face of logic when war is unlimited and generates uncontrollable violence – its nature contravening law itself. In sum, the aim of this paper is to study the progressive secularisation and absolutisation of international society, its transformation into a multitude of sovereign States that claimed power inside their territory and independence in their relations with religious authority (the Papacy) and political authority (the Empire); a period that culminated with the Conquest of America and in which a myriad of studies flourished concerning the (il)legality of Spanish occupation of the New World.

## Critical Human Rights and Liberal Legality: Struggling for ‘The Right to Have Communal Rights’

Roger Merino Acuña, University of Bath

Recent critical approaches to human rights have exalted the potential of this category for seeking progressive agendas (Santos, 2007) insofar as they are enacted within counter-hegemonic cognitive frames (Rajagopal, 2006) towards the construction of “subaltern human rights” (Onazi, 2009). Others, however, have pointed out that the human rights institutional and political hegemony makes other valuable emancipatory strategies less available, and that this foregrounds problems of participation and procedure at the expense of distribution (Kennedy, 2005). Finally, others have explained how the abstractedness of the category entails a de-politization (Rancière, 2004; Žižek, 2005; Douzinas, 2007) or an emptiness that, of course, can be filled by progressive activism, but whose substance is easily re-appropriated by those in power (Miéville, 2005). By engaging with the above-mentioned perspectives, and following the decolonial approach (Mignolo, 2009, 2011), I suggest that the category human rights can be decolonized and being used for progressive agendas only after a comprehensive critique of liberal legality (that entails a critique of liberal abstract rationality, political economy and modernity/coloniality) has been performed.

## Indigenous Peoples and the Baroque Origins of International Law and Human Rights

Miguel Rábago Dorbecker, Universidad Iberoamericana, México

One of the main outcomes of the *Controversia de Valladolid* and the theological discussions centred around the *Universidad de Salamanca* and the *Universidad de Alcalá de Henáres*, is the common origin of international and human rights law. Their birth singles not only discussions regarding the theological basis for Spanish Colonial domination of the Americas, but also fashions the form in which the colonial project would be articulated. *Vitoria*, *Gines de Sepulveda*, *Las Casas* and *Suárez* would establish not only a pathway for the colonisation of territories, but also of the souls of their inhabitants. This process supposed the power of the Catholic Church as the prime source of official ideology for the colonial system. It also implied the institution of other wide forms of coloniality, using *Quijano's* definition, which combined slavery – through the slave trade and the *encomienda* – and the forced acceptance of servitude to the Spanish Crown with the conversion to Catholicism. This theological arrangement also provided for notions of property that would institute the basis for dispossession of the lands of the original inhabitants of the Americas. Given the brutality of the colonisation of the Americas, there is a tendency to minimise the capacity by which the indigenous peoples of the Americas negotiated and re-inscribed institutions such as Catholicism, property and political organisation. The acceptance of the Spanish Crown's administration of the *República de Indios* through the *Leyes de Indias* is perhaps the best example in the formal legal realm. Religious syncretism proves this capacity of negotiation with a Colonial structure, which was not always as present militarily in some areas of the Americas, but nevertheless retained its hegemony. Following *Bolívar Echeverría's* proposal for alternative modernities concretely in the Baroque, this negotiation and negation of the Spanish Colonial machine enabled the very existence of indigenous peoples until today. Even if the concept of universal human rights has its origin in these theological discussions, the whole colonial apparatus was based in the exploitation of the lands and the people through the establishment of a caste system inherited by the expulsion of the Jews and Moors after the Reconquista. This negation of the indigenous peoples rights, continued during the independent liberal republics under the promise of universal rights and the process of internal colonisation. Discursively the operation which *Vitoria* and *Las Casas* produced in the Fifteenth century of embedding Indigenous Peoples Rights in International Law would take more than five centuries in the making. The coming of the Universal Declaration of the Rights of Indigenous Peoples in 2008 would finally include indigenous peoples in the grand narrative of international human rights. This inclusion may be much more problematic than what it seems at first glance. New reconfigurations of traditional legal concepts such as the right to private property (the *Awás Tingni Case* in the Inter-American Court of Human Rights), the right to

prior consultation and the articulation of political autonomy are questioning the core of the Liberal/Capitalist political arrangement. Or are they really just a translation of Multicultural capitalism?

## International Law as an Intimate Enemy

Prabhakar Singh, National University of Singapore

Albeit a law of easy virtues, the paper contends that, today, international law has become an intimate enemy to the Third World. After the European Court of Justice provincialized international law in the Mox Plant Case, it again expressed its preference for dualism in the Kadi case. EU scholars defended the ECJ's dualism as pluralism, adding to the recognized American constitutional dualism. Largely, thus, even though both the EU and the USA keep violating international law, there is an expectation of compliance from the African and the Asian states. This expectation is further forced into compliance through responsibility to protect seconded by the threat of force. As the war on terror evinces, to recall Albert Camus, "it is with cannon shots that Europe philosophises." In times of shifting realities, there exists a love-hate relationship between the Third World countries and international law, animosity mixed with intimacy. Depending upon the nature of international concern, the intimate animosity grows or declines. This constitutes a gradual shift of positions between the Western and the non-Western countries in relation to international law. Using African Union's example, this paper discusses international law's intimate animosity vis-à-vis the Third World.

## A Trojan Horse? The pirate and the international constitution of the in/human

Roberto Vilchez Yamato, Birkbeck College, University of London

During the 1990's, the discourse of "the end of history" was accompanied by a sense that, finally, human rights were going to be inter/nationally protected, enforced, and thus realised. After the end of the Cold War, a certain discourse would advertise that we were all – as one, as humanity – moving towards the global. The UN International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Pinochet Case, and the Rome Treaty establishing the first permanent International Criminal Court were read, at least by some, as some kind of institutional proof of the realisation of a universal, self-fulfilling prophecy of enlightenment. In such story, the "new" international criminal law was celebrated as the final, natural next step within the universal progression of human rights towards the global. What is more, the universal, the global and the international could be understood, or simply confused, as synonyms, and the so-called universal jurisdiction could be celebrated as the enforcement paradigm of humanity's sovereign law and order.

According to the so-called Princeton Principles on Universal Jurisdiction, this progression towards humanity's universal law and enforcement had its origins in the criminalisation of the pirate, the first international outlaw, also constructed as the "enemy of human race". In this paper, I attempt to develop a deconstructionist reading of "international human rights-international criminal law" through a re-reading of such an "enemy of human race", of such an international outlaw, or outsider of the international order. I aim at critically engaging the following provocation: taking into account that liberal story, was/is the pirate a kind of Trojan horse? More seriously, with the pirate, I aim at engaging a double problem: international sovereignty and the constitution of the in/human.

## Bartolome de las Casas and the Colonial Origins of Modern International Law and Human Rights

José-Manuel Barreto, Goldsmiths College, University of London

Natural law operated as a safeguard for ensuring respect for the indigenous peoples of America already in the Sixteenth century. In this counter-European variation, the theory of natural law became a shield that was used to protect human beings and peoples being subjected to murder, rape, torture, enslavement and plunder. Drawing from his studies of philosophy, theology and Roman and Canonical law, Bartolome de Las Casas elaborated a theory of natural law and international law with the aim of protecting the Indians from the cruelty of the conquistadors. As in the case of Francisco de Vitoria, Las Casas' work was mainly engaged with the relationship between the Spanish invaders and the peoples of the "New World". Las Casas' preoccupation was again that of creating a base for a universal jurisdiction, an international legal framework able to apply to Indians and to Spaniards. However, contrary to Vitoria's interpretation in which the new universal jurisdiction was thought of as a way of proclaiming the rights of the invaders, Las Casas' elaboration of natural rights doctrine sought to counteract the butchery of the war of conquest. Thus, this paper explores the work of Las Casas beyond his engagement with activism in order to show his contribution to the theory of modern international law, and with a view to consider the question of the colonial origins of modern human rights.

## *Cave! Contra vim dominium non crescit salvia in hortis:* Revisiting the ECtHR Judgement of Handölsdalen Sami Village and Others v. Sweden through Francisco de Vitoria

Can Öztas, Birkbeck College, University of London

Francisco de Vitoria reconstructed and extended the Roman law principle of *dominium* (as title and property) to the West Indies. He reacted to the growth of trade, commerce and the expansion of European rule by producing a legal and political system that rendered this expansion as natural development. He argued in favour for the rights of the local populations based on their being human with reason. *Dominium* played a central role in the construction of the universal legal system. While the system argued for individual rights, peace and justice based on universal morality, in reality its goals were to maximise land and profit of the Spanish, privileging of capital and economic growth over human suffering. The construction of a system of law that legally sanctioned wealth creation and influence, exploitation and the distribution of material resources through the exercise of right to property, disguised within a system that appeared egalitarian functioned through the inclusion and the exclusion of the indigenous people in order to allow for their exploitation. This presentation will re-examine the Admissibility Decision and Judgement of the ECtHR case Handölsdalen Sami Village and Others v. Sweden through the legacy of Vitoria.

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## JUSTICE AND LAW IN GENDERED GARDENS

Convener: Eva-Maria Svensson, Göteborgs universitet

The garden as a symbol can be understood in different ways. Garden is close to Nature, but as such cultivated by human beings. The relation between nature and human beings has been understood in varying ways through history. According to Carolyn Merchant (1980), Nature in an organic and living setting was abolished during the scientific revolution, in favour of an objectified nature controlled and possible to exploitation (by men). The relation between Mother Nature and Man turned into an unequal relationship in which men controlled both nature and women. Can the Garden as a symbol be a way out of the exploiting way of perceiving Nature – and of woman? Can a new and more sustainable ecological view on the world go hand in hand with a more sustainable gender equal view?

The Garden is also the space we visit (physically or psychically) in daily life. With Dorothy Smith's everyday-life concept the "doing of every-day life" can be made visible. For instance, what representations of human beings do we meet in daily-life, in commercials, at work, at school, on public transportation system and other spaces. Every-day life experiences help us to understand mechanisms of production and reproduction of inequalities and discrimination.

Finally, the garden as a society has its institutionalized relations of exclusion, exploitation and dominance. Can Justice be understood and used as a notion for the absence of exclusions, exploitations and dominance, according to Iris Marion Young? Justice in a Nordic welfare state context has mainly been perceived as redistribution, achieved by politics and not by the judiciary system. Justice today is to an increasing extent perceived as claims for individual rights and access to the judiciary system. Can the Gardens as a (spatial and concrete) symbol help us to rethink justice to capture a more complex understanding of justice?

## PAPER ABSTRACTS

## Justice for women exposed to male partner violence

Monica Burman, Umeå Forum for Studies on Law and Society, Umeå universitet

For many women male partner violence is an everyday experience related to gender and power. The aim of this paper is to address justice for women exposed to male partner violence in the context of criminal law. Legal and policy measures have been undertaken internationally and domestically to target men's violence against women in heterosexual relationships as a social and legal problem. Criminal legal measures undertaken in Sweden aims to ensure women's human rights and to develop more effective and gender-sensitive laws and policies. However, feminist research, especially in the Anglo-American context, has questioned criminal justice interventions as ineffective, discriminatory, racialized and destructive ways of dealing with the violence in the best interest of women and their families. It has been suggested that other legal or social measures, such as family counseling, restorative justice, civil law or social rights, might give better results and a sense of justice for differently situated abused women based on their experiences of violence and the societal responses to violence. In this paper I will argue that criminal law, with these problematic aspects in mind, still has an important role to play as regards justice for women exposed to male partner violence. Criminal law is not only a tool for delivery and fulfillment of individual rights and problem solutions. While discussing justice, criminal law must also be contextualized and theorized at societal, normative and discursive levels and the interrelations between different levels should be acknowledged.

## Legal Cultures of Fiscal Justice – What is best practises for gender equality?

Åsa Gunnarsson, Umeå Forum for Studies on Law and Society, Umeå universitet

The power to raise and spend public revenues remains fundamentally associated with the nation state at a time when states increasingly set their fiscal directions in response to pressures associated with global economic integration, capital mobility and market deregulation. Nation states have also agreed to collaborate on matters of fiscal governance and policies in the OECD, the WBG and the IMF. Apart from having a strong global influence on world trade, these organizations also have a worldwide influence on multinational commitments to engage in stimulus budgeting and on cooperating in preventing tax evasion. A global economic order has been on the agenda for a while as a means for fighting harmful tax competition. Tax law reforms are regarded as valuable instruments for achieving this aim (Mumford 2010, 36-37). The series of economic crises starting with the global economic

crisis in 2008 has also led to new multinational commitments. The interventions of international organizations in the economic and fiscal governance of national states is exposed, for example, in the way Greece has been forced to submit to massive budget cuts and fiscal restraints. Many OECD countries have reformed their income tax over the last twenty years. Even though a common understanding of the ideal income tax system has never been expressed openly, there are common strands in the various tax reforms. Based on a neoliberal tax ideology, a special interpretation of what constitutes an optimal taxation for economic growth has guided the international trend in redesigning national budgets and fiscal systems. A line between fiscal purposes and social justice has been drawn, meaning that tax regulations with redistributive intentions are seen as political interventions in the market economy. Economic intervention creates excess burdens or welfare losses, which hinder economic growth. As redistribution of wealth and income are based on political ideals concerning economic equality, such interventions are seen as creating inefficiency in the economy (Hayek 1956; Korpi, Palme 1993; Prop. 1989/90:110, 620-632). This legal culture of tax system design developed inside the OECD community has resulted in a normative standard whereby distributional neutrality is a part of the concept of fiscal taxation, which aims to preserve the status quo. In contrast to this legal culture, the Swedish welfare economy represents a more egalitarian culture with a high tax burden, a comprehensive and generous social welfare system. Despite high levels of social spending – which according to the theory of optimal taxation creates dead weight losses – the Swedish economy is growing. The paper will show how it is possible to build a competitive economy built on an active legal culture that promotes gender equality.

## Corporate Speech as an Invasive Species

Tamara Piety, University of Tulsa College of Law

Freedom of expression has, until recently, been perceived as an organic product of a commitment to liberal democracy. Its roots are in the democratic process itself. To be sure, freedom of expression needed to be tended and nourished in order to thrive. Yet its roots rose organically from the lived experience of democracy. Freedom of speech has never ever been an Eden, i.e. the ideal was always more perfect than the reality. Yet of late the notion that freedom of expression can spring up from democratic processes and that democratic processes are sufficient to protect is being replaced by the metaphor of the marketplace and, we are told, money is speech. Corporations have used the rhetoric of equality and the mechanisms of democracy to supplant democracy with what Robert Monks has called a “corpocracy” where corporations have more speech rights than people do because they have access to more resources. Corporate interests have argued for formal “equality” for their expression in a manner that disregards the reasons for which we protect freedom of expression and which make real equality for human beings, especially

women, captive to the economic aims of commercial enterprise. Human beings will have just as much freedom of speech as will maximize profits. This trend has perverted the values reflected in protection of freedom of expression and turned it into a commodity to be bought and sold in the marketplace. Those with no resources have no speech. Protection for commercial speech is an invasive species which threatens to make a number of problems like global climate change harder to solve and threatens to overrun democracy itself.

## Gendered consequences of the commercialisation of freedom of speech

Maria Edström, NORDICOM, Göteborgs universitet & Eva-Maria Svensson, Department of Law, Göteborgs universitet

Gender stereotypes and sex discriminatory images are commonly used in advertising. They are considered to sell. Advertisement is a large part of the content in media, and what is more, commercial messages are to a great extent blurred with editorial messages. With a strengthening of the legal protection for commercial messages the space for gender stereotypes is consolidated. Focus in this paper is gendered consequences of challenges from the market on freedom of speech in the media. With the expression commercialization of freedom of speech we try to capture a process in which commercial interest to communicate commercially is claimed to be a legitimate interest. Commercial messages are framed as commercial speech, and commercial communication is framed as commercial freedom of speech. By doing so, commercial interests are framed as legitimate interests worth protection by law. Commercial speech has a weaker protection in many constitutions, but during the last years we have seen a growing discussion about giving commercials the same protection as other expressions. With a situation in which commercial messages are considered to be speeches worth protecting by law, and in which commercial interests claim more and more of the space for communication in society, we would like to turn the way we understand and think of communication and space for communication up-side-down out of a citizen and a gender-equal-promoting perspective. The claim for what kind of interests should be legitimate interests to protect as part of the right to freedom of speech, have to be reconsidered.

## Clio's Forgotten Consciousness: temporal wanderings in the gendered gardens of law, critique and justice

Maria Drakopoulou, Kent Law School, University of Kent

This paper interrogates the interrelationship between historiography, historical method and the feminist project in law. It argues that the existing modes of representation of the historical trajectory of feminist legal thought and politics, in privileging a phenomenological understanding of historical consciousness and a belief in the emancipatory power of law, have valorised a particular understanding of the past and its relation to the present. In detaching the historian from her own contemporaneity this particular understanding has served to strip her of the ability of self-reflective historical inquiry and, in so doing, to limit the critical horizons of modern feminist legal scholarship. Through revealing the shadowy threads which connect historical narratives of feminist legal thought and politics to current feminist critique of law and justice, this paper argues for a critical self-reflexivity, one which posits feminism's past and its historical interpretation as partaking of feminism's lived experience and, in so doing, offers a reading of the present and its history as mutually constitutive. In this way it also explores the possibilities of thinking otherwise, not only for the writing of an alternative history of women and law, but, perhaps most importantly, for a re-conceptualisation of the feminist critical engagement with law.

## Experimental Spinning and the Gender of Invention

Cressida Limon, Melbourne Law School, University of Melbourne

The paper addresses the gender of invention through a consideration of the practice of spinning. It is a feminist critique of the legal concept of invention that has come to dominate intellectual property and the focus on 'high' technology, especially biotechnologies. Freud hypothesised that women had made few contributions to the inventions and discoveries of mankind. He proposed one exception: weaving. This, however, he considered motivated by women's shame at our lack of a penis. The invention of weaving, Freud continues, was a very simple one as women simply copied nature by observing the matting of pubic hair. Spinning, I suggest offers an alternative to Freud's phallogentric metaphors of weaving/invention. Spinning is both a feminine art and skill and the necessary condition for any weave (and law). I draw (the word 'draw' is significant) on the work of Victoria Mitchell on spinning and textility. In spinning drawing (whether you use a stick, a distaff, a wheel) is "one of the most subtle and significant manipulations of fiber [...] Multiple fibers are drawn into a single thread, an act of deliberate fashioning which, although notably different from the process of extrusion through which hair or silk is formed through organic growth, carries with it a morphological inevitability, as if through a continuity of relations within a coherent system" (2006: 343). In other

words, there is a law of spinning. Did I mention that the best place to spin is in a garden? But not on a windy day.

## Women and war: retelling a (very) old story

Anél Boshoff, Aberystwyth University

This paper draws on some selected aspects of the *Iliad*, and especially on the ways in which Homer's epic represents the nature and fate of its female protagonists, and tries to find new perspectives on contemporary warfare. First, looking at the *dramatis personae*, it becomes clear that the cast in this ancient story of war is, on the one hand, clearly gendered, almost representing two opposing worlds or cultures: on the one hand that of the warriors representing a relentless and blind combative force (*alkē*); and on the other hand, the world of Andromache, the wife who persistently begs her husband Hector to find an alternative to war. However, despite this stark opposition, there also remains traces of inherent ambiguity and unstable and confused gender imageries in the depiction of the warring protagonists – Achilles passionately pleads for peace and Athena, with her terrifying Gorgon, appears as the female face of absolute horror. Looking at the plot of the *Iliad*, two related themes and its consequences for contemporary theory, will be considered: (1) The aim of the Trojan War was the total annihilation of the enemy. Hannah Arendt (*The Promise of Politics*) points out that, unlike the Romans, the Greeks completely separated war from politics and thus completely barred the possibility of reaching a settlement or entering into political negotiation with the enemy. Law's function was to enclose the non-violent political space of the *polis* and not to regulate what happened outside of it. (2) During the massacre that ended the bloody ten-year Trojan War, Andromache was dragged off like a slave and given as a war prize to Achilles' son. Cassandra was raped by Ajax (the lesser) on the altar of Athena. Against the background of these ancient but not out-dated atrocities, divergent theories on international law will be briefly compared: post-Marxists and realists regarding the law as simply irrelevant; liberals and international society scholars regarding the problem as one of compliance; and Arendt, like Foucault, pointing to the productive/constitutive power of the law to create a new political space rather than to try and control a pre-existing situation or to restrain an already entrenched power.

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## LAW & ANARCHISM

Convener: Gilbert Leung

There is, to put it mildly, a strong tendency in anarchist circles to think against or outside law (*anarkhia*). Kropotkin considered Diogenes the Cynic the first true anarchist, the first known in the 'West' to counter, both in word and deed, the norms of the city. Kropotkin himself called for disobedience to all authority and to refuse to submit to the law. Today anarchy can also be found in music and art as much as politics, or rather, it also manifests itself in aesthetic political form, one that continues to confront, provoke and guard against the end of history. With such a background, anarchism could lay claim to be one of the most important platforms from which to launch a critique of law.

But this, of course, begs the question: Is there such a thing as an anarchist legal theory, and if there is, how might we conceive it today in the light of recent social, political, and critical theory? Is anarchist thinking contaminated by its own normative concerns and would this be the same as saying it is contaminated by legality? On the other hand, is the ground of law itself anarchic, contingent, without foundation or head, except for ones 'we' invent? In other words, could legal fictions form one pillar of an anarchist legal theory? Perhaps most importantly, how could an anarchist thinking of law inform both the struggles against and the apathy towards the injustices of neoliberal and biopolitical governance?

This stream invites you to think and feel with, around, beyond and, if you wish, against anarchism(s) in relation to law or against law in relation to anarchism(s); to express and to sublimate, to produce and be creative in the face of its inherent tensions.

## PAPER ABSTRACTS

## Law and an-archic ethics

Matthew Stone, University of Essex

The specific relation between anarchy and law has received surprisingly little treatment within critical legal theory. There remains a quietly persistent question as to whether law is negated by the concept of anarchy, or whether anarchy may allow for, or even require, a radical form of legal structure. Yet the two alternatives produced by this dichotomy – expunging law on the one hand, radicalising it on the other – are locked in a co-determinative imperfectability. The difficulty of conceiving of community without law mirrors the respective contradictions of thinking of law that is an-archic: law that is somehow not-law. This paper enters the debate by thinking of anarchy not as an objective political ideal, but as an ingredient of emancipatory subjectivity. It argues for a way of thinking anarchy as entailing neither the rejection nor co-option of law but rather as a horizon of perpetual ethical resistance, set against law's interminable terrain.

## The new anti-lawyers: On the emergence of new anarcho-communist writing in international law

Grietje Baars, City University, London

The last decade has seen the rediscovery of Marxist legal theorist Evgeny Pashukanis in the work of international law scholar China Miéville. Pashukanis' commodity form theory of law posits that law holds no emancipatory potential, advocates extra-legal struggle and looks forward to a communist anarchy, without state and without law. China Miéville's *Between Equal Rights: A Marxist Theory of International Law* (London: Pluto 2004) likewise presents an anti-law argument, explaining how law (through its very form) works as a vital ingredient co-constituting the current configuration of global power, and likewise showing how ostensibly 'good' law such as human rights law merely functions as an ideological smokescreen legitimating the legal enterprise as a whole. Miéville's monograph inspired a new generation of international law scholars to explore these arguments and apply them in discreet areas such as international economic law (Rasulov), to specific questions including the question of international law and imperialism (Knox), to particular movements such as the international human rights movement (Kotiaho) and in order to deconstruct legal proposals to policy questions, e.g. in the field of 'corporate accountability' (Baars). In this paper I explore both Pashukanis' and Miéville's commodity form theory of law as examples of anarcho-communist legal theory. I comment on the emergence of a new body of anti-law work at this precise moment (period) in time – the significance of its emergence in international law scholarship – while extrapo-

lating where this generation's work may take us next. Specifically, I will argue that this new anti-law scholarship can (must) play a key role in revitalizing the struggle against the 'injustices' of neoliberal and biopolitical governance, by exposing and articulating law's function within capitalism and inspiring a redirection of so-called 'rights-based' activism into meta-, extra- and counter-legal avenues.

## On the Anarchist Question: Law, State and Two Kinds of Cynicism

Soo Tian Lee, Birkbeck College, University of London

cyn·i·cal /'sɪnɪkəl/ adj. 1. Expressing jaded or scornful skepticism or negativity. (*American Heritage Dictionary of the English Language*, Fourth Edition). 2. Resembling the Cynic philosophers in contempt of pleasure, churlishness, or disposition to find fault. (*Oxford English Dictionary*). Emma Goldman once defined anarchism as "[t]he philosophy of a new social order based on liberty unrestricted by man-made law." Many who embrace anarchism as a political position commonly feel that they have to oppose law at least in rhetoric, even if not in practice. This is unsurprising given that the absence of coercive authority implicit in *an-arkhē* appears to exclude the forms of law that are predominant in contemporary society, linked as they are to state-centric institutions. In essence, what is common is a cynical view of law. There are, of course, different forms of cynicism. This paper will attempt to think through some elements of the relationship between law and anarchism (embodied in the ideas and praxis of actual anarchists) by considering two forms of cynicism – the first being a sense of the word more commonly invoked in everyday conversation, and the second linked to the canine-linked origins of the Greek philosophical school.

## Anarchy as Improvisation

Sara Ramshaw, Queen's University Belfast

Anarchy shares with improvisation the quality of being lawless. Both supposedly flout form and deny or defy structure and law. At the same time, though, anarchy, as with improvisation, relies on this structure for its definition and meaning, as that which supposedly disobeys already established forms of authority. As Mingus says of improvisation – "You gotta improvise on somethin'" – so too of anarchy. Without law from which to revolt, recognition as anarchy would be impossible. Following Derrida, then, anarchy is conceived here as a necessary impossibility. It is necessary in the sense that, without it, we would remain forever trapped in the festering determinacy of generality and the selfsame, devoid of hope and the possibility of transformation or change. Yet, at the same time, it is impossible to recognise the new or the singular event of anarchy without a context or general back-

ground from which meaning and designation emerge. Through an exploration of the impossible necessity of anarchy as improvisation, this paper asks, if it is never possible to think outside or against law, what is the point of anarchist thought, or why exactly does anarchy matter? The answer to this question may be surprising.

## 'Destroy the idea of Divinity': Bakunin's Anarchism

Angus McDonald, Staffordshire University

It is superfluous to offer one more synoptic overview of anarchism, selecting from the wildly contradictory positions of those identified by themselves or others as belonging to the anarchist tradition, and seeking to assess their "contemporary relevance". Instead, we might adopt some contestable precepts which have at least the benefit of providing orientation as to what is worth looking at here and now in anarchism. These precepts: first, anarchism is most significant as a nineteenth century politics, philosophy and mass movement, one current of revolutionary socialism. Other "anarchisms" are either precursors or successors to this current, to which the label is attached because of their affinities to this current. So, any attempt to engage with anarchist thought should look to the nineteenth century writers. Second, anarchist texts of the nineteenth century are too little read, and if read, are read in a historicising way that only emphasises their irrelevance to our present circumstances. Instead, we could and should read these authors as we read Greek philosophers: irretrievably distant from us, but still to be read for their ideas, as if we could be in dialogue with them today without condescension. Third, let the historians tell us why and in what circumstances the texts were written, relativising their content, nonetheless we might read them as putting forward coherent positions that still demand our responses, even a response that causes us to consider why such demands are so absent from present day politics. Taking these three precepts, this paper engages with a text by Michael Bakunin from 1872, his Program of the Slavic section of Zurich, drawing from it one definition of anarchism allowing for a consideration of the view it takes of law. Other texts by Stirner, Proudhon, Kropotkin, Reclus could equally well be considered, but the argument for closely engaging with one text has been stated. This one text is of course not selected entirely at random, but was chosen to find an instance when anarchism was fully engaged in the politics of the International, in debate with marxism and informed by the social revolutions of the period.

## An Anarchist Analysis of Property: Tool of Domination and Exploitation or Means of Self-Government and Prosperity?

Sirus Kashfi, Université de Panthéon-Sorbonne & Osgoode Hall Law School

This paper aims at critically examining anarchist ideas about property as well as its libertarian alternatives. In contrast to anarcho-capitalists and individual anarchists, who replace political authority with economic authority through the worshiping of private property rights, social anarchists analyse private property as an essential element of governmentality whereby the masses (proletariat) are dominated and exploited by a minority (proprietors) who possesses the means of production. While social anarchists regard private property as “theft” because idle and greedy individuals have monopolized lands, factories, and banks while the majority of people live with “wage slavery”, that is to say, the bare minimum necessary to sustain the existence of workers; in contrast, rightist anarchists regard private property as a necessary element for self-government and prosperity. Elsewhere, libertarians believe that the protection of private property requires State intervention through criminal and civil laws relying on the police, the prosecutor, the lawyer, and the judge who possess a sophisticated panoply of ideologies and sanctions at both national and international levels. Meanwhile, anarchists have proposed alternatives to monopolized property rights.



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## THE LAW AS AN INVASIVE SPECIES: WHY AND WHEN DO LEGAL RULES HURT RATHER THAN HELP A GARDEN OF JUSTICE?

Convener: Megan McDermott, Attorney, Wisconsin

As a society, we have become conditioned to call upon legislators and the court system to resolve society's pressing issues. There is no doubt that the law has its place. Yet too often, for situations that require a multi-disciplinary approach, the introduction of legal rules is extremely disruptive to the societal ecosystem. For example, on the criminal side, we rely heavily on criminal law to address the complex issue of drug use and addiction; on the civil side, reliance on family law and uninformed judges may distort parents' incentives and undermine the well-being of children.

These problems are not always without solutions. But too often, we see that stakeholders in the legal system are reluctant to loosen their grip once certain issues have been placed within their jurisdiction. This may be due to any number of factors, ranging from self-aggrandizement and institutional inertia to the simple realities of line-item budgeting. Over and over again, we see that once unleashed, legal rules crowd out promising grassroots efforts and kill off effective multi-disciplinary approaches.

This stream will focus on major contemporary issues that call for multidisciplinary approaches (e.g., human trafficking, bullying, political speech, genomics, the status of embryos, etc.). As we who tend gardens of justice look for solutions to these problems, we need to view legal rules as a risky invasive species that could completely subsume our garden. We will discuss whether it is possible *ex ante* to have a full understanding of what legal rules will do to our garden, as well as the steps necessary to plan and monitor these effects once legal rules have taken root. Is it possible to predict the impact and have a plan in place to minimize it? Is it possible to eradicate legal rules quickly if we see that they are actually destroying our garden?

## PAPER ABSTRACTS

### Collateral Damage from Criminalizing Aggression? Lawfare Through Aggression. Accusations in the Nagorno Karabakh Conflict

Marieke de Hoon, VU University Amsterdam

The regulation of war through the prohibition and criminalization of the act of aggression has provided a common legal language to denounce an opponent of committing aggressive war. In times of conflict, this language is often used between warring sides and is understood globally. Nevertheless, due to the indeterminate nature of aggression, different actors may invoke different interpretations and conceptual frameworks related to the legality of war to accuse the other of aggression. This paper draws on the 25-year old Nagorno Karabakh conflict in the Southern Caucasus to illustrate this dynamic. A deconstruction of the arguments used by the Armenians and Azerbaijanis to accuse each other of committing aggressive war shows that even though both sides speak the same 'language' of law, they rely on contradictory underlying assumptions, both in their internal argumentative structure as well as between both sides' legal argumentations. This paper asserts that the notion of aggression can be used as a weapon of lawfare because the laws of war can be interpreted differently by different actors. The paper explores how this is done and what this implies for the crime of aggression. Strengthened by the criminalization of aggression, the indeterminacy of the notion of aggression provides conflicting parties with another weapon to battle with, and another battlefield to fight on. Despite its aim to monopolize and prevent war, the regulation of war and criminalization of aggression thereby provides new ways to continue a conflict, allows law to be used as a strategic tool of lawfare, and creates false presumptions on the ability of law to resolve fundamental disagreement.

### Administering Juvenile Justice in Nigeria

Osuagwu Ugochukwu, Barrister, Abuja, Nigeria

A nation's juvenile justice system is an integral part of a functioning criminal justice system. In addition to ensuring the constitutional protections guaranteed to all persons accused of crimes, an effective juvenile justice system also places special emphasis on philosophies of concern, care, and reformation for young people who are accused of violating the law. This paper uses a background of international norms and guidelines to analyze the efficacy of the Nigerian juvenile justice system in fulfilling these often competing goals. The author finds that the Nigerian system is inadequate in protecting these values because of inconsistencies and ambiguities in municipal legislation. For example, the age of criminal responsibility is different under various statutes, and bail provisions intended to ensure basic constitutional

protections are capable of being abused. Further, policemen are known to have been brutal in their dealings with juvenile offenders, and a shortage of specially trained state officials makes the state machinery ill-equipped to facilitate the process of rehabilitative justice. The paper concludes that having dedicated juvenile courts may improve on the current system, in which magistrates handle both adult criminal cases and juvenile matters. The paper further argues that juvenile custodial institutions have not been effective in rehabilitating juvenile offenders housed there, and makes recommendations to address these shortcomings.

## The Distorting Effect of the Dual Sovereign on Criminal Justice in the United States

Megan McDermott, Attorney, Wisconsin

With the highest per capita incarceration rate in the world, the United States presents an important case study on the philosophy and effectiveness of criminal justice policy. This paper examines one aspect of the United States' approach: the dual sovereign system for investigation, prosecution, and incarceration. Up until the mid-20th century, most crimes were investigated and prosecuted locally, with all associated costs also borne within a particular state. In contrast, the federal government historically had a narrow and circumscribed role in criminal justice, with strong incentives to prioritize crimes that offered the greatest possibility of financial recovery for the public fisc. Over the last thirty years, however, the federal government's role in criminal justice has expanded dramatically, as has the size and the budget of the investigative, prosecutorial, and penal agencies that comprise the federal Department of Justice. Today, the vast majority of federal inmates are serving sentences for non-violent offenses, such as drug and immigration crimes or gun possession. To the extent that removing these individuals from the community is beneficial, any benefit is primarily local, yet the costs of prosecution and incarceration are borne nationally. This paper argues that the massive expansion of the federal Department of Justice has obscured the dynamics of the United States' penological system, making it difficult to develop effective criminal justice policy at the local level. Likewise, the disconnect between costs and benefits distorts incentives for decision makers and prevents them from making meaningful decisions about law enforcement. This paper concludes that in a time of shrinking budgets and re-evaluation of national priorities, the United States should consider alternatives to the current dual sovereign system of criminal justice.

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 OPEN STREAM: GARDENS OF JUSTICE

Convener: Matilda Arvidsson, Lunds universitet

## PAPER ABSTRACTS

### State of the Garden: Decaying due to the Systemic Failure

Ayush Arora, University of Delhi

Posterity always remembers those who created beautiful gardens, complements those who maintain them well, respects those who allow their territory for establishing gardens, and loves those who initially propounded that very idea of creation. However, such gardens remain superficial superstructures void of humanism, if analysed from the standpoint of the common person as placed in a developing multi-ethnic society of India. It is more so, if contextualized in the perspective of world development propelled by forces of invisible hands, globalization, Information and Communication Technologies (ICT) and knowledge. It is corroborated by the prevailing general lawlessness, riots and social insecurity, suicides, massive corruption, illiteracy, poverty and unemployment, glaring socio-economic inequalities, the poor access to education and health facilities etc. Partly attributable to the prevailing strong nexus of politics-business-bureaucracy-judiciary, the life of the common person in such a garden managed by insensitive and dishonest gardeners is gruesome despite boasting of a high growth economy with elite consumption. It is realized that until or unless the rules concerned are not in ultimate analysis issued from a sovereign political authority possessing a humane and people-sensitive approach, those gardens will continue to exist for namesake. In this setting, this paper after briefly reviewing the evolution of the present day globalizing India in post independence period, examines the dynamics of how such a beautiful garden has been governed ruthlessly by a few to keep at bay the majority of the population. It further brings out the serious need to evolve a well-placed legal system in the context of jurisprudence, deontology and utilitarianism particularly for the political class in India, who are well settled to behave as the permanent gardeners and custodians of the garden.

### Crime-focused Law and Sovereign Creations

George Pavlich, University of Alberta

Today, expansive criminal justice industries define criminal acts, generate criminal identities and aspire to reduce criminality (whether through deterring punishment or treatment-based rehabilitation). Despite a lineage that dates back many centuries, such governance has shown little sign of making substantial inroads into its aspirations. However tenacious the failures no doubt are, there is another,

more successful, political side to criminal justice; namely, its ability to author and authorize a sustained politics of law-conserving sovereignty. Reflecting on one example of that success, this paper will examine how a colonial sovereignty politics emerged in large measure through the language and force of crime-focused law at the Cape of Good Hope after 1795, immediately following the collapse of the Dutch East India Company (VOC). By charting the unusual reflections on crime, law and sovereignty politics during the turmoil of the next decade, it examines how contextual images of colonial sovereignty were influentially framed through the argot, idioms and force of crime-focused law. The aim here is to show how crime-focused law declared, enforced, summoned, authorized and sustained an unfolding version of sovereignty politics. In so doing, the paper will argue that placing undue emphasis on discourses that champion crime reduction deflects attention away from the vital role that crime-creation plays in generating a particular sort of sovereignty politics. This approach promises to provide some insight into how and why vastly expanded criminal justice industries fail but yet thrive because of their success in sustaining the unspoken foundations for a pervasive sovereignty politics.

## Juridical Field and the Autonomy Game

Martin Škop, Masaryk University, Brno

Pierre Bourdieu's concept of the juridical field presents a remarkable instrument for describing the position of law in society and its relation to other fields (e.g. power field). It also describes the development and existence of the modern state. The concept of juridical field reflects the struggle for the control over state capital. This contribution focuses on the image of law as an autonomous field. The paper focuses on the possible use of Bourdieu theory in the research on the Czech juridical field and its structure. In the Czech Republic, legal practice (the interpretation of law and application of law) is presented as autonomous field where is only little space for employment of findings of other humanities (or social sciences) and also as a field where particular forms of capital has no impact. In my opinion this leads to isolation of legal field in theory. Another consequence of this autonomous representation of law is an increasing impact of non-legal factors. However this impact is not expressed in legal language. In other words the nature of the Czech juridical field is heteronomous. This blurred nature of the field leads to possibility of soft power manipulation. Here the utilization of symbolical capital triumphs. To illustrate this process of utilization I use the case of the new Civil Code which will come into force. This New Civil Code (passed 2012) causes changes not only in law but also in political and power field.

## The bonds of obligation

Scott Veitch, Faculty of Law, University of Hong Kong

This paper considers the nature of social and legal bonds. It addresses their changing relations and significance, evidenced through a number of more or less corporeal manifestations.

## Control and Consecration in Cultural Reproduction: Towards a Critical Copyright Theory

John Tehranian, Southwestern Law School, Los Angeles

This paper proposal stems from chapter in my recently published book, *Infringement Nation: Copyright 2.0 and You*, published by Oxford University Press. Building on an emerging literature that I dub ‘critical intellectual property studies,’ the paper examines the profound role that copyright, through its forceful regulation of expressive activities, plays in the construction of meaning and the maintenance of social order in the twenty-first century. To provide a framework for future work in the field, this paper identifies three primary moments of analytical interest for critical intellectual property queries: (1) the creation of rights; (2) the assertion of rights; and (3) the adjudication of rights. As I illustrate, decision-making in these three theatres of operation reveals the intricate way in which ostensibly neutral laws have combined to create hierarchies of informational and cultural rights that patrol relations between sovereigns and their subjects, corporations and individuals, and entrenched interests and surging parvenus. Specifically, the paper discusses how the seemingly neutral features of the American copyright regime – in both its procedural and substantive guises and through such features as the registration requirement and the use of aesthetic judgments – play a fundamental role in shaping social structures and regulating individual behaviour as part of a larger hegemonic project. The paper draws on a wide range of examples, from the use of (unauthorised) music at the American detention facility at Guantanamo Bay and the broad immunity American states enjoy from copyright liability to the surprising place of William Shakespeare and the opera in the nineteenth century American culture to juridical responses to send-ups of two American classics – *Gone with the Wind* and *The Catcher in the Rye*.

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## THE UNCONSCIOUS OF THE COURTS OF JUSTICE: BETWEEN THE VISIBLE AND THE INVISIBLE

Convener: Isabelle Letellier, Université de Provence, Aix-Marseille I

The idealization of justice calls for the image of vision: giving a judgment requires that every aspects of the situation have been seen and examined. How can we rely on the truth of justice if it is not based on the decisions of an all-seeing eye? But here precisely, the representation of the all-seeing eye of justice can be considered as a way to repress the invisible of and in justice. From the idealization of justice to the very concrete courts of justice, stands the invisible: the invisible is for instance what must be hidden in order to legitimate justice or what is left of the unknown surrounding the case and the judgment, despite every possible enquiries, but also what is most often not questioned in the prejudices implied in law itself and in the specific setting of the court.

If courts of justice are the place where justice is enunciated, that is, put into an act, they strongly question the idealization of justice, because they are making visible the invisible of the representation of justice which they are based on. How can we question this unconscious representation of justice in the process of representing justice in the courts? To what extent can we look at the setting of the court as a setting of a scene whose aim would be to hide the unknown – or in the Lacanian terms the Real – as the scene of fantasy that constitute a screen memory to the psyche? How the return of the repressed makes his way despite of or paradoxically through the efforts to build a visible setting in the courts of justice?

But if the courts of justice do not succeed in hiding the invisible, they definitely succeed in parting society in a visible part and an invisible one, excluded from the *polis*, sending unwanted criminals inside the dark walls of prison. When Oedipus becomes aware of his crimes, he blinds himself, because he cannot face the gaze of the citizens of Thebes anymore. If criminals do not blind themselves, they have to be withdrawn from the gaze of society. In this regard, courts of justice can be considered as keepers of the frontier between the visible and the invisible. Hence can we question courts of justice as places where the maintaining of this frontier holds together society through its division? Can we read it as a place where the Real is de-territorialized? And to what extent can we look at this invisible part excluded by the courts of justice to make visible the unconscious of justice in which society relies on without questioning it?

## PAPER ABSTRACTS

### Haunting Justice: Spectrality, Performativity and the Political

Basak Ertür, School of Law, Birkbeck College, University of London

A murder trial in Berlin, 1921: the defendant admits to the killing, witnesses corroborate, there's some evidence to the effect that it was premeditated. But the trial results in acquittal. The key figure in this unusual outcome is a ghost, that of the defendant's mother, understood as having haunted his intentionality. In turn the very invocation of this singular ghost brings thousands of other ghosts into the courtroom, haunting the trial in myriad ways. Historically, this murder trial is situated between the First World War and the Second World War, between the war crimes trial that never was, and the war crimes trial to come, relating the two in a spectral logic, whereby the ghost of the past and the ghost of the future cannot be differentiated once and for all. Departing from a close reading of the trial transcript, and linking it to a discussion of several other, more contemporary criminal trials, I consider the ghosts of international law, spectral ruptures in the political, and the disjointed temporality of sovereignty. In an attempt to understand the "political" of political trials, I work with theories of performativity as understood by J. L. Austin, Jacques Derrida and Judith Butler; and combine Derrida's understanding of spectrality with other insights into the logic and structure of haunting, such as those offered by Sigmund Freud and Avery Gordon.

### Gardens of Justice in a Glass House? The Ideal of Transparency in Governance

Ida Koivisto, University of Helsinki

The ideal of transparency has become increasingly victorious in legal and political discourse on governance. Along with analyzing transparency's connection to law, this panacea-like catch-word needs unpacking. My first claim is that transparency as a concept is based on a metaphor of a gaze. It presupposes a subject who is watching something located on the other side of some transparent material. As such, transparency is a mediator between the spectator and the target. However, it is not clear to whose eyes the visibility is addressed: to a hierarchically higher civil servant (surveillance, panoptic or bureaucratic control inside governance), to different interest groups like NGOs (knowledge, democratic control and public criticism outside governance), or to a single individual (legitimation, governmental control between governance and individual)? Tentatively, it seems that transparency employs different functions, rationalities and subject positions of control. Secondly, I argue that transparency paradoxically operates also as a method of concealing power. The mentioned mediator between the spectator and the target cannot be purely objective, but an actor regulating the visibility. When the visibility comes into being through words, it loses

its innocence in the visual world of “is”. When it is formed into an indicator, it adopts constructive and performative elements. It becomes an “ought” – but what kind? The central focus of the paper is to diagnose, how transparency is functioning both as a response to an individual’s legitimate need for knowledge and as a proactive tool for exercising power vis-à-vis individuals by creating different spheres of knowledge.

## Law as ritual theatre

Markéta Klusonová, Mazaryc University

A common citizen supposes that every judicial proceeding contains a strictly rational examination of a legal problem and that the final decision is based on the results of this examination. Taken *ad absurdum*, it should remain as some detective work of Sherlock Holmes. However the legal reality is different from this utopia. In the past the authority of justice was based on religion, now the situation has changed and we have to find another reasoning of the power of justice. But what can substitute for this powerful system? The scientific and logical argumentation is usually seen as the ideal answer on this highly important question. But there are still many invisible parts of legal reasoning which must be hidden for public. And there many other powers influencing the final decision during the deciding process too. Due to that all judicial proceedings are not only a matter of law but also of sociology, anthropology and of course teatrology. From this point of view justice can be seen as a kind of ritual theatre. It has different meanings for insiders – lawyers and different ones for laymen but for all of them law has the same ritual base. The trials before courts of justice are strongly connected with playing of both conscious and unconscious roles so this parallel to theatre is very appropriate. Someone can refuse it because of the characteristics of theatre as a fiction. Fortunately the ritual theatre is completely different because even its definition requires the reality of its impact on participants.

## Law and Flesh in the Garden of Madness

Max Liljefors, Lunds universitet

The most famous judge in the modern period was mad. The German jurist Daniel Paul Schreber (1842-1911) succumbed to psychotic paranoia in 1893 after having been appointed as Presiding Judge in the Saxon High Court of Appeal. Schreber’s book *Memoirs of My Nervous Illness* (1903), an insider account of paranoia composed during his ten-year-long incarceration in asylums, is today one of the most commented-upon texts in psychiatric history. This paper suggests that Schreber’s descent into madness can be seen as a journey into the heart of the legal system which had been invested in his person at the time of his falling ill. Drawing on commentary by Certeau (1988) and Santner (1997), who link Schreber’s psychosis to a ‘crisis of faith’ vis-à-vis the juridical mandate bestowed upon him, I argue that

the harrowing, magnificent universe of Schreber's delusions – with its anonymous transcribers, repetitions of phrases, and towering authorities – constituted a new regime of law on the ruins of the old, which had crumbled for Schreber. It had crumbled, I propose, because Schreber was unable to look away from the kernel of violence in legal authority, which Benjamin would later describe as 'something rotten in law' (1921). For Schreber that kernel materialized as a literalization of the performative power of juridical language – that is, the speech acts by which juridical statuses and mandates are instated and transferred – into direct physical coercion in the form of 'nerve-language'; words as slices of neural flesh that forced themselves into his body. Madness has been described as a walled garden where you realize in the very moment you think you are out, that you have only strayed further in. This paper suggests that Schreber's journey into that realm can be seen as an attempt to dig out the delusion of law itself, with prophetic significance for the new relations of law and human biology (bio-law) today.

## The Words of the Stage

Terezie Smejkalova, Department of Legal Theory, Masaryk University

It may be claimed that the language used in the courtroom represents a barrier that divides the lay parties from the legally trained judges that is not dissimilar from the divide between the space designated for the audience and the stage. This divide represents the crossing where the everyday dispute turns into the trial, producing a just decision. Apart from (and based on) the visible scene of the court, there are the words that create the discursive space of law where the words matter and in the end mean the difference between guilt and innocence. What is the role of this sometimes incomprehensible or ritualistic language and its formulae? Is it the audience/stage divide, or can it be the form of recognition by the Other? This paper seeks to answer these questions and to discuss whether it can be claimed that the words of the legal discourse create (among others) the all-seeing but invisible eye of justice?

## A disciplinary unconscious: Psychoanalytic reading of the forensic psychopathology

Yann Tostain, Psychoanalyst, Marseille

Forensic psychopathology is at the meeting point of judicial and psychopathological fields although each of them does work according to different ethical and technical requirements. In 1906, in "Psycho-Analysis and the Establishment of the Facts in Legal Proceedings", Freud pointed out the difficulties inherent to this encounter and linked them to the concept of mental culpability. How can we define the function of the forensic psychiatrist/psychologist in the judicial process? Has this function significantly changed since the expert swapped the criminal constitution for the unconscious?

The judiciary has become accustomed to using the word ‘unconscious’, which first appeared in forensic psychopathology reports. But, at the same time, the judiciary seems to invent a new determinism for the subject at the expense of its inner former Freudian significance. By creating a sort of prehensile unconscious that could thus be manipulated and whose “examination” would allow the judiciary to establish a list of damages, penalties and compensations, this new meaning brings up major ideological and epistemological issues. We propose here to conduct a psychoanalytical reading of French forensic psychopathology. As a first step, we will try to highlight the disciplinary dimension of forensic psychopathology, focusing on the examining magistrate and the public prosecutor’s doubt. We will then seek how, through a singular use of the concepts of credibility and trauma, a disciplinary definition of the unconscious does appear. And finally, we will ask ourselves whether, through this new acceptance of the unconscious, we still deal with the intrinsic control function of the judiciary or whether we are confronted to a new type of power, which Deleuze, after Foucault, calls ‘control power’ and defines as succeeding to the disciplinary power.

## Conscious screen instead of unconscious scenes

Laure Westphal, Université de Paris 7 Diderot & Marc Jacquet Hospital, Melun

In the past, we used to behead culprits on a public square. Today people want to attend trials until the verdict. We need to take part of the punishment but something has changed: the idea of transparency. How could we understand this determination to take part of the trial visually? Let’s focus our attention on sexual crimes that keep on scandalizing society. The almighty man who claims the right to abuse every woman looks like the primal father described by Sigmund Freud in 1912-13 in *Totem and Taboo*. According to Freud, the individual father complex has a phylogenetic history. The sons, who decided to murder the violent and jealous primal father, discovered the symbolic paternity in the work of mourning, guilt and idealization. Retrospective obedience produced the social contract. Today the subject continues to re-enact his link to the law in being indebted to the one he wants to shut away. The fantasy of ‘a child is beaten’, introduced in 1919, is also an original fantasy which structures the desire of everyone to the law and guilt. The father who beats the child produces the emergency of desire thanks to masochism. Let’s think of the opposites sadism/masochism as well as the opposition of active and passive. Punishing the father is a reversal of the fantasy which deploys a wish-fulfillment by the way of voyeurism. On the basis of these two original fantasies, we suggest to explain how the idealization of justice is a way to re-enact the emergency of sexual desire which is inseparable from application of law. The deployment of the trial offers unconscious fantasies the way to satisfy drives. The intrapsychic conflict is externalized by forces engaged in the process in a wish of complete control. Thus, the psychic apparatus deals with excitation without being opposed to moral imperatives. The more the scene will be shown, the more the unconscious and guilty fantasy will be covered.

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## WE NEED TO TALK ABOUT HUMAN RIGHTS

Conveners: Catherine Turner & Liam Thornton, University of Ulster

In the Garden of Justice human rights have long been seen as a desirable addition. Aesthetically pleasing, the presence of human rights adds considerable depth to the Garden. However, in recent years gardeners have struggled to manage the exotic new plant. Its rapid annual growth and relentless spread has allowed it to overwhelm a variety of other native plants that existed within the Garden. In practical terms what this means is that there is an increased reliance on human rights law as being a solution to what once were viewed as political issues. Human rights law is viewed as a panacea to political and social conflict. The garden risks losing its character as a colourful and multifaceted space within which questions of justice jostle for prominence and recognition. The new and exotic species of human rights law may yet colonise the Garden of Justice. This raises issues in relation to hierarchy, power and the very notion of human rights as a legal instrument. This stream calls for a more sustained problematisation of the relationship between justice and rights. In particular it seeks to address the increasing colonisation of 'justice' by human rights law.

## PAPER ABSTRACTS

## Nurturing hybrid forms and cross-fertilisation in the garden of human rights

Kimberley Brayson, QMUL

Human rights discourse, more often than not, focuses exclusively on one manifestation of the legal subject's personality in its decision-making processes. This one-dimensional focus results in outcomes which do not take into account the legal subject as a complex entity whose whole equals more than just the sum of its parts. This drastically distorts social reality as experienced by the legal subject and further, precludes the "real right to personal autonomy" – as established by the European Court of Human Rights (ECtHR) in *Pretty v UK* – from being realised. This paper seeks to explore alternative methodologies by which this situation can be addressed in the jurisprudence of the ECtHR. Further, this paper will propose a shift in terms of how we think of human rights discourse away from their incarnation as state-centred rules of intervention and resituate the human subject and the autonomy of the human at the very heart of human rights discourse. Such a conception of human rights requires a theoretical framework which facilitates relative outcomes as opposed to one "right" answer. On this interpretation, what it means to have knowledge of human rights becomes a more labyrinthine, complex matter. Most important of all, human rights discourse becomes more capable of articulating the claims of marginalised groups and individuals resulting in a more holistic notion of equality.

## Equality and Non-discrimination in the Garden of Justice

Anthony Cullen, University of Leeds

The purpose of this paper is to explore the principles of equality and non-discrimination in the Garden of Justice. It explores the conceptual basis of these norms, their presence in treaties of international human rights law and international humanitarian law, and their recognition as rules of customary international law. In doing so, it suggests that the values associated with these principles have developed over time, that the scope of consequent positive obligations have increased, and that they have a significant role to play in securing social justice and the realization of a more equitable global community. Overall, the paper will argue for the strengthening of equality and non-discrimination as principles of international human rights law towards the realization of balance in the Garden of Justice and unity without adverse distinction based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

## Closed Systems, Segregated Space, and the Boundaries of Law: What the spatial dynamics of Belfast and Chicago tell us about the limits of legally enforceable rights

Tim Cunningham, Transitional Justice Institute, University of Ulster

The quintessential image of the garden, from nursery rhyme to Chelsea flower show, is that of a clearly defined, colourful, and well-manicured space, bounded by neat borders with trim edges. Such precision and order is of course only attainable by regular weeding and pruning to inhibit and curtail the natural growth pattern of constituent shrubs. Other than the most militant environmentalist, there is a general acceptance that manipulating the natural environment in this way is a good thing – particularly if it can deliver an aesthetically pleasing landscape for all to enjoy. The question becomes somewhat more problematic however if one considers the well-maintained garden as a metaphor for the urban environment. In such a context, the natural growth patterns of particular communities can also lead to calls for precise borders to be erected and maintained in order to ensure peace and tranquillity. How legitimate is it to regulate access to public space, particularly when the tensions that arise as a result of growth patterns on the part of particular communities have a racial or religious dimension? If access to public space is to be regulated, should that be the role of law, or politics, and which one is likely to be more effective? Again, the boundary between these two disciplines becomes less neat and precise when questions about the right to access certain kinds of public space is mixed with questions about racial or political identity and the need to minimise conflict. Using the legal theory of autopoiesis, this paper will examine the complexities that surround the regulation of spatial equality and seek to identify, using a systems theory approach, ways in which some of these difficulties might be addressed.

## The Archaeology of Otherness: using the past to understand the present

Michelle Farrell, Irish Centre for Human Rights, NUI Galway

“There are gardens organized around ruins, let’s call them Roman gardens, where you can get a sense of the historical past, but without feeling threatened by its strangeness.” J. M. Coetzee’s *Waiting for the Barbarians* provides a novel way of thinking about the link between our reading of history and our construction of the other. In a non-doctrinal manner, the book advances a theme of ‘insignificance’. This theme becomes evident when the book’s central character, the Magistrate of an Imperial outpost, realises the trivial role that he, his peers and, more importantly, his generation play in the rise and fall of time. The Magistrate yearns for an easy life, an ordinary life, a life with which he associates a garden in which he

might leisurely toil. His fate, however, is to play a part in the ordinary, and, later, the exceptional, running of Empire, to represent the liberal conscience of tolerance and human rights and, eventually, to come to terms with the subjectivity of justice, having felt its full force. The Magistrate yearns for his own private space. But his public role and his need – albeit a need he resists – to understand the mechanisms of Empire and of justice provide that his garden is one shared publically. The space that he uses for his leisure time, unlike the typical garden, is not enclosed; it lies outside the walls of the Imperial outpost. This space might constitute *terra nullius*. Perhaps it is barbarian territory. Is it the working land of the fisher-folk or the playground of the outpost's children? For the Magistrate, this is a space of history where he can peacefully practise amateur archaeology amongst the ruins. In his comfort with the strange writings of Other peoples' past, the Magistrate discovers the irony of his Empire's fear of Other peoples' presence. This paper uses Coetzee's novel as a lens through which to consider the relationship amongst the old notion of justice, the newer notion of human rights, the insignificance of the present and the inexorable progress of time.

## Politics of Rights and Law in Contemporary Warfare

Maayan Geva, Open University UK

In this paper I examine the political dynamics of international law and war through the case study of legal mechanisms of the Israeli military in and around the 2008/9 offensive in Gaza, which brought about extensive loss of human lives and massive destruction. This empirical research of Israeli military legal mechanisms builds on critical legal theory and engages with contemporary debates on war and state violence. The Israeli offensive in Gaza has been widely debated in academia, focusing largely on the legal aspects of the operation. To advance this debate, I offer a consideration of the crucial political role of concrete legal and military structures, processes, and actors. This case demonstrates recently-increased use of law in warfare and presents a unique opportunity to comprehend the emergence of legal frames and human rights discourse, and their implications as to political conflicts and questions of justice. My purpose is to problematize the discourse of law and rights, through critical reflection on the operation, position and role of international law in war.

## Two Tulips: Human Rights in Turkey and the Netherlands

Joel Hanisek, Trinity College, Dublin, School of Law

This paper aims to draw from the rich history of exchange between Turkey and the Netherlands in order to explore and challenge current understandings of the human right to freedom of religion or belief in a European context. Beginning

with a brief exegesis of the “Tulip mania” of the early 17th century, the paper will appropriate botanical terms to consider the contemporary jurisprudence of the European Court of Human Rights (ECtHR). Much as flowers are classified in terms of varieties and attention given to the conditions and seasons that serve their growth best, this paper will address normative claims that a certain soil of secularism represents a way forward for the advancement of a “prize variety” of human rights and toleration. Arguing that the privileging of such secularism, while fashionable, is as unsustainable as the early modern tulip trade, the paper will carefully challenge questions of legal universality and mine the language of pluralism and difference for local, organic alternatives. In particular, the paper will look at traditions of rights in the Netherlands and Turkey within communitarian and cosmopolitan fields. Arguing in favour of hybridity, but against a “cut flower” industry of justice, the work will seek to find ways in which a shared European framework might continue to enhance appreciation for the beauty and common nature of rights without championing a genetically modified or deracinated variant of the right to freedom of religion or belief.

## Redeployment and Avoidance of Human Rights Talk: TWAIL, Pragmatic Sensibility and Performative Ontology of Rights

Jayson S. Lamchek, Australian National University

In a succinct summary of the concerns of Third World Approaches to International Law (TWAIL), Ruth Buchanan (2008) asked “how can resistance be written into international law without simultaneously being written out of it?” Focusing on human rights law, we can ask: How can human rights, a discourse based on positive law and marked by Eurocentricism, generate struggles that transcend subjection instead of reinscribing subordination to the state and empire? First, I will argue that for many TWAILers, the point of the question is to incite a “pragmatic sensibility” (Kennedy 2005) among users of the human rights vocabulary, as well as to draw attention to effective emancipatory practices by subordinated peoples that are eclipsed by Western elitist narration of mythical human rights progress. Second, I will illustrate the possibility of redeploying human rights that escape state capture by considering struggles documented by Shannon Speed (2008) in Chiapas. I will highlight the notion of “rights existing in their exercise” in Speed’s discussion, i.e., a performative ontology of rights that serves as critique of both legal positivism and natural law. Third, I will illustrate the possibility of obtaining emancipatory results, that is to say, rights, by pragmatically avoiding instead of using the human rights vocabulary which can be observed in the clandestine strategies of survival and resistance by undocumented migrant domestic workers in the US and the Netherlands. I will then conclude that both these forms of emancipatory practices are valuable archives for TWAIL and kindred scholarship that problematize the colonization of ‘justice’ by human rights law.

## In Search of Men before Adam

Patrick McDaid, University of Ulster

Seventeenth-century England saw a sustained attack on the political, legal, and religious orthodoxy of the time. Notable among attacks on the religious orthodoxy was the argument that, if the existence of men before Adam could be demonstrated then the orthodox Biblical narrative and the establishment church would be discredited, opening up the space to consider religion outside the church constructed regime of truth. With human rights lauded as the new religion, offering the promise of a metaphorical return to the Garden of Eden, I argue that a similar search for the existence of people before Adam in the field of human rights can open up new ground and allow us to think outside of what is presented to us as the totality of human rights. In adopting such a path I offer a radically different reading of the 1647 Putney Debates, one which focuses on the right to property and opens up a window into a pre-capitalist world where a fundamentally different concept of the right to property existed. This, I argue, presents us with an opportunity to explore a subjugated rights discourse which invites us to overcome the established regime of truth's construction of a rhetorical opposition between law and custom. In so doing, it situates us in a position to engage with the present day human rights discourse from outside what is presented to us as its totality and to consider the possibilities offered by other rights discourses for the decolonisation of the Garden of Justice.

## An English Rose, not Japanese Knotweed: Human Rights Law in England as a native species in the Garden of Justice, growing in harmony with the Common Law and the Constitution

Felicity McMahon, Pupil barrister at 5RB Chambers

Notions of human rights law as an invasive species usurping native English law are challenged. Despite having been hot-housed in Strasbourg and cross-fertilised with continental conceptions of human rights, Convention law is characterised as a re-import of a domestic species, wholly compatible with the common law and English notions of justice. Political rhetoric and press clamour to the contrary are challenged as mis-reporting and/or concern about matters which are overturned on appeal. For practising lawyers, human rights law is a useful addition, a persuasive tool to help shape the garden, rather than a free-standing miracle product. Claims that judges use human rights to overrule elected government arise from fundamental misunderstandings of the unwritten constitution – in particular the proper role of judges and the doctrine of separation of powers. Examination of recent cases shows judges to be very aware of the limits of their role when deciding cases with a human rights element which also relate to macro-economic and politi-

cal decision-making. Decisions are a continuation of existing jurisprudence, to the extent that judgments may contain little explicit reference to the ECHR, despite clearly according with its values. As with all green-fingered endeavours, there is a need for education: both of how and where to plant for gardeners (lawyers) and what to expect from the resulting blooms (the public). It may look to the untrained eye like a plant is being strangled by an invader when, in fact, the two are, and have always been, in a mutually beneficial relationship.

## Talking about Rights

Eugene McNamee, University of Ulster

The historian of ideas Ernst Borkenau, comparatively neglected respective to his contemporaries such as Benjamin and Voegelin, locates an engine of Western societal development in the continuing conflictual engagement between Augustinian and Pelagian basic theo-political redemptive constructs. This engagement has been parsed as the conflict between 'grace' and 'good works'. The idea of good works as a route to salvation invites contractual analysis, and the essential divide between God and human suggestively complicates the dynamic of any such analysis. Gunter Teubner in some of his recent work has approached the issue of contracts across autonomous 'worlds', and this paper takes up some of the threads of legal right in the context of a re-figuring of 'law' as a pattern of normative co-ordination rather than normative order. The question arises of the degree to which 'right' may be re-worked away from an individual possession to something more akin to social value, a question which in turn prompts attention to seemingly unrelated concepts such as love, grace and redemption, and consequently to the thinkers of justice in such terms.

## Let's Not Talk About Human Rights

Sara Ramshaw, Queen's University Belfast

In many academic institutions, human rights-based research, with its focus on the rule of law and legal reform, is seen to be the only proper form of legal scholarship. Researchers working in this field are rewarded with large research grants, book deals, prestigious job offers, and media attention. Although there exists a great deal of interesting and inspiring work being done in the field of human rights, its more positivist variant is often given heightened status, or is looked to when defining what 'criticism' actually means in contemporary legal scholarship. Insofar as much human rights-based research entails a very limited kind of critique, one that is determinately lacking in creativity and imagination, this paper makes the case for a critical legal scholarship that does not talk about human rights.

## Strange Fruit in African Gardens of Justice: The South African Constitutional Court's Challenge to Human Rights Colonisation

Annabel Raw, Lunds universitet

This paper problematizes the view of human rights law as strange fruit (Abe Meeropol, 1939) in African gardens of justice. The view of human rights as predominantly fruits borne of neo-colonial domination, racial dominance and violence is argued to reflect an underlying ontological essentialism that fails to acknowledge the emancipatory potential of human rights law in the post-colonial context. Recent jurisprudence from 2012 in the South African Constitutional Court is analysed as examples of new hybrid fruits that, while at once grounded in the richness of indigenous earth, allow diversity the space to thrive whilst acknowledging the gains of aesthetic credibility from the view of external gardeners. The examination finds that the manner of the Court's enforcement of socio-economic rights presents opportunities for creating spaces for democratic decision-making and dissent, and reconciliatory consultation. Furthermore, it finds that recent invocations of rights have effectively and directly challenged bitter fruits manifesting obstructions to social justice through individual capital ownership as the historical legacy of racial domination. Finally, it finds instances in which human rights law has been used to transform the imports of Western legal colonialism of past as invasive species. In this manner, it is argued that human rights law is used as a political tool effectively to challenge the presumptions of equality in the post-Apartheid era that, being employed in the restrictions of well-established judicial sensibility, does not necessarily impinge on the growth of the fruits of democracy and diversity to (re)colonise the landscapes of justice.

## The Seeds of Normative Community? International Law and Cosmopolitan Order

Isobel Roele, Cardiff Law School

The garden of justice with which this paper is concerned is Habermas' design for cosmopolitan order. Habermas suggests that through constitutionalization, public international law (PIL) can provide a medium for accelerating the propagation of cosmopolitan order. This places too much faith in the constitutional credentials of current PIL institutions and in the civilizing force of human rights discourse. For Habermas cultivating political discourse is an imperative response to the growth of autonomous functional systems on a global scale. In order to be effective for this purpose and legitimate in itself, global political discourse requires global normative community which Habermas sensibly fights shy of claiming. As with the disintegrating (Western) national societies he considered in *Between Facts and Norms*, Habermas attempts to use positive law as an *ersatz* normative context for com-

municatively rational politics. However, legal norms can play this role only where they are the product of communicatively rational political discourse. This chicken-and-egg problem was addressed at the national level by appealing to the vestiges of normative commonality that survive social disintegration. No such fix is available on a global scale; global society is not disintegrating, it was never integrated in the first place. Further, most present social practices of PIL discourse sideline human individuals in favour of state actors which adopt instrumental, not communicative, rationality. In order for PIL to provide the kernel from which cosmopolitical discourse could grow, Habermas must re-imagine nation states as institutional intermediaries between nationals *qua* world citizens and the global institutions which guarantee their basic human rights. This raises the dangers attendant on the moralization of politics because Habermas must base his theory in an abstract concept, human dignity, rather than in the practices of social actors.

## Making life live or letting it die: (Human rights) Courts as administrators of human life

Ukri Soirila, The Erik Castrén Institute of International Law and Human Rights, University of Helsinki

We are living in times of globalized contingency where the proliferation of individual freedoms, on the one hand, and the novel possibilities of surveillance and management of the population, generated by rapid development in genetics, technology and medicine, on the other, are bound to generate conflicts, translated increasingly into human rights language. This causes pressure for (human rights) courts and other organs responsible for solving human rights disputes. As has been demonstrated in critical legal literature, there are no clear rules on how to balance hierarchically equal – theoretically absolute – rights against each other. Therefore, (human rights) courts are necessarily left a certain, increasingly broader, margin of discretion regarding their decisions. As the courts are, in spite of this indeterminacy, supposed to make decisions regarding such topics, linked to the most fundamental questions of human life, as abortion, genetics, marriage, surveillance and euthanasia, they necessarily adopt the position of administrators of human life – in other words, they become entangled with the form of power, aiming for the control, management and maximizing of human life, that Michel Foucault calls ‘biopower’. This paper argues that the so-called ‘structural bias’ of human rights courts is increasingly a biopolitical bias, but claims that the courts also have a unique possibility of resisting excessive biopolitical practices.

## Creating Spaces of 'Justice'? Cameron's Big Society and its Governmentality Agenda

Bal Sokhi-Bulley, Queen's University Belfast

Cameron's flagship policy of the 'Big Society' rests on a society/government dichotomy, diagnosing a 'broken society' caused by 'big government' having assumed the role communities once played. The remedy is greater social responsibility and the 'Big Society'. This paper argues that the dichotomy is deceptive. It shows that the Big Society is big government, as it employs techniques for managing the conduct of individuals and communities such that the mentality of government, far from being removed or reduced, is bettered and made more efficient. The paper illustrates this by examining one major Big Society initiative and one major event that has helped reinforce it: the National Citizen Service and the 'London Riots'. The NCS demonstrates how practices of informing and guiding the conduct of individuals – through providing teenagers with a regulated urban 'space' (gardens, parks, community centres, for instance) in which to interact both produce agents and normalise certain values, resulting in the population being better known and controlled. The London Riots allowed Cameron to construct a discourse of a 'just' society to repair the 'broken-ness' of Britain that was based in 'togetherness' and community involvement. Thus, far from lessening government and empowering people, the Big Society extends governmentality throughout the social body.

## Ethical Loneliness: Forgiveness, Resentment, and Recovery in Law

Jill Stauffer, Haverford College

This paper responds to the "Gardens of Justice" invitation to view law as a place where symbolic orders and disorders become visible and may be acted out. What happens when a speaker speaks in an institution designed for hearing, and an audience hears something other than what she says? A survivor of trauma tries to narrate a destruction of self and world, while interviewers hear a story of human resilience; a soldier testifies to the complexity of his role in violence commanded by a state, and the court seeks a narrative of individual agency in order to assess criminal responsibility; a woman registers her refusal to forgive, while truth commissioners coach her toward restorative goals. To get at what is lost here, I offer an account of 'ethical loneliness', a condition undergone by persons who have been unjustly treated – dehumanized by human beings and political structures – who emerge from that injustice only to find that the surrounding world cannot properly hear their claims about what they suffered and what is now owed them. Ethical loneliness is the experience of being abandoned by humanity compounded by the experience of not being heard. Diagnosis of this disorder helps reveal the limits to both the restorative discourse of truth and forgiveness and the retributive procedural-legality approach, such that we might better understand how different

approaches succeed or fail. That might equally help us begin to rethink existing institutional design/procedure or subject received truths about transitional justice and political reconciliation to renewed scrutiny.

## Governmentality, Democracy and Rights: Welfare Reform and the Limits of Rights

Liam Thornton, University College Dublin

Socio-economic rights continue to be viewed as exotica in the gardens of justice. Notions of rights have failed to fully weed out distinctions between distributive and commutative justice. The welfare state, rather than solely being about social justice and wealth re-distribution, also relies on the governance/government of control to combat those deemed problematic in society. The Welfare Reform Act 2012 further emphasises the controlling aspects of the UK's welfare state and significantly alters the relationship between State and Individual, particularly those who are viewed as having a feckless over-reliance on distributive aspects of State social policy. While campaigners and activists attempted to move arguments of rights to the forefront of the debate on the Welfare Reform Act 2012, such arguments failed to move beyond the rhetoric of indivisibility and universality of all rights. Such arguments masked (1) State failure to recognise full parity of esteem between civil and political and economic and social rights (2) limits of using the Human Rights Act 1998 in arguing for a more redistributive social welfare State and (3) structures of governance/governmentality being put in place to control problematic populations. This paper argues, with particular reference to the Welfare Reform Act 2012, that in gardens of justice, socio-economic rights play a limited role. Importantly, beyond the rhetoric of indivisibility and universality, lurks power and control, something that those advocating for protection of socio-economic rights fail to acknowledge.

## Public Space or Gated Community? Accessing the Garden of Transitional Justice

Catherine Turner, Transitional Justice Institute, University of Ulster

The idea of the public garden has a long history. Traditionally democratic spaces for the benefit of citizens, public spaces are open to all, regardless of ethnic origin, age or gender. When properly designed and cared for, they bring communities together, provide meeting places, foster social ties and shape the cultural identity of an area. The beauty of these spaces lies in their ability to welcome all without distinction and to provide a space for the experience of diversity. Using the metaphor of the garden as a space for justice, human rights are a relatively new addition, and yet they have begun to colonise the garden. Rather than functioning as a truly pub-

lic space, these gardens have become gated communities, with access restricted to those who hold the key. Using the case study of transitional justice, this paper will explore the ways in which the normative discourse of human rights has contributed to the restriction of access to the garden of transitional justice. Increasingly access is restricted to those who know how to speak the language of human rights, to articulate their demands in the proper terms. The effect of this is that if access to the garden is viewed as necessary, either through desire or pragmatic necessity, alternative conceptions of justice must be left behind at the gate. The instrumental language of rights must be engaged. Rather than being a democratic space in which ideas of justice are debated, the effect of the introduction of the language of rights has been the homogenisation of the idea of justice and the silencing of those whose experience and demands do not “fit” the desired landscape of the garden.

## Do human rights really come into blossom? The case of state immunity in cases of human rights violations

Camila Vicenci Fernandes, Renato Treves International Programme in Law and Society, University of Milan

This paper aims to analyse if Human Rights, despite of their fast growth in the Gardens of Justice, are really coming into bloom before the courts or if they are actually being pruned by other institutes, such as State Immunity. In the first part I shall examine the most important theories that advocate for the denial of State immunity before courts in cases involving serious violations of Human Rights, such as a) the implied waiver theory; b) the normative hierarchy theory; c) the use of Universal Jurisdiction; d) the risk calculability theory and e) the mutual or collective benefit theory. In the second part, I will look at the case law on the matter and examine whether courts are actually accepting those arguments and letting Human Rights flourish, to finally draw some conclusions and try to balance the primacy granted to the protection of Human Rights in the 21st Century with traditional norms and institutes of International Law, such as State Immunity.

## What Should We Hope For? On the Limits of Justice in a Global Age

Jon Wittrock, Centre for European Research (CERGU), Göteborgs universitet & Urban Strandberg, Department of Political Science, Göteborgs universitet

In this paper, we will argue for the deficiency of justice, even as an ideal, even if it could be realised. Hopes and ideals for global justice and a just community are insufficient, not simply because of some pragmatic flaw – that they would supposedly be difficult to realise and to implement – and neither merely because of the tension between justice, on the one hand, and legal norms, on the other, in the sense that an ultimate justice could never be realised by means of legal measures. Although this

latter strand of critique, championed, notably, by Derrida in *Force de Loi*, is indeed important, and continues to exert a vast influence on debates concerning the contemporary relevance of (re)reading Paul as a political thinker, it, too, falls short, to the extent that it does not focus on the radical insufficiency even of justice, as long as the latter is thought of as primarily concerning inter-human relationships. But neither do I wish to argue in favour of extending justice to animals, although this is in itself, possibly, a desirable project, and at any rate, worth taking seriously. Nevertheless, none of these critiques reach their full potential unless we address the contemporary global situation in its historical context; that is, until we situate it historically. For, as I shall argue, while contemporary notions of justice remain nourished by a Judeo-Christian heritage, this heritage in itself, alongside with its parallel traditions, risks becoming, not obsolete, but insufficient, in addressing the threats posed by the erection of a global, technological space. Thus, while the Judeo-Christian heritage emerged, alongside other religious and philosophical traditions which remain supremely influential and relevant to this day, in the transitions of the axial age, commencing around three thousand years ago across the Eurasian landmass, the contemporary world is enveloped in another transition, at least as dramatic and far-reaching, in the erection of a global space. Just like local and regional spaces were transcended and bound together by emerging cultural and civilisational world-spaces in the transitions of the axial age, an emerging global space, today, arguably, in many ways and with increasing intensity ties together and transcends the latter. This is a bold argument to make and it ought not to be made lightly or without a firm theoretical and empirical grounding. Furthermore, even if accepted – if only tentatively – it does not by itself show the insufficiency of norms of justice in addressing the problems of the contemporary world. Thus, I will venture to show, or at least argue in favour of the plausibility of assuming, I) that a global space is indeed emerging, entailing II) a specific set of problems which III) cannot be addressed by norms of justice. Hence, in the following, I will have to show in more detail, firstly, what characterises the global space of the contemporary world and what distinguishes it from the civilisational spaces of the axial age and succeeding centuries in such a way that, secondly, it brings with it new problems which, thirdly, are not addressed by contemporary norms of justice, as formulated, typically, in the language of rights and citizenship. This is a tall order, but luckily, I am able draw on the rich conceptual and empirical resources of two strands of critique, which I will attempt to bring together and from which I shall draw some radical implications, normatively and in terms of concrete institutional suggestions. It is in the bringing together and drawing of implications that my actual effort lies; thus I will attempt to utilise, in tandem, the works of historical sociology on the axial age, and the polemics of 20th century German-speaking philosophy against technology and nihilism as specific contemporary problems. By bringing these two critical strands together, I hope to be able to sketch some concrete proposals complementing, rather than rejecting, norms of human rights and hopes for a just cosmopolitan order.

## We're all 'proletariat': from universal right to the right of 'the common'

Andreja Zevnik, Department of Politics, University of Manchester

When in his lectures of 1968-69, Lacan developed a theory of four discourses (a discourse of the Master, Hysteric, University and the Analyst) little was he aware of its impact on the future legal and political debates. Forgotten for a couple of decades, the theory of discourses re-emerged in relation to the study and the critique of the world order. Žižek, Župancic, Declercq, amongst others, wrote about the critiques and alternatives to the political, to subjectivity, law and capitalism at the back of Lacan's theory of four discourses and the traces of Marxist thought in it. This paper builds on the critiques and alternatives of the aforementioned thinkers in order to create a non-individualist and a non-determinist conception of human rights. Supported by Lacan's theory of four discourses, the paper starts with the assumption that in a modern capitalist system we are all proletariat with no individual rights or private possessions. A condition we all share – proletariat – opens up a possibility for thinking the category of 'the common' rather than the private, public or the individual. After drawing out the status of 'the common' and its legal and political place in the world, the paper looks at the rights that both create and are being created by the existence of such 'common'. The paper gives focus on the notion of space as a 'common right' and explores the potentiality of such right for social movements and political manifestations of various kinds. While the paper of course discusses the Occupy Movement as one particular claim for a common space or a way of turning private/public space into a common space; the paper also looks at the practices that can translate such claims for 'the common' in ways that allow for the protection of individuals without abandoning their 'common' nature.

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## WELFARE STATE AS SOCIAL UTOPIA?

Conveners: Toomas Kotkas, Social Insurance Institution of Finland, & Kenny Veitch, University of Sussex

“The foundation of a home is based on unity and compassion. A good home does not recognise privileged or excluded ones, no favourites and no stepchildren. There no one looks down on the other, no one seeks to profit at the other’s expense, the strong one does not suppress or exploit the weak one. In a good home equality, care, cooperation and helpfulness prevail. If this notion is applied to a larger, people’s or citizens’ home, it would mean that all social and economic obstacles should be crushed; obstacles that now divide citizens into the privileged and the excluded, the rulers and the dependent, the rich and the poor, the affluent and the needy, the exploiters and the exploited. The Swedish society is not yet such a good citizens’ home. Here certainly prevails equality on a formal level, i.e., equality in regard to political rights, but considered from the point of view of the social, the class society still exists and in economy an oligarchy is prevailing. Inequalities are sometimes crying: whereas one part lives in the lap of luxury, many wander from door to door begging for bread, and the poor worry about tomorrow’s world where sickness, unemployment and other misfortunes lurk. For the Swedish society to become a good citizens’ home, class distinctions must be removed, social welfare developed, levelling of the economic differences must take place, the employees must be given part in the administration of economy, and democracy must be effectuated also on a social and economic level.”

These words were uttered by Per Albin Hansson, one of the main ideologists of the Swedish Social Democratic Party, in his speech held in the Diet in Stockholm in 1928. By the 1980s, most of the reforms suggested by Hansson were realized in Sweden. The term “people’s home” (*folkhemmet*) came to denote, by and large, the Swedish welfare state. Today, it seems, however, that we are still/again faced with similar kinds of social problems once indicated by Hansson – only the terminology has changed. Instead of talking about “class distinctions”, social policy discourse is dominated by such catchwords as “social exclusion” and “income inequality”. Of course, new problems have also occurred. Too high public expenditure and an ageing population cast a shadow over the future of European welfare states. Accordingly, new measures have been introduced to tackle these problems. Activation, New Public Management and privatization, among other things, have all been offered as solutions to these problems.

What has become of the European welfare states today? Was Hansson dreaming of a social utopia that could never be realized? We invite papers that deal with law in today’s welfare state. Francois Ewald characterized the law of the welfare state as *droit social*, not merely referring to social law as a separate field of law but to a legal logic peculiar to all law in the welfare state. Social law is law of different interests, law of groups and law of compromises. It does not refer to some extra-positive moral order but to the factual reality of a given society. Is Ewald’s account still valid or have we perhaps already entered into an era of new legal logic?

## PAPER ABSTRACTS

## Asylum Seekers and the Welfare State: A Social Dystopia?

Katie Bales

The redistribution of resources through the English Welfare State is fundamentally an expression of national solidarity, which provides for the indigent members of society. However this form of solidarity is stratified on the basis of immigration status which, it will be argued, overlooks social need in defining the responsibilities of the welfare state. As a result, a hierarchy of entitlement and rights exists. Despite international and European legal verification for the occupancy of asylum seekers within the sovereign State, NGO studies show that this group, including those whose applications have been refused, suffer from systematic poverty, prejudice and inadequacy and in some instances abject destitution. This paper will examine the welfare provision for asylum seekers and refused asylum seekers within this context. The paper will use a hypothetical case study to outline the current support system for asylum seekers and refused asylum seekers, whilst at the same time accounting for the experiences, history and consciousness of applicants. It will stress that applicants are not only discriminated against in their exclusion from the national welfare framework but also experience the detrimental and compounded effects of intersectional grounds of discrimination, which can then impact further upon rights. It aims to consider the boundaries of 'solidarity' within the current welfare system and whether those boundaries should be extended to include asylum seekers and refused asylum seekers. With reference to the case study, human rights and cosmopolitanism I will consider how and why this is necessary even within 'the factual reality of given society'.

## Lousy landscaping?

Laura Kalliomaa-Puha

The social welfare state promised to help us out with the social risks of life – old age, unemployment, sickness, and parenthood. And it certainly has done that: with numerous norms and benevolent plans, projects and institutions. In regard to social welfare, there are so many different systems to rescue us that most of us are unable to find salvage even when one would need it. The garden of social welfare has overgrown to a jungle without clear paths to follow. For a long time, orders from above were the way the welfare state operated. It was more of a garden planned for the people than with the people. More recently, everyone in the garden has been invited to be a landscape gardener of their own. The humble subjects of administration have turned into active citizens, from beneficiaries to clients and from patients to customers. The goals are meaningful: individuality, autonomy,

freedom of choice and commitment, persons' right to think for themselves. Now, the idea is that people know best what is good for them. All this means vouchers, personal budgets, client contracts and personal responsibility. In order to realise one's social rights, one needs to negotiate, to plan and to conclude contracts. Personal responsibility also means choosing the right services, supervising their quality and giving notice of defects. Are all the frail persons up to this? Could it be that the current tools of social welfare, in fact, increase inequality rather than reduce it? Do the new tools actually create a new type of social risk: are we shutting out those who are unable to find a path in the overgrown garden of welfare and to landscape their own plot?

## Policy Corruption as a Pest in the Garden of Justice

Kamal Khanal, Nepal

Policy is a plan or course of action. Every actor, be it government, political party or company, intends to operate and make decisions according to a preset plan in order to influence matters that are directly or indirectly related to it. In other words, policy is an organized method followed and applied by an actor and its administrators. Corruption, on the other hand, is action done with the intention to obtain some irregular or unlawful advantage. Bribery is one of the most common examples of corruption but corruption may also take place in other unlawful forms (e.g. a contract by which the borrower agrees to pay the lender usurious interest). Corruption entails the denial or violation of the rights of others. When the concepts of policy and corruption are put together as a phrase, it assumes a different meaning. Policy corruption is action where corruption takes place within the boundaries of law and regulations. In fact, in policy corruption law and other regulations are utilized to create a favourable operational environment in order to meet some irregular or morally questionable target. Single acts of policy corruption have an impact on the overall structure of laws as well as other policies. Many authorized high-ranking officials and top businessmen are in a position to engage in this type of corruption in their respective fields. Policy corruption is a dangerous trend in contemporary societies. Policy corruption is reasonably common but it seldom becomes a topic of serious public discussion because it is hard to detect and to regulate. However, policy corruption needs to be taken seriously because of the negative impact it has on our societies as well as on justice.

## Controlling Private Social Welfare Service Providers in Finland: From Official Supervision to Self-Monitoring

Toomas Kotkas, Social Insurance Institution of Finland

Today, in Finland roughly 30 percent of all social welfare services are provided by private service providers. The percentage has steadily risen from the early 1990s onwards. The proportion of private service providers is especially high in the fields of sheltered housing for, and institutional care of, elderly people as well as child day care. It cannot be argued that the increase in private service providers would have been an outcome of a conscious governmental policy. The situation is, rather, a result of independent decisions made by autonomous municipalities. Indeed, in 1992, in Finland the municipalities were given a more extensive right to purchase social welfare services from private service providers. The purpose of the reform was to give the municipalities a possibility to organize social welfare services “in such a way that would take into account local circumstances and would be as economical as possible.” Although not dictated by the government, the general trend in Western welfare states towards outsourcing and marketization of public services has of course contributed to the change. The rise of private service providers has compelled the legislator to consider the effectiveness of existing official control mechanisms. Indeed, the Government Bill on the new Act on Private Social Welfare Services of 2011 stated openly that “it is not possible to increase the resources of official supervision in such a way that it would correspond to the increase in private service providers.” Instead, new ways of controlling the activities of private service providers have been introduced. One such control mechanism is “self-monitoring”. The idea with self-monitoring is that each service provider monitors its own activities through drawing a “self-monitoring plan” and by actively following its realization. In addition, the idea is that through the public display of plans clients of private social welfare services are able to take part in the monitoring. In this paper self-monitoring is scrutinized as a particular governmental idea and practice. What is the origin of self-monitoring? What are the explicit justifying reasons behind it? How does self-monitoring change our conceptions of the welfare state and the client of social welfare services?

## Waste and the Welfare State

Kenneth Veitch, University of Sussex

This paper deploys waste as a lens through which to grasp some key aspects of contemporary social policy and law in the UK. Taking as its focus two recent pieces of legislation – the Welfare Reform Act 2012 and the Health and Social Care Act 2012 – and drawing on literature within legal and political theory on superfluity and waste, the first part of the paper develops two notions of waste (as excess and

inertia) as means to think through the controversial policy of workfare and some of the contentious reforms to the National Health Service. The paper then moves on to consider what those forms of waste, and their respective modes of elimination and recycling, can reveal more generally about the nature and function of the contemporary welfare state and its law. It will be argued that they exhort us to return to explore the nature of the compromise between the economic and the social at the heart of the welfare state, and to assess whether recent developments in this institution and its law are not best framed as economic utopia and social dystopia.



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# WITH CARL SCHMITT IN THE GARDENS OF JUSTICE

Convener: Leila Brännström, Faculty of Law, Lunds universitet

## PAPER ABSTRACTS

### Space and Spatiality

Jon Wittrock, Department of Political Science, Göteborgs universitet

We have to distinguish between contests in space, on the one hand, and spatiality, the discursive and phenomenological domain for contests of space, on the other. In the former case, Carl Schmitt's thought on international politics, which was largely formulated during the later phase of his career, from the second half of the 1930's and onwards, speculates on a shift from the state to the large space. This is a change pertaining to the dominant type of political entity, globally: the state was dominant, Schmitt says, during the era of European domination from the 15th to the 19th centuries, whereas the 20th and 21st centuries may entail the emergence of a novel entity, the large space, which might inherit the state as the dominant unit of global political power struggles. Schmitt does not assure us that this will happen, but he sketches a possible development. In the latter case, however, Schmitt does not describe a shift, even a possible one, but solely the gradual growth of one type of spatiality, establishing an "abstract [...] empty and overwhelming, mathematically and geographically determined spatial dimension." In other words, whereas there is at least a possible discontinuity pertaining to the global contest in space, there is solely continuity, conversely, pertaining to the global diffusion of a specific spatiality. To understand the former dimension, of power struggles in space, Schmitt resorts, firstly, as we have seen, to a description of political entities; secondly, he seeks to describe the possible range of interrelations between these entities. Taking these two elements together, we get a picture of the struggle in space. To understand the latter dimension, of power struggles of space, Schmitt needs an understanding of conceptual and experiential transformations. And just like there are political entities in space, there are distinct ways of thinking about space, distinct outcomes of a struggle of space. The paper will sketch some possible contemporary implications of these two trajectories.

### Carl Schmitt's notion of law as *Hegung*

Johanna Jacques, London School of Economics

In his analysis of spatial order, Schmitt used two notions belonging, while not to gardens directly, to forestry: that of *Lichtung* (clearing) and of *Hegung* (protecting, bracketing). This paper looks at the surprising way in which Schmitt conceives of

the world as a clearing, in which war, like a young forest, is *gehegt*: protected and cared for through the laws of war. Focus is the world of the *jus publicum Europaeum*, where the laws of war become the threshold through which Europe needed to pass in order to establish itself as legal order. Against all expectations, it was the function of the laws of war not to contain and neutralise conflict, but to allow it to grow; taking the role of the absent gardener, these laws enabled the flourishing of a legal order without sovereign. This reflects on the kind of space in which intra-European wars took place, but also on the European order as a whole, which Schmitt came to identify with the boundary drawn around wars in the process of *Hegung*.

## Politics in the Permanent State of Exception

Petra Gümplová, Institute for Political Science, Justus-Liebig-Universität

The paper addresses the question of the consequences of the proliferation of states of exception on democratic politics and argues that the loss of the sense of what is normal and what is exceptional represent one of the most serious challenges for democracy in the 21st century. The aim is to identify a recent trend to define reality in terms of exception, risk, or permanent crisis, and to show that this trend involves a progressive blurring of the distinction between normal and exceptional. The paper shows that until the second half of the 20th century, the prevalent legal paradigm used for dealing with emergencies was defined by a clear distinction between normal and exceptional; and that exceptional had always been seen as sporadic, temporary, and regarded as inferior to the norm. Theoretically, the change of the perspective towards permanent states of exception is linked to the work of Carl Schmitt. It is argued that today's tendency to identify risks and emergencies in all aspects of social reality without clear determination of their boundaries, their bearers, their scope and extent, and corollaries is conducive to a political practice that finds legitimacy for its actions beyond standard democratic institutions such as the rule of law, representative institutions or public discourses.

## 'Carl Schmitt and the Launderette'. Walled identities, embodied vulnerabilities, and waning sovereignty: The collision of homosexuality and religion in Canada

Nicolas Blanc, Université de Bordeaux IV & Université de Montréal

Stephen Frears' 1986 witty movie *My beautiful launderette* might be a good cultural starting point for a Schmittian reading of the evolutions currently occurring over the scale of neoliberal late modern sovereignties when it comes to a conflict of rights – namely freedom of religion and provisions against discriminations based on sexual orientation. This movie was incredibly prescient, remotely sarcastic, and politically hectic: “England is being sodomized by religion” one of the main Indian

characters argued. Homosexuality, Religion, and Ethnicity are described as potential terrorist affects threatening neoliberalism through this metaphor of a double penetration. When rights collide, waning constitutional sovereignties are trying to patrol their fictitious identity walls through the production of new fictions of containment and purification. Within Canadian constitutional law, a conflict of fundamental rights is, then, issued and sorted out as a material hierarchy of identities resulting in 'othering' processes and exclusions, denying the agency of vulnerable queer Muslim bodies. Dangling legal identities are embodied through affect projections, and a generalized condition of vulnerability. Those embodied vulnerabilities are the new walls of a waning sovereignty. The introduction is about illustrating a conflict of rights and a hierarchy of identities with Frears' movie. The first part is critical; I sketch out an analytical framework for the understanding of questions pertaining to the conflicts of rights understood as 'othering' processes, fictitiously walling waning sovereignties. The second part is illustrative of the working of this homonationalism within the multicultural context of Canada's constitutional law and the ethical quandaries stemming from the denial of queer Muslim bodies' vulnerability.

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## NOTES















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## GENERAL INFORMATION

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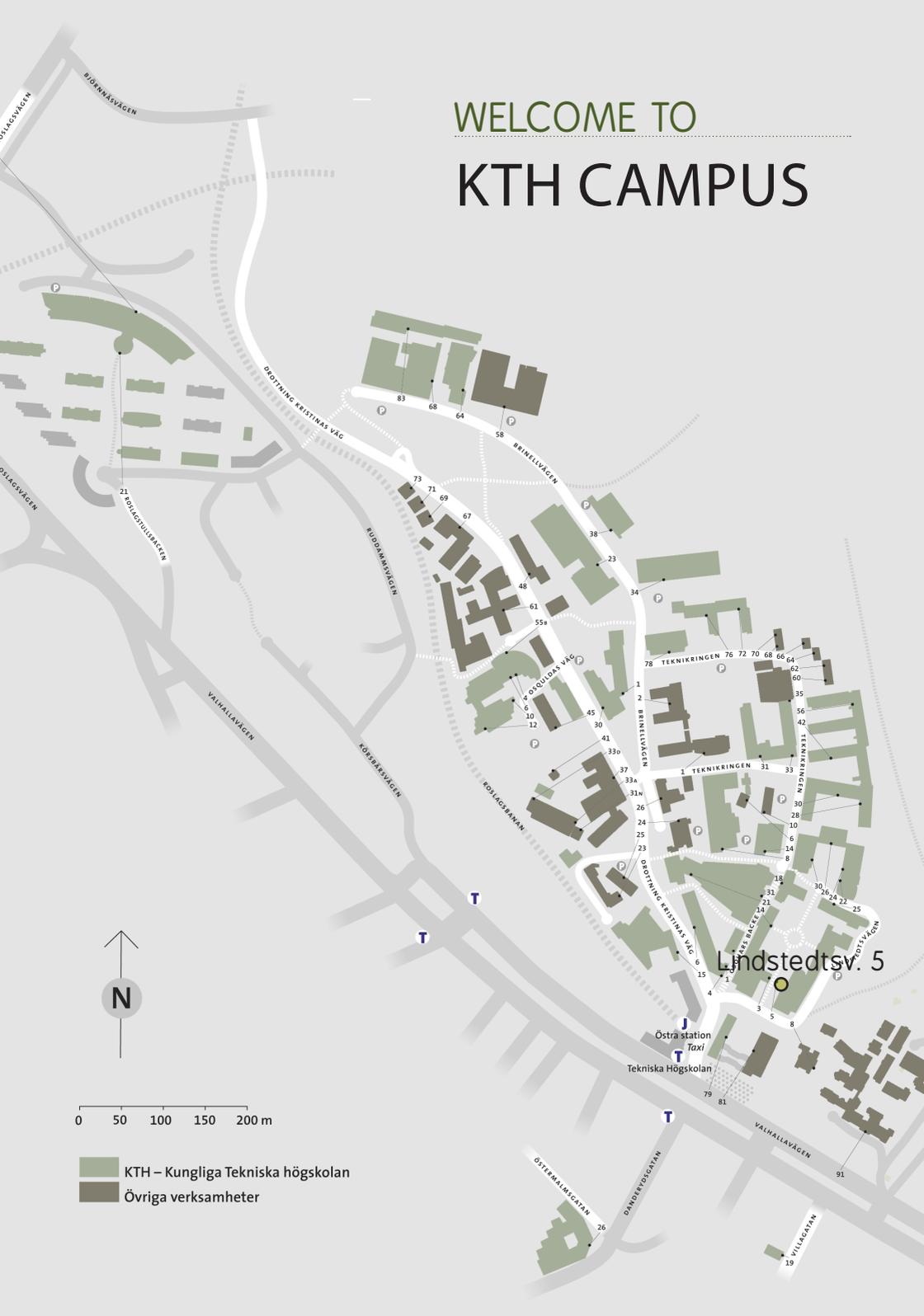
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