Internationale Konferenz

"Law and Society in the 21st Century"

Berlin, 25.-28.Juli 2007

Humboldt-Universität zu Berlin

Programmauszug bedeutender Veranstaltungen mit Zusammenfassungen der Vorträge

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Konferenzthemen

Folter und der Sicherheitsstaat: Im 21. Jahrhundert hat die US-Regierung Folter in aller Öffentlichkeit als “legitime” Taktik zur “Bekämpfung des Terrors” und dem“Erhalt der Sicherheit“ wiedererweckt. Die einzige verbliebene Supermacht, die eigentlich ein Modell für den Rechtsstaat sein will, hat ganz offen den universellen Konsens verlassen, der die Misshandlung von Gefangenen rechtlich missbilligt. Rechts- und Sozialwissenschaften müssen darüber nachdenken, welche Auswirkungen die Renaissance der Folter und das Ausgreifen des Sicherheitsstaats auf globaler Ebene auf die heutigen Gesellschaften haben.

Gewalt, Menschenrechte und Gender: Formen von gewaltsamer Machtausübung, die Ungleichheit von Geschlechterbeziehungen und Menschenrechtsverletzungen verbinden sich in vielfältiger Weise unter Bedingungen von Krieg, Menschenhandel und häuslicher Gewalt. Häufig manifestieren sich diese Verbindungen in sexueller Gewalt als Kriegswaffe während Genoziden. Im Rahmen der Aufarbeitung von Kriegshandlungen wird sexuelle Gewalt regelmäßig durch internationale Gerichte oder Versöhnungskommissionen öffentlich thematisiert. Auf der Konferenz wird in vergleichender Perspektive diskutiert werden, wie Menschenrechte besser durchgesetzt werden können.

Ethnizität, Rassismus und Diskriminierung im 21. Jahrhundert: Ethnische Gruppen sind in modernen Gesellschaften unmittelbar von Gesetzen, staatlichen Maßnahmen und öffentlichen Diskussionen , die ethnische Identität zum Thema haben, betroffen Die Frage nach Rassismus und die Antwort des Staates hierauf stellt sich in allen Demokratien immer wieder neu. Wie sind die Erfahrungen mit Antidiskriminierungsgesetzen, die in Deutschland kontrovers diskutiert werden, im internationalen Vergleich? Wie formieren sich Identitäten und soziale Gruppen in verschiedenen rechtlich-sozialen Kontexten?

Rechtsstaatlichkeit und Verfassungsgerichtsbarkeit im Vergleich: Der kontinentaleuropäische „Rechtsstaat“ und die „Rule of Law“ der anglo-amerikanischen Rechtssysteme haben in den vergangenen 20 Jahren einen weltweiten Siegeszug angetreten. Im Zuge der „Verrechtlichung der Politik“ sind in alten und neuen Demokratien Verfassungsgerichte eingerichtet oder verstärkt worden. Wie steht es um die Souveränität des parlamentarischen Gesetzgebers, wenn Männer und Frauen in Roben Gesetze mit einem Federstrich zunichte machen können? Wie können Gerichte Individuen und Minderheiten zu ihren Rechten verhelfen? Kann der Rechtsstaat gesellschaftliche Konflikte lösen?

"New Governance“: Im Zeitalter der Globalisierung bilden sich neben den rechtlichen Strukturen der Nationalstaaten immer mehr andere, häufig informelle und demokratisch nicht legitimierte Formen des Regierens und Regiert-Werdens heraus. Diese unter dem Begriff “New Governance” zusammengefassten Strukturen beruhen die auf rechtlich unverbindlichen Prinzipien und Koordinierungsmechanismen sowie auf zahlreichen und oft konkurrierenden Institutionen zur Konfliktlösung. Diese Mechanismen bieten oft erweiterte Partizipationsmöglichkeiten, stärkere Transparenz und neuartige Entscheidungsprozeduren. Auf der anderen Seite wächst die Zahl der kritischen Stimmen. Wie sieht – auch aus rechtssoziologischer Sicht – die Bilanz dieser neuen „Governance“-Strukturen aus?

Religion und Säkularismus: rechtliche Perspektiven: Im 21. Jahrhundert hat das Verhältnis zwischen Recht und Religion neue Dimensionen gewonnen. Das Religiöse erlebt

eine Wiederkehr und kommt immer stärker in den Blick staatlicher Regulierungsversuche. Um das häufig hoch brisante Verhältnis von Recht und Religion samt seiner Wechselwirkungen zu verstehen, ist nicht nur ein Rückgriff auf die Geschichte der Säkularisierung des Rechts notwendig. Die empirische Untersuchung von religiösen Praktiken, Identitäten, Orten und Lebensweisen steht neben der kreativen Neukonzeption von Regulierungsformen auf der Agenda der „Law and Society"-Forschung.

Transformationen von Kriminalität und Strafe: vom „Lokalen" zum „Globalen" und zurück: Die Globalisierung erfasst Kriminalität genauso wie deren Bekämpfung. Neben organisierten kriminellen Netzwerken überqueren Ideen und Praktiken in Polizei und Justiz die Grenzen und verändern die kriminologische Landschaft auf allen Ebenen. Die Diskussion um Todesstrafe und die Rechte von Gefangenen, Straftätern und Opfern spielt sich vor einem kulturellen und sozioökonomischen Hintergrund ab, der sich in jedem Land anders gestaltet. Wie verändert die internationale menschenrechtliche Diskussion regionale „Kulturen des Strafens"? Inwiefern trägt die – immer noch in den Kinderschuhen steckende - internationale Strafgerichtsbarkeit zur Verhinderung von Regierungskriminalität bei?

Transnationale Rechtsordnungen: Inter- und transnationale Organisationen wie die UNO, die Weltbank, die Europäische Union oder die OECD haben im Zusammenspiel mit nationalen Regierungen und Gesetzgebern und international agierenden Unternehmen die Ausweitung und Homogenisierung von Regelungen auf globaler Ebene gefördert, begleitet von der Einrichtung von Gerichten und gerichtsähnlichen Streitschlichtungsorganen. Nicht zuletzt die europäische Integration zeigt, dass nationale Kompetenzen in großem Ausmaß auf supranationale Instanzen übertragen werden können. Wohin führen diese Entwicklungen? Wer sind die Gewinner des „globalen Rechts"?

Recht, Globalisierung und Entwicklungszusammenarbeit: In der öffentlichen Diskussion, aber auch in der Wissenschaft des „Nordens" wird oft nicht umfassend erkannt, welche spezifischen Auswirkungen die Globalisierung des Rechts auf die Akteure des Rechtssystems und das Rechtsbewusstsein der Bevölkerung in Ländern des „Globalen Südens" haben. Damit „Rechtsstaatsdialoge" nicht in Monologe ausarten und rechtliche „Transplantate" keinen Schaden anrichten, sondern zu nachhaltiger Entwicklung beitragen, müssen interdisziplinär arbeitende Wissenschaftlerinnen und Wissenschaftler aus dem „Norden" und dem „Süden" sich gegenseitig zuhören und zusammenarbeiten.

Recht, Umwelt, Technik: Der technologische Fortschritt macht auf der einen Seite immer weitergehende Erfolge bei der Bekämpfung von Krankheiten, Umweltzerstörungen und anderen Risikofaktoren möglich. Auf der anderen Seite ergeben sich Gefahren für Menschen- und Bürgerrechte durch Technologien, die die lückenlose Überwachung der Bürger, seiner Daten und seiner genetischen Informationen ermöglichen. Wie verändern Patente auf wissenschaftliche Entdeckungen und „Biopiraterie" das Verhältnis zwischen Mensch und Natur? Welche Antworten hat das Recht auf die Herausforderungen der Technik?

Inhaltsverzeichnis

Recht und Globalisierung

Featured Session: Comparative Disputing Behavior--New Insights on Disputing Behavior: Comparative Perspectives (2506)

Paper Session

(Session Organizer) Masayuki Murayama, (Discussant) Erhard R. Blankenburg, (Co-Chair) Herbert M. Kritzer, (Discussant) Hazel Genn

Drawing upon recent national survey data and large-scale empirical studies, we will compare patterns of disputing behavior in various countries and present a causal model which relates public attitudes with disputing behavior. Then, we will discuss theoretical and policy implications of comparative empirical studies.

Zeit: Donnerstag, 26. Juli 2007, 16:30 – 18:15 Uhr; Ort: Humboldt-Universität, Theologische Fakultät, Burgstraße 26, Raum 013

Participants

1. **Pascoe Pleasence** (Leagal Service Research Centre) <Pascoe.pleasence@legalservices.gov.uk>:

   Civil Law Problems and the Individual: An International Comparison

   This paper draws on large scale survey evidence from a number of countries to explore similarities and differences in people's approaches to resolving civil law problems.

2. **Bert Niemeijer** (Free University/Ministry of Justice) <e.niemeijer@minjus.nl>:

   Varieties in Disputing Behavior in Different Countries: Explanatory Strategies and Methodological Pitfalls

   > > In this paper we will compare empiricial results from different countries > and we will ask ourselves how eventual differences can be explained. We > will make a difference between the explanation of the frequency of > (potential) legal problems and of the resolving strategies > Part of the explanation is the vatiation in the methods of research. For > other differences we will offer explanations on macro, meso and > microlevel: economic and cultural conditions, variation in the legal > infrastructure, etc.

3. **Masayuki Murayama** (Meiji University) <aa00092@kisc.meiji.ac.jp>:

Value Attitudes, Problem Experience, and Disputing Behavior

Based on a national survey on problem experience and disputing behavior in Japan in 2005, we will try to develop causal models between problem experience and subsequent behavior and socio-economic, situational and psyco-cultural variables.

4. **Herbert M. Kritzer** (University of Wisconsin, Madison) <hkritzer@wisc.edu>:

To Lawyer or Not To Lawyer: Is That the Question?

This paper will examine the use of lawyers in dispute situations in multiple countries. It will draw on published and unpublished findings. The expectation is that the analysis will show that the decision to obtain assistance from a legal professional is more a function of the problem context than the resources of the disputant.

Der Sicherheitsstaat und der “Krieg gegen den Terror”

Featured Session: Torture and the Security State (3205)

Roundtable

(Session Organizer) Lisa Hajjar, (Participant) Louis Frankenthaler, (Participant) Jamil Dakwar, (Participant) Leigh Payne

Torture and the Security State Over the 19th and 20th centuries, torture lost legitimacy as a penal or judicial practice, and was legally prohibited as an international crime after World War II. Nevertheless, it continued to be practiced with appalling regularity and prevalence, albeit practitioners tended to deny allegations because of its criminal status and illegitimacy. However, in the 21st century torture has been openly resurrected as a "legitimate" tactic for "fighting terrorism" and "enhancing security" by the US government, despite the denial-through-euphemisms such as "coercive interrogations" and "alternative tactics." What makes 21st century torture distinctive and different from trends of the past is the fact that the world's lone superpower, ostensibly a model for the rule of law, has refuted and abandoned a universal consensus on the illegality of brutalizing prisoners in custody, not to mention the substantial body of expert opinion that it is inefficacious in producing "truth." The American embrace of torture after 9/11 has had a number of important and contradictory effects on a global scale, and these are the subjects of this panel. Revelations about American torture have galvanized and united an interesting array of critics within the country who are intent on reversing these trends, including uniformed military lawyers, human rights activists, civil libertarians and legal scholars. People in other countries who are committed to maintaining and enforcing the prohibition against torture have been appalled and propelled to action by the "green lighting" of torture by the US, which has been taken as a license for other states to openly adopt the same brutal tactics against their "enemies" and "subversives." And scholars of torture have added to these global discussions by offering reminders and insights about the destructive effects on societies where torture was rampant in the past.

Zeit: Mittwoch, 25. Juli 2007, 8:15 – 10:00 Uhr; Ort: Humboldt-Universität Hauptgebäude, Unter den Linden 6, Raum 3059

Participants

Government Secrecy (1118)

Paper Session

(Session Organizer) Gia B. Lee, (Chair/Discussant) Richard C. Schragger

Questions concerning the nature and extent of government secrecy are recurring ones in contemporary social, political, and legal theory. The aggressive secrecy shrouding government conduct and processes occasioned by efforts to "fight terror" make these issues particularly urgent and significant today. What kinds of secrets do governments keep, and by what methods? How do governments justify their practices, and are those justifications persuasive? How does the citizenry acquiesce to or challenge such secrecy? This panel will examine various aspects of government secrecy, including executive branch secrecy, the state

secrets doctrine in U.S. law, government lawyer confidentiality obligations, and government transparency efforts.

Topics: DEMOCRACY & STATE THEORY CONSTITUTIONAL LAW & CONSTITUTIONALISM

Participants

1. **Amanda B. Frost** (American University):

The State Secrets Privilege and Separation of Powers

Since September 11, 2001, the Bush administration has repeatedly invoked the state secrets privilege in cases challenging executive conduct in the war on terror, arguing that the "very subject matter" of these cases must be kept secret to protect national security. The executive's recent assertion of the privilege differs from past practice, in that it is seeking dismissal, pre-discovery, of all cases challenging the legality of specific executive branch programs, rather than asking for limits on discovery in individual cases. This essay contends that the executive's assertion of the privilege is therefore akin to a claim that the courts lack jurisdiction to hear and decide such cases. The executive's recent invocation of the privilege raises a concern that has been largely overlooked thus far - the impact of the privilege on legislative power to assign jurisdiction to the federal courts. The U.S. Constitution grants to Congress, and not the President, near-plenary authority to craft federal jurisdiction. Furthermore, when Congress assigns federal courts to hear cases challenging the legality of executive action, it is enlisting the judiciary as its partner in policing executive conduct. The executive's recent use of the privilege disrupts that constitutional collaboration, leaving the executive potentially unchecked by any branch of government. The essay then discusses how courts should incorporate the concern for legislative power and executive oversight into its analysis of the state secrets privilege. It concludes by advocating that courts refuse to dismiss these cases until Congress has indicated a willingness to take back the task of executive oversight that it had delegated to the courts through the original jurisdictional grant.

2. **Gia B. Lee** (University of California, Los Angeles):

Presidential Secrecy and the Candor Rationale

The Bush Administration, and many past presidential administrations, routinely decline requests for information on the ground that disclosure would have a chilling effect on full and frank communications. Citing the need for confidentiality to ensure "unfettered discussion" or "unvarnished advice," they invoke what I call the "candor rationale." This Paper examines that rationale. It argues that, despite its common sense appeal, the rationale is overstated, with only limited application in presidential contexts. Secrecy does not necessarily produce full and frank deliberations. Even when it does, such deliberations harm, as well as help, presidential decision making. As the Paper makes clear, the candor rationale stresses one potentially salutary effect of secrecy - reducing speaker inhibitions - while ignoring other, more troubling consequences.

3. **Kathleen B. Clark** (Washington University, St. Louis):

Confidentiality Norms and Government Lawyers

While the legal ethics rule on confidentiality does not distinguish between government and private sector lawyers, this article asserts that government lawyers are bound by a different confidentiality obligation because governments are different from private sector clients. According to the rules of professional ethics, lawyers are required to keep confidential all "information relating to representation," unless a client consents to its disclosure or unless one of several narrow exceptions applies. Private clients have the discretion to give or withhold consent to disclosure on an ad hoc basis. A government client, on the other hand, must abide by pre-existing disclosure norms found in the statutes and regulations that make up its information control regime. This highly regulated field includes clear prohibitions on the disclosure of certain information (e.g., the Privacy Act), clear mandates to disclose other information (e.g., through the Freedom of Information Act), and areas of discretion where government officials may choose to disclose or withhold information. Put another way, the government's information control regime defines the contours of the government client's consent to the disclosure of information by current and former government lawyers. This article sets out the substantive standard for government lawyer confidentiality, and recommends adoption of a review procedure akin to that which occurs with respect to highly classified information so that current and former lawyers can determine whether the information which they wish to reveal fits into the category of prohibited, discretionary, or mandated disclosure.

4. **David B. Goldberg** (deeJgee research/Consultancy):

Advocating less government secrecy: some balance about balance

The 46 member Council of Europe adopted a "Declaration on freedom of expression and information in the media in the context of the fight against terrorism" in 2005. On June 1 this year, the Council of Europe Convention on the Prevention of Terrorism enters into force. Has the right constitutional balance between the public interest in maintaining the secrecy of security-related information and the public interest in disclosure been achieved? And, in any event, maybe political critics of government secrecy should heed theoretical analyses such as Georg Simmel's (1906 trans.) The Secret and the Secret Societies or Hood and Heald's 2006 critique of the absolute value of transparency (Transparency: The Key to Better Governance?)

Rechtsstaatlichkeit und Verfassung(sgerichtsbarkeit) im Vergleich

PLENARY--Globalization of Constitutional Law (2601)

(Session Organizer) Elizabeth Holzer, (Participant) Francois Venter, (Participant) Jutta Limbach, (Participant) Javier A. Couso, (Chair) Brun-Otto Bryde

Constitutional law is closely connected with national identity as is evidenced in the U.S. debate about the legitimacy of the Supreme Court's citing foreign case law and has therefore for a long time been less influenced by globalization than other fields of law. This has changed. Processes of de-nationalization of constitutional law are widely recognized and discussed in jurisprudence and comparative law. The aim of the session is to explore this development from a social science perspective. It will discuss on a macro-sociological level the global economic, political social processes influencing the internationalization of constitutional law and on a micro-sociological level the structures supporting these developments, e.g. the international community of constitutional judges and their conference activities or the role of international drafting specialists and NGOs

Zeit: Donnerstag, 26. Juli 2007, 18:30 – 19:30 Uhr; Ort: Humboldt-Universität Hauptgebäude, Unter den Linden 6, Audimax

Featured Session: Reaction of Constitutional Courts to Social Change (3203)

Roundtable

(Session Organizer) Thomas Raiser, (Chair) Dieter Grimm, (Participant) Pedro Cruz Villalon, (Participant) Jutta Limbach, (Participant) Miroslaw Wyrzykowski

Social change presents a challenge to lawmakers and law applicants. The faster society changes the sooner the law ages. Interpreted in the traditional way it may produce undesirable results. Not all the necessary adaptations of the law to changing situations can be achieved by the legislature. Adaptation is also the task of the courts. This is particularly true for constitutional law, which in most countries cannot be amended as easily as ordinary law. Here much of the burden of adaptation is placed on constitutional courts or courts with constitutional jurisdiction and has to be achieved by way of interpretation. The panel will discuss how courts fulfil this function and how they ought to fulfil it in a manner faithful to the text and in accordance with democratic principles. The question has a methodological and a functional aspect: How can judges ascertain whether social change affects the meaning of constitutional provisions and what are the appropriate hermeneutic means to reinterpret the constitution? Which adaptations to changed circumstances can be achieved by judges, which are reserved to constitutional amendments? Special attention will be paid to new constitutional democracies.

Zeit: Freitag, 27. Juli 2007, 10:15 – 12:00 Uhr; Ort: Humboldt-Universität Hauptgebäude, Unter den Linden 6, Raum 1070

Europäische Integration

Featured Session: Social Europe and CRN08 Roundtable--European Welfare and Employment Policies: A Global Social Model? (3207)

(Participant) Joel Handler, (Participant) Manfred Weiss, (Participant) Csilla Kollonay Lehoczky, (Participant) Claus Offe, (Session Organizer) Marley S. Weiss, (Chair) Ralf Rogowski, (Participant) Diamond Ashiagbor, (Participant) David M. Trubek

This mini-plenary will discuss the content of the European Social Model, its governance characteristics, and its implications for welfare, labor and employment policies, their development and implementation, in the world at large. Participants will focus on a series of critical, cross-cutting questions, including the role of the nation-state and of supranational institutions in providing welfare, in shaping and coordinating the labor market, and supporting or undermining industrial relations systems. Further topics include the role of non-state actors, particularly the employer and trade union social partners in the redesign and operation of these systems; the relationship between state welfare policies and the operation of the labor market; the race and gender segmentation of the labor market and its relationship to welfare policies on the one hand, and industrial relations institutions and employment policies on the other; the importance of welfare and employment policy in broader economic policy-making; and the role of supranational coordination and learning mechanisms as catalysts, pretexts, or re-channeling devices for national reforms in these intertwined and overlapping portions of Social Europe. The session will discuss factors that can explain the resilience of European welfare policies and explore the implications of efforts to sustain a European Social Model in relation to reactions to globalization in the world at large. However, it will also problematize the common assertion that European social values are distinctive as well as broadly shared within EU Member States, as compared to other developed and developing countries.

Zeit: Freitag, 27. Juli 2007, 10:15 – 12:00 Uhr; Ort: Humboldt-Universität Hauptgebäude, Unter den Linden 6, Senatssaal

Roundtable--The Social Problèmatique of the Europeanization Process: What is Left? (2335)

Roundtable

(Participant) Christian Joerges, (Chair) Ellen Kennedy, (Participant) Ulrich Preuss, (Participant) David Abraham, (Session Organizer) Galya Benarieh Ruffer

The theory of the European Economic Constitution, premised on the interdependence of the Rechtsstaat, the ordering of the European Economy, and the assignment of social policy to the nation states, has contributed to the decoupling of social policy from the European project (Christian Joerges, 2005). This roundtable explores the claim of Europe's Left that the potential of the theory of the European Economic Constitution to guide the European project is exhausted and that the erosion of the economic constitution has not paved the way to 'social Europe' or to the reconstruction of a European social democracy. We examine Joerges' claim that neither the open method of co-ordination nor the commitment to a "social market

economy" in the Constitutional Treaty nor the new "social rights" provide a conceptually sufficient and politically credible basis for this end. In particular, the OMC threatens the very idea of constitutionalism, namely, the idea of law mediated, and rule of law bound governance.

Zeit: Donnerstag, 26. Juli 2007, 12:30 – 14:15 Uhr; Ort: Humboldt-Universität, Universitätsgebäude am Hegelplatz, Dorotheenstr. 24, Raum 1.301

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Vergangenheitsbewältigung durch Recht und demokratischer Wandel

Featured Session: Memory and Reconciliation (2509)

Paper Session

(Session Organizer) Jacek M. Kurczewski

Featured Session: Transitional Justice - Memory and Reconciliation The session focus is on the ways in which law-makers and judges are confronting the issue of giving justice to the victims and collaborators of the authoritarian and totalitarian regimes in various areas of the world. Since 1945 successive waves of bringing back justice had occurred starting with failure of NS-regime in Germany and its allies and collaborators elsewhere, followed by abolition of authoritarian right-wing juntas in Southern Europe and Latin America, then by disappearance of communist totalitarianism in Central Eastern Europe and some left-wing dictatorships in Africa, Latin America and Asia up to the abolition of apartheid in South Africa and ending of bloody ethnic "cleansing" in Balkans and in Africa. The common thread is realization of the wide involvement of a part of society in the misdeeds and crimes of the past regime and the need to reestablish the social solidarity in order to consolidate the newly set or set back democracy with its assumption of the rule of law and respect for human rights. The tension between these ideals and the search for justice and historical truth is permanent element of social and political life for long time in the countries that had passed through such historical experience. Practically the reconciliation struggles with memory and contradict each other. The tension itself as well as the actual mechanisms involved in its attempted solution are to be discussed using the widest possible range of experience in order to present the viable set of general scenarios that may in help in future to eliminate some traps and illusions that accompany the Big Transitions.

Zeit: Donnerstag, 26. Juli 2007, 18:30 – 19:30 Uhr; Ort: Humboldt-Universität Hauptgebäude, Unter den Linden 6, Senatssaal

Participants

1. **Gracyna B. Skapska** (Jagiellonian University) <g.skapska@iphils.uj.edu.pl>:

Can We Do Justice to the Past? Comparative Empirical Analysis of Lustration, Decommunization, and Restitution in Russia, Poland, and Germany

This paper is organized along an East-West axis in analysis of approaches toward the human rights violation in the past and reckoning of it by the new, democratic governments in postcommunist Europe. It debates the various approaches toward lustration, decommunization and restitution of property rights in Russia, Poland and Germany and looks for an explanation of the most contrasting approaches: in Germany and Russia in the local political cultures.

2. **Susanne Karstedt** (Keele University) <s.karstedt@keele.ac.uk>:

The Endurance of Collective Memory: Germany 1950-1980

Transitional justice and in particular the monumental spectacles of bringing past rulers and their heinous crimes to justice shape collective memories. However, transitional justice and the prosecution of crimes committed is often drawn out over a long period and more than a generation. How do recurrent waves of legal and public engagement with such crimes shape collective memories in the long run, how do collective memories change and fade with new generations, and how does this impact on the acceptance of guilt and responsibility? Survey data from Germany from 1945 - 1980 are analysed to show the oscillation of memory and judgement over time and in different generations.

3. **Ruti G. Teitel** (New York Law School) <TeitelRuti@aol.com>:

Transitional Justice Genealogy

Ruti Teitel will explore the genealogy, law and politics of "transitional justice." She will give an overarching presentation of the last half century of developments in transitional justice, showing the association of this conception of justice with periods of political change, and the connection of legal developments in this area to diverse political aims such as regime change, democratization, and peace. The genealogy proposed here is structured along multiple lines. First, it is organized largely chronologically and illustrates critical cycles divided into three phases of transitional justice. Second, the genealogy is organized largely along a schematic based on the law and politics of the developments associated with the three phases of transitional justice. Third, the genealogical phases are structured along related intellectual trends, reflecting the connection of the politics of transitional justice with the intellectual trends of the time and, in particular, a drift toward increased politicization of the law, as well, as the juridization of international affairs.

4. **Monika Nalepa** (Rice University) <nalepa@rice.edu>:

Skeletons in the Closet: Transitional Justice in the Post-Communist World

Monika Nalepa will discuss the relationship between negotiated transitions from authoritarian rule and transitional justice. For such negotiations to be successful, the opposition must ensure outgoing autocrats that they will not be punished with transitional justice after they step down from positions of control. But how can these promises be credible, if the opposition has incentives to punish the former autocrats after it is voted into power in democratic elections?

5. **Jacek M. Kurczewski** (Warsaw University) <J.Kurczewski@uw.edu.pl>:

Constitutional Jurisprudence toward the Communist Past (Expectations and Reality)

On my lecture, I present the real role of the constitutional jurisprudence in the specific period of the post communist transformation. I indicate the main challenges in creating the new legal reality as well as limitations imposed by the fact, that Polish revolution was a result of the political compromise. The subject of my lecture is "the fundamental decisions" of Polish Constitutional Tribunal concerning mainly the process of so called "lustration", the re-privatization and liability of the failed communist regime, for its crimes. One of the main conclusions is that the process of transformation towards the democratic state ruled by law was seriously affected by the specific polish social and political determinants. The constitutional jurisprudence had to be confronted with the need for balancing between the requirement of continuing the legal order and new democratic axiology on the other hand. I try to examine the question - what was the definite price of such evolutionary transformation model and whether the positive effects prevailed over the negative ones?

Dealing with an Objectionable Past: A Comparison across Countries (3116)

Paper Session

(Chair/Discussant) Carl Baar, (Session Organizer) Inga Markovits

A survey of insitutions and techniques of transitional justice using examples from countries that either emerged from f repressive past or that are currently attempting at least partial reform.

Zeit: Freitag, 27. Juli 2007, 8:15 – 10:00 Uhr; Ort: Humboldt-Universität Hauptgebäude, Unter den Linden 6, Senatssaal

Participants

1. **Maria Paula Saffon** (U de los Andes/U Nacional) <m-saffon@uniandes.edu.co>:

Transitional Justice without Transition? The Colombian Case and its Challenges to the Transitional Justice Paradigm

This paper will analize the particular difficulties and challenges that the Colombian context imposes on the paradigm of transitional justice. It will focus on at least the following questions: 1. Is the transitional justice paradigm useful to address partial or fragmentary transitions, such as the current Colombian transition? 2. Is the transitional justice paradigm useful for dealing with pro-systemic actors, such as paramilitary groups? 3. What is the relation between the protection of victims' rights and the warrantee of non-recurrence? Is the protection of those rights enough to assure, by itself, the non-recurrence of atrocities?

2. **David Sugarman** (Lancaster University) <d.sugarman@lancaster.ac.uk>:

Imperfect Justice: The Challenges and Obstacles to the Prosecution of Pinochet in Chile, 2000-2006

When General Augusto Pinochet breathed his last on December 10 2006, this much seemed clear: the man who had lived his whole life and never paid for even one of his crimes had done it again. Once more - one final time - Pinochet had escaped judgment. This paper describes and analyses the struggle to prosecute Pinochet in Chile from his return home in March 2000, following his 18 month detention in Britain, to his death in December 2006. It examines how the numerous proceedings against the former dictator were successfully delayed, why Pinochet was never convicted of anything, and the implications for Chile and the international human rights movement. This paper seeks to make an empirically-based contribution to the largely theoretical debates concerning: the interaction between law and politics; the judicialization of power; the efficacy of human rights, and the ability of courts, activist lawyers and social movements to find new paths to substantive justice; globalization; the denial of organised atrocities and the struggle to acknowledge the past; and the impact of international (i.e., third country) as distinct from domestic accountability. It derives

from my analyses of archival material, multiple secondary literatures and hundreds of interviews with key actors (including victims and their families, exiles, judges, NGOs, lawyers, officials, journalists and politicians).

3. **Christopher Kendrick Connolly** (Clifford Chance US LLP) <ckconnolly@gmail.com>:

Living on the Past: Prospects for a Truth Commission in Northern Ireland

The fear and uncertainty of Northern Ireland's past are slowly giving way to a sense of optimism. Behind the outward signs of rejuvenation, however, lurks the legacy of decades of conflict. Northern Ireland is not the first society to face the question of how to deal with its past conflict as part of a larger process of political transformation. Some states facing similar problems have established truth commissions as mechanisms through which to achieve transitional justice. This paper examines the prospects for applying the truth commission model in Northern Ireland. It argues that, although Northern Ireland faces significant and unique obstacles to any form of official truth-seeking, the implementation of a transitional justice mechanism that confronts the past is crucial for the future of the peace process, and would serve as an important example for other societies undergoing processes of conflict resolution. The paper identifies aspects of the Northern Ireland conflict that highlight both the need for some process of truth-seeking, as well as the difficulties such a process would face. It critiques three recent truth-seeking initiatives: the Report of the Northern Ireland Victims' Commissioner, decisions by the European Court of Human Rights, and the Bloody Sunday Inquiry. It then sketches the shape of a Northern Irish truth commission, keeping in mind both the benefits and limitations of the truth commission model, as well as the particular historical and political circumstances of Northern Ireland. The paper concludes by asserting that a process of truth-seeking is necessary for Northern Ireland to come to terms with its past and build a peaceful future.

4. **Laurel Fletcher** (University of California, Berkeley) <lfletcher@law.berkeley.edu>:

Context, Timing, and Dynamics of Transitional Justice: A Historical Perspective

Criminal accountability is invoked by some victims, diplomats, human rights activists and scholars, as well as opinion leaders at the national and international levels as necessary if not a precondition for societies affected by mass violence to transition into a new period of peace and stability. For all the talk of the importance of trials, what evidence is there that justice is more than a rhetorical talisman for social transformation; that the transitional justice paradigm that has been evolved is a magical process that may be invoked to usher in a new era? In this paper, we question the presumption that trials and/or truth commissions should be fixtures in any transitional justice process. To gain insight into what works for which country at which time, we conducted a qualitative analysis of seven case studies of countries impacted by mass violence and repression - Argentina, Cambodia, Guatemala, East Timor, Northern Ireland, Sierra Leone, and South Africa. We selected cases from different regions, different ways in which the conflicts concluded (military victory v.

negotiated settlement), different types of underlying conflict, and different responses to the violence. What emerges is a fuller appreciation of the dynamic system in which transitional justice interventions occur. We offer principles that can guide institutional development, scholarship, and policy prescriptions in the area of transitional justice.

5. **Daniel Rezene Mekonnen** (University of the Free State) <mekonnend.rd@mail.uovs.ac.za>:

The Ripeness of Transitional Justice Issues in Eritrea

The ripeness of transitional justice issues in Eritrea (An abstract of the paper to be presented at the International Conference on Law and Society in 21st Century, Humboldt University, 25-28 July 2007) Daniel R Mekonnen: LLB (Asmara) LLM (Stellenbosch) LLD expected 2008 (University of the Free State); formerly Provincial Court Judge in the Eritrean Judiciary Key words: transitional justice; truth and reconciliation The recurring injustices in Eritrea, perpetrated both in the pre- and post-independence era have never been healed properly since the country's liberation in 1991. Eritrea desperately needs a special paradigm of transitional justice that pertinently suits is own peculiarities. However, there are concerns that in a country that is still ruled by a notorious, violent and repressive government (which is nowhere near even the begging of democratic rule) the question of transitional justice is still somewhat abstracted from the reality of today in the case of Eritrea. This paper intends to discuss the ripeness of transitional justice issues in Eritrea. In so doing, it holds that advance planning around the idea of possible options of transitional paradigms can take place anytime and anywhere, although it is true that such plans can only be implemented in Eritrea whenever a ripe political transition might allow. A genuine desire for accountability for past abuses or at least a mechanism of truth-telling is an imperative part of a transitional period. It is not compulsory to wait for such a transitional moment to materialise before relevant studies on these issues can take place.

Recht und Geschlecht

Featured Session: Gender, Violence, and Human Rights (2507)

Roundtable

(Session Organizer) Lisa Frohmann, (Chair) Konstanze Plett, (Participant) Elizabeth Schneider, (Participant) Pratiksha Baxi, (Participant) Gabriela Mischkowski, (Participant) Rhonda Copelon

The ICTY and ICTR, in their landmark decisions, recognized, for the first time, that rape and sexual violence are in them themselves crimes against humanity and instruments of genocide. Nevertheless, sexual violence and humiliation are common acts in war. The Universal Declaration of Human Rights states individuals have the right to life, liberty and security of person (art. 3), it prohibits slavery and servitude (art 4) torture or cruel, inhuman or degrading treatment or punishment (art 5). Yet systematic rape and genocide continue in Dalfur and elsewhere, there is growing evidence of the connection between participating in war and acts of domestic violence at home, and aid workers report women are given a choice of trading food for sex or starving. This session will focus on the relationship between gender and war. It will explore sexual violence as a weapon of war and genocide, the use of sexual slavery as a tool of war, the use of gender violence in military training and the relationship between war and gender based violence at home. It will also examine responses to these human rights violations through international courts and reconciliation procedures in post-war areas ,as well as methods for address the psychological trauma that results from this violence.

Zeit: Donnerstag, 26. Juli 2007, 16:30 – 18:15 Uhr; Ort: Humboldt-Universität, Universitätsgebäude am Hegelplatz, Dorotheenstr. 24, Raum 1.204

Antidiskriminierungsrecht

Fighting Racial Discrimination with European Union Law: Limits and Possibilities (4416)

Paper Session

(Session Organizer) Jacqueline Gehring, (Discussant) Rainer Nickel

In 2000, at a time when far-right extremism seemed to be on the rise, the European Union passed the 'race directive' a law that requires all the member states of the European Union to implement racial anti-discrimination policies. The directive drew heavily on the British and American experiences with civil rights law, but also included some new European innovations. Seven years hence, the papers on this panel will consider the directive broadly--from its creation to its implementation and its unexpected consequences. Employing multi-disciplinary methods of analysis drawing on the law and society tradition of civil rights scholarship these papers put old theories to the test in a new context--the European Union. This Berlin panel is especially timely, as it will explore the state of the fight against racism in the European Union at the same time that the European Union's presidency will be occupied by Germany--which has promised to make a new anti-racism law a priority of its presidency.

Zeit: Samstag, 28. Juli 2007, 14:30 – 16:15 Uhr; Ort: Humboldt-Universität Hauptgebäude, Unter den Linden 6, Raum 1072

Participants

1. **Theresa Squatrito** (University of Washington):

Combating Religious Discrimination in France: Mobilizing European Law

In November 2005, the electrocution of two Muslim teenagers brought a wave of riots in largely Islamic suburban neighborhoods around France. At the same time, the number of reported anti-Semitic incidents in France escalated from 601 in 2003 to 970 in 2004. Dealing with these and other facets of religious discrimination in France is seemingly conditioned by the new relevance of law disseminating from the European Union (EU) and the Council of Europe (COE). Yet at the same time, French domestic law addressed the issue of religion and established protections against religious discrimination prior to the adoption of relevant European legal mechanisms. In this paper, I ask why does European law on non-discrimination, namely the EU Racial Equality Directive, become meaningful source of law within France when similar domestic law existed? More specifically, I look at the domestic incorporation of the EU Racial Directive with regards to religion and examine the process by which international and domestic legal orders are reconciled. Drawing upon public law and political science literature, I argue domestic social groups give meaning to European law in domestic legal systems by initiating claims based on European law, and are thus central to processes of legal integration. Thus, the extent to which social groups

mobilize the Racial Equality Directive is determinative of the level of legal integration.

2. **Jacqueline Gehring** (University of California, Berkeley):

Resistance or Responsiveness? Explaining State Responses to the European Union's Racial Equality Directive

Much European public policy literature focuses on the goodness of fit between old and new policies in order to explain the variation in implementation of European law by member states. I argue that in the area of European racial anti-discrimination policy the goodness of fit theory fails to explain the variation between states. Instead, I propose that in order to understand the variation in the implementation of European racial anti-discrimination law a new model must be considered, one that focuses on the way that the institution of citizenship frames racial policy making. At the heart of this model is the proposal that the way a nation-state imagines itself as formalized in citizenship policy will heavily influence how it constructs important concepts such as race, racism, and racial anti-discrimination/equality and how it in particular problematizes racial anti-discrimination. It is this problematization, as Favell (1998) argues, that best explains national policies about racial discrimination. Linking the process of problematization to citizenship policies adds depth to Favell's theory as well as to understanding the challenges faced in implementing a European-wide anti-discrimination law.

3. **Paul Frymer** (University of California, Santa Cruz):

What APD Can Say about Race and Institutions in the EU

This paper examines how American political development scholars understand the way in which institutional development impacts race and ethnic politics. In doing so, it has an eye towards the EU, another institution developing with potentially similar consequences for racial diversity in Europe. The paper will compare the development of the Civil Rights Act in the US with that of parallel institutions in the EU.

4. **Rhonda Evans Case** (East Carolina University):

Engineering Legal Opportunity Structures: The EU's Racial Equality Directive as a Blueprint for Strategic Litigation

In this paper, we argue that the RED represents the culmination of efforts by activist lawyers associated with the Starting Line Group (SLG) who (1) concluded that in an increasingly hostile political environment courts could provide an arena within which they could more successfully advance a progressive social policy agenda; and (2) learning from cross-national experiences, concluded that certain rules and institutional arrengments would create legal opportunities to exploit courts to maximum effect. As interest groups have turned to the courts as a means of advancing their objectives, social movement theorists have expanded the concept of political opportunity structure to include legal opportunities. In recent years, political scientists have paid increasing attention to the conditions under which groups make use of courts in order to advance

their interests. Less attention, by contrast, has been paid to the ways in which groups attempt to shape legal opportunity structures as a means of facilitating strategic litigation. This study shows that activist lawyers not only seek to exploit existing legal opportunities and resources, but that they also seek to engineer new ones. Existing analyses of the RED have focused on the timing of the Directive's adoption and on the role of the SLG experts in lobbying for it. The substantive content of Directive has been attributed to a process of borrowing from preexisting European directives concerning gender equity. This study subjects the substance of the RED to further study. It demonstrates that the Directive prescribes a number of national-level reforms that can facilitate strategic litigation as a means of advancing egalitarian and pluralistic goals. It argues that the SLG devised these types of provisions and persistently lobbied for them throughout the European policymaking process in order to create new legal opportunities that could be exploited in pursuit of its broader goals.

Rechtstransfer / Recht und Entwicklung

Cases on Law, Governance, and Development I (1304)

Paper Session

(Session Organizer) Tom Ginsburg, (Chair/Discussant) Julio Faundez

This is the first of three linked panels examining law and development issues from a comparative perspective.

Zeit: Mittwoch, 25. Juli 2007, 12:30 – 14:15 Uhr; Ort: Humboldt-Universität, Universitätsgebäude am Hegelplatz, Dorotheenstr. 24, Raum 1.608

Participants

1. **Richard Crook** (University of London):

Legal Pluralism and Access to Justice: Land Disputes in Ghana and Cote d'Ivoire

The social regulation of rights to allocate and use land is of critical importance in the development of the predominantly agrarian economies of West Africa. Increasing conflict over land takes place within a context of legal pluralism, where customary systems are still dominant, but to different degrees and within different legal contexts. This paper compares the cases of Ghana and Cote d'Ivoire, which illustrate contrasting forms of legal pluralism, and analyses the effectiveness and equitability of a wide range of state and non-state institutions for providing accessible dispute resolution. It concludes that state courts serve a real need for authoritative remedies and should be enhanced and supported. The introduction of ADRS also needs state support. Customary or traditional justice systems have played a key role in protecting land rights where they have been legalised by the state, as in Ghana. But where there are powerful chieftaincies, as in southern Ghana, they are not necessarily suited to ADR solutions because of their formality and embeddedness in local power structures. Situations of polarised inter-communal conflict as in Cote d'Ivoire also undermine their capacity to be effective.

2. **Jaap Timmer** (Leiden University):

Access to Justice in Indonesia: Some Methodological Considerations

In the language and practical approach of legal interventions for social and economic development, there is much debate about the connection and disconnection between 'civil society' and legal and judicial institutions. These debates revolve mostly around both the desired and unwanted practical effects of interventions, and generally argue for careful historical, political, social and cultural grounding of rule of law. Little and mostly implicit attention is paid to the methodological limitations of the concepts

used. This paper explores such concepts as 'civil society', 'local community', 'stakeholders', 'demand side' versus 'elite', 'rulers', 'state', 'supply side' in relation to the situation in the Mahakam Delta of East Kalimantan, Indonesia. The discussion aims to develop sound methodological points of departure for an integration of theories of co-management and sustainable coastal management with socio-legal theories.

3. **Martin Lau** (SOAS):

Afghanistan's Legal Needs and Foreign Assistance Efforts

This paper argues that especially in the rebuilding of legal systems of Islamic countries not enough attention has been paid to the role of Islam in the new, post-conflict, legal order. Afghanistan is a case in point: many of the country's problems and issues faced in the re-construction of its legal system are very similar to those faced by other developing countries. They range from what may be termed purely practical issues like the infra structure of the legal system, ie its buildings and staff, to cultural, political and economic issues. The co-existence of official and un-official law, the sharp divisions between the rural and urban, the socio-legal status of women, the absence of the visible manifestations of the state in many areas of the country and political and social instability are some of these issues. However, in addition to all these it is the role accorded to Islam in the legal system which is of particular relevance. The framing of a new, post-conflict, constitution in Afghanistan triggered a heated debate over the role to be accorded to Islam and Islamic law in the new constitutional set-up. This paper examines one of the outcomes of this debate, namely the newly conferred jurisdiction of the Supreme Court of Afghanistan to review legislation on the basis of Islam. The possible impact of this jurisdiction is examined with reference to the case of Pakistan, where similar constitutional provisions have been in existence for the past 25 years.

4. **Luciana Cunha** (Fundação Getulio Vargas):

Judicial Administration in Brazil: Dissemination of Information and Transparency

The reform of the justice system has been integrated into the Brazilian state's institutional reform agenda since the beginning of the 1990'. In fact, the administration of the judicial system's institutions is one of the focal points of such agenda. Therefore, questions pertaining to the types of demands received by the judicial system's institutions, the services they provide, the form in which they provide such services, the time and costs involved become essential questions in order to understand the way the judicial institutions are administered. However, the access to such data, which will make possible an evaluation of these institutions' performance as public service providers, will depend on the existence of an information production policy and a commitment to transparency. The paper tries to verify the degree of transparency in the Brazilian judicial system's institutions by identifying the existing information production policies and by observing the handling of the information produced and the use of such information in the judicial administration and in the planning for the future.

5. **Marina Svensson** (Lund University):

Heritage Management on the Chinese Countryside: Living Culture and the Law

As part of the social and political transformation of the Chinese society after 1949, the Chinese state took over or destroyed temples and ancestral halls on the countryside. This signified not only a struggle over political power but also a struggle over space, memory, and identity. In the 1980s, the countryside saw a cultural and religious revival as villagers started to reclaim and rebuild their temples and ancestral halls. Since the 1990s, these sites and buildings have also begun to receive attention and protection from the cultural relics bureaus. However, this process do not only change the places themselves but also the local community's views of its heritage and ability to control it. The 'discovery' of these sites by tourism developers and the growth in tourism furthermore transforms the rural heritage into something of an economic asset. This development gives rise to new contradictions and conflicts over interpretation and management and has in some cases led to dissatisfaction among villagers, who find themselves disinherited of their cultural heritage, excluded from the decision-making process, and not benefiting enough from tourism. The paper is based on field studies in selected villages in Zhejiang provinces and discuss contestations over use and the positive and negative impacts new laws and regulations have for management and preservation of heritage sites.

Religion und Recht

Featured Session: Revisiting the Sacred/Secular Divide: The Legal Story (3204)

Roundtable

(Participant) Mary Anne Case, (Participant) Tomoko Masuzawa, (Participant) Tim Jensen, (Participant) Hans Kippenberg, (Session Organizer) Winnifred Fallers Sullivan

Re-consideration of the secularization thesis, in all of its various guises, is proceeding apace. In the legal arena, recent work includes re-tellings of the history of the nature and extent of the modern secularization of law, philosophical delineation of the impossibility and/or undesirability of separationist legal ideologies, as well as empirical investigation and creative re-imaginings of approaches to the actual regulation of religious persons, places, and ways of life. All of this work presents challenges to existing legal regimes and legal philosophies. This interdisciplinary panel will focus on the legal contexts of this re-consideration at the global, national, and local levels. Panelists will consider the genealogy of legal secularism, the anthropology of the legal secular, legal regulation of emerging religious populations, and the re-invention of national "church/state" regimes.

Zeit: Freitag, 27. Juli 2007, 10:15 – 12:00 Uhr; Ort: Humboldt-Universität, Theologische Fakultät, Burgstraße 26, Raum 013

Transformationen in Kriminalität und Strafe

Featured Session: Transformation in Crime and Punishment: From Local to Global (3208)

Roundtable

(Participant) David Garland, (Participant) Joachim J. Savelsberg, (Session Organizer) Mona Lynch, (Participant) Katja Franko Aas, (Participant) Farid Samir Benavides-Vanegas, (Participant) Laura Piacentini

This featured session will examine the continuities and discontinuities across time and place in the crime control/penological landscape. It will explore how and to what extent globalization processes (in terms of transportation and "border crossings" of ideas, practices, policies, and economies) influence how local criminal justice/penological change takes shape in varied settings, as well as the limits to these broader influences on local systems. Each panelist will talk holistically about his/her work in terms of how it illuminates these issues.The discussion will consider and debate the robustness of recent theoretical contributions, as well as the varied empirical approaches to test those theories, that seek to explain the process of late modern penal transformation across and within different locales.

Zeit: Freitag, 27. Juli 2007, 10:15 – 12:00 Uhr; Ort: Humboldt-Universität Hauptgebäude, Unter den Linden 6, Raum 3059

Participants

Contradiction, Persistance, Challenge: The Status of Capital Punishment in the United States (1303)

Paper Session

(Session Organizer) Austin Sarat, (Chair/Discussant) Jody Lynee Madeira

What is happening to the death penalty and in the death penalty process in the United States? What forces/factors explain capital punishment's persistance, reveal its contradictory elements, and highlight the challenges it faces? Sponsored by CRN 11

Topics: PUNISHMENT

Participants

1. **Timothy Kaufman-Osborn** (Whitman College):

Capital Punishment and the Paradox of Lethal Injection

Until just recently, many students of the death penalty (including the present author) contended that the near-universal adoption of lethal injection as a method of execution

in the United States had, at least in part, rendered the practice of capital punishment more or less unproblematic. However, in the past three or four years, that contention has proven surprisingly misguided, as an increasing number of imminent executions have been challenged in court on the ground that this method constitutes a form of cruel and unusual punishment. The purpose of this essay is, first, to ask how to make sense of this shift in the receptivity of courts to such challenges; second, to ask what these challenges portend for the future of capital punishment; and, finally, to ask what the increasingly problematic character of this method of execution might tell us about transformations in dominant cultural understandings regarding the human body, the permissibility of pain deliberately inflicted by the state, and, most broadly, the limits of the legitimate punitive power of what might be called "the late liberal state."

2. **Paul Kaplan** (University of California, Irvine):

Facts and Furies: The Antinomies of Law and Retribution in the Work of Capital Prosecutors.

One way of investigating capital punishment's life or death in the U.S. is to examine the practices and consciousnesses of the persons who most vociferously promote its purported benefits-capital prosecutors. In this paper, I analyze the work of California Capital Prosecutors through a close reading of trial transcripts and also interviews from three large diverse California counties. The results of this analysis show that prosecutor discourse and consciousness evinces a paradox of sorts-while instantiating powerful ideological themes that underlie state killing (such as retribution and individualism) in trial discourses and also interviews, prosecutors also assert the primacy of 'facts' and 'law.' Why is this paradoxical? It is firstly because there is a tension between the rational, formal, bureaucratic process through which prosecutors narratively construct reality and the affective, moralistic, and inflammatory content of that constructed reality. Secondly, prosecutors' profound commitment to and valorization of the rational, formal 'law' is at odds with their belief that the law's purpose is to provide retribution on the behalf of the families of murder victims and also society in general. While this tension does not represent a strict measure of capital punishment's lifespan, its continued presence in the law suggests that while the death penalty may be weakened in the United States, it is not close to dying.

3. **Susan Bandes** (DePaul University (Visiting Professor, University of Chicago 2007-2008)):

The Heart Has Its Reasons: Abolition as a Change of Heart

The debate about the future of the death penalty often focuses on whether its supporters are animated by instrumental or expressive values, and if the latter, what values the penalty does in fact express, where those values originated, and how deeply entrenched they are. In this paper I argue that a more explicit recognition of the emotional sources of support for and opposition to the death penalty will have salutary consequences for the clarity of the debate. The focus on emotional variables reveals that the demarcation between instrumental and expressive values is porous; both types of values are informed (or uninformed) by fear, outrage, compassion, selective

empathy and other emotional attitudes. More fundamentally, though history, culture and politics are essential aspects of the discussion, the resilience of the death penalty cannot be adequately understood when the affect is stripped from explanations for its support. Ultimately, the death penalty will not die without a societal change of heart.

4. **David Garland** (New York University):

The Forms and Functions of American Capital Punishment

Today's American system of capital punishment - defined as the whole set of discursive and non-discursive practices through which capital punishment is enacted, evoked and experienced - has a peculiar institutional form. This paper argues that an analysis of that distinctive form, and the processes that have produced it, can help explain the retention of this institution in a context of widespread abolitionism and provide important clues to the real functions of today's death penalty.

(Zivil-)Gesellschaft und Justiz

Presidential Panel on Empirical Research: Legitimacy, Morality, and Law (2125)

Paper Session

(Session Organizer) Tom Tyler

The ability of legal authorities to gain deference from the public is central to their effectiveness in being able to maintain social order. For the past several decades discussions of the mechanisms for shaping public behavior have focused heavily upon gaining compliance through threatening punishment for rule breaking. Recently there has been increasing attention to gaining deference by motivating people to act on their own values. Two values are the belief that authorities are legitimate and ought to be obeyed and the judgment that the law reflects moral values. This session will discuss recent research on these value based mechanisms for maintaining social order.

Zeit: Donnerstag, 26. Juli 2007, 8:15 – 10:00 Uhr; Ort: Humboldt-Universität, Universitätsgebäude am Hegelplatz, Dorotheenstr. 24, Raum 1.101

Participants

1. **Tom Tyler** (New York University) <tom.tyler@nyu.edu>:

Legitimacy and the Rule of Law

Using the results of a survey of New Yorkers the role of legitimacy in shaping public cooperation with legal authorities is examined. The study contrasts cooperation that is linked to instrumental issues of performance to cooperation based upon normative judgments about police legitimacy. It is argued that people's relationship to the police and the legal system more generally is linked to moral judgments about the appropriateness of the manner in which authority is exercised.

2. **John Darley** (Princeton University) <jdarley@princeton.edu>:

Intuitive Moral Judgments and Public Support for the Law

When a person receives a description of an individual committing a specific crime, the person rapidly forms judgments on the severity of the offense and the duration of appropriate punishment for it. Evidence is converging that those judgments are what we would now call "intuitive" judgments. Rather than being the result of a reason guided, step-by-step analysis the severity and punishment judgments seem simply to "pop into" the heads of the respondents. Thus they are similar to the heuristics, biases, and other shortcut decisions that the judgment and decision-making researchers have documented that we all use. Imaging research suggests that these intuitions draw on both evaluative and emotional areas of the brain. Behavioral research demonstrates

that these intuitions are driven by intuitive ideas of "just deserts", i.e. retributive reactions rather than more reason-based deterrent or incapacitive considerations. The high degree of consensus within cultures on these judgments suggests that they are learned through early socialization processes, perhaps building on evolutionarily prepared cognitive structures. This "justice as intuitions" account has a several implications for the judicial system. Most disturbingly, evidence demonstrates that legal codes that contradict these culturally shared intuitions will move citizens toward moral contempt for the justice system and lessened willingness to voluntarily "obey the law." Rule of law practices need reconsideration in the light of an understanding of the basic shared notions within the population about right and wrong. Finally, we examine how such actions as "insider trading" can be framed so that citizens will find them appropriately criminalized, and why some public welfare offenses are difficult to intuit as crimes.

3. **Jojanneke van der Toorn** (New York University) <jojanneke@nyu.edu>:

Justice or Justification? Alternate Routes to Legitimacy

The question of why people view authorities as legitimate has been explored for decades by the application of both instrumental and relational models. Instrumental models are based on resource-based theories and predict that people will see authorities as legitimate as a result of the resources they received in the past or expect in the future. Relational models build on social identity theory and argue that authorities draw an important part of their legitimacy from the fairness of procedures by which they exercise their authority (Tyler, 2006). However, perceived procedural justice is not necessarily fair in objective terms (also see Tyler, 2006), which raises the question of what other factors legitimacy depends on. System Justification Theory poses that people are motivated to justify the position of those in power by perceiving their position as deserved (Jost, 2001). Legitimacy is thereby ascribed to the powerful (Haines & Jost, 2000; Jost & Major, 2001). Relating these findings to those prevalent in the social justice realm led us to consider a motivational route to legitimacy in addition to the established cognitive route. Legitimacy not only derives from the procedural aspects of an authority's behavior, but also from one's dependency on the authority. The present research tested these predictions on a sample of American employees who answered a series of questions about their work related attitudes and behaviors. Results indicate that those who are dependent on their job are more likely to view their supervisor as procedurally fair and legitimate than those who are not.

4. **Robert MacCoun** (University of California, Berkeley) <maccoun@berkeley.edu>:

Moral Outrage and Opposition to Policies that Reduce the Harms of Risky Behaviors

Some policies for risky behaviors attempt to prohibit, prevent, or deter the behavior (prevalence reduction); others try to make the behavior less risky (harm reduction). American society tends to use the former approach for stigmatized and/or illicit behaviors, and the latter approach for more mainstream activities like sports, driving, etc. But this begs the question of the underlying rationale for our social choices. In a

series of public opinion studies, I ask citizens to evaluate both types of policies across a variety of domains (heroin, tobacco, teen sex, skateboarding, female genetical circumcision, pollution trading credits, education for the children of illegal immigrants, etc.). These domains vary in important ways, but in each case there is a tension between making a behavior less harmful and discouraging the behavior. I examine a variety of potential mediators of these preferences, including religion, political ideology, education, gender, experience, consequentialist views about harms, and feelings of disgust and anger. I will present evidence that support for prevalence reduction over harm reduction is influenced more by deontological and emotional reactions to the behavior than by consequentialist reasoning about the policies.

Recht und Umwelt

Legal Change and Climate Change (4422)

Paper Session

(Session Organizer) Cary Coglianese

Zeit: Samstag, 28. Juli 2007, 14:30 – 16:15 Uhr; Ort: Humboldt-Universität, Juristische Fakultät, Bebelplatz 1, Raum E 44/46

Participants

1. **Sarah Pralle** (Syracuse University):

States, Courts, and Nature: The Impact of State Litigation on National Environmental Policy

In October 2003, attorneys general from twelve U.S. states filed suit against the federal government in an attempt to compel the Environmental Protection Agency to regulate so-called "greenhouse gases." This lawsuit appears to be part of a growing trend in which state attorneys general are attempting to shape national environmental policy through the courts. This practice, dubbed "legislation through litigation," is the focus of this paper. My paper examines all state-initiated lawsuits against the U.S. federal government and private parties in federal courts from 1970 to the present. Over 300 cases are examined, with the goal of tracing litigation patterns and trends. The second part of the paper analyzes the political and policy consequences of these lawsuits, focusing in particular on recent multi-state lawsuits that address national environmental problems. The analysis examines how the courts, Congress, government agencies, and the media have responded to the litigation. This research will expand our understanding of the role of litigation and "judicial entrepreneurs" in environmental politics and policymaking. On the one hand, proponents of state environmental litigation praise activist state attorneys generals on the grounds that they are effective policy entrepreneurs in an otherwise moribund federal regulatory environment. But critics of such litigation claim that the judicial arena is not the proper place to settle conflicts over national regulatory standards. They argue, among other things, that these lawsuits forward an adversarial model of policymaking that is inefficient and ineffective. While the debates over these lawsuits continue, very little empirical research exists in which to evaluate them. This paper attempts to fill this gap.

2. **Sumudu Anopama Atapattu** (University of Wisconsin):

Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?

Much has been written and argued about global climate change since its emergence in the late 1970s. From a total rejection to a gradual and rather reluctant acceptance, the

debate on climate change has been wrought with controversy. While the occurrence of global climate change is no longer seems to be challenged, the issue now being debated is "how much" and "when". While nature would have contributed to the process, it is no longer seriously disputed that it is a human-induced phenomenon. The human cost of climate change will be astronomical. These range from the very survival of human beings to adapting to different livelihoods, crops, cultural practices, and even a different lifestyle as well as displacement and migration in some instances. Thus, a broad range of human rights can be violated as a result of global climate change. This paper seeks to discuss the impact that global climate change will have on the realization of human rights and the implications for international law. It discusses the protected rights that could be violated as a result of climate change, the response of the international community to global climate change and its adequacy, and how international law must respond to the threat posed by climate change. It also seeks to deal with the new category of people called "environmental refugees" who have become displaced as a result of environment-related causes which are exacerbated by climate change. It is also predicted that some of these environmental problems caused by global climate change - soil erosion, deforestation (and desertification), and lack of potable water - will play a role in increasing the incidence of conflict thereby undermining regional and/or international peace and security. In short, global climate change can give rise to complex, inter-woven issues at the international level leading to unprecedented changes in international society. The paper seeks to discuss whether the present international legal order can cope with these challenges. Given that these concerns cut across a wide spectrum of issues - environmental, economic and social - it would seem that global climate change poses a particular challenge to sustainable development. In other words, global climate change can undermine the very process of sustainable development - a process that was endorsed by the international community at the Rio Conference on Environment and Development in 1992 and reiterated at the World Summit on Sustainable Development in 2002. Key words - Global Climate Change, Environment, International Human Rights Law, Sustainable Development, international peace and security, environmental refugees.

3. **Cinnamon Carlarne** (University of Oxford):

Notes from a Climate Change Pressure-Cooker: Local, State, and Civil Society Attempts at Transformation Meet National Resistance in the USA

Global climate change poses one of the most pressing environmental, economic, and social problems of the 21st Century. The USA bears a disproportionate burden for contributing to global climate change and has the capacity - if not the will - to be a world leader in combating climate change. Local, state and civil society efforts to transform climate change policy-making in the USA, however, have met with stiff resistance at the federal level, spurring a new era in American environmental policy. While the federal government was once the leader in environmental policy-making, it is now the laggard. Meanwhile, sub-federal actors find increasingly inspired ways to push for more progressive climate change policies. Much has been written about sub-federal efforts to adopt climate change policies, but this is just the tip of the iceberg. From adopting local policies, to employing common law, criminal law, and tort based litigation, to using existing federal environmental laws, to invoking the jurisdiction of international institutions, civil society is utilizing every possible mechanism to

overcome stagnation and resistance at the national level and thereby drive a progressive climate change policy agenda from the bottom up. This paper examines new and creative uses of local, national and international law to overcome federal resistance and to force legal transformations in climate change policy-making in the USA.

4. **Jason Johnston** (University of Pennsylvania):

An Economic Analysis of Decentralized Responses to Global Warming: Optimal Strategies with Developmental Divergence

This paper analyzes the economics of liability and decentralized regulatory responses to global warming (including national or regional cap and trade schemes) and argues that given the radically diffferent developmental stages of various key carbon-emitting states, the optimal policy is one involving subsidies for carbon sequestration and provision of energy from low (or no) C02 sources.

5. **Ilhami Olsson** (Kent University):

The Normative Development of International Climate Change Regime: The Interplay between Hard and Soft Law

This paper portrays the normative structure of international climate change regime, consisting of 1992 UN Framework Convention on Climate Change, 1997 Kyoto Protocol and other additional elements, the practices of the Intergovernmental Panel on Climate Change, Global Environmental Facility and procedures of these institutions. The first part of the paper explains the international legal foundations on which the climate change regime is built, including how rules with different normative qualities, i.e. hard and soft law rules, are used in this regime. This part gives an overview of the role of various participants in the climate change regime, including both governmental and non-governmental actors. Part two covers the substantive rules of the climate change regime, including the reporting, review and non-compliance mechanisms and institutions and procedures established by the regime to oversee implementation, enforcement and future development. Part three explains the increasing role of soft law in environmental regime and climate change regime and analyses the interaction between legally binding and enforceable rules and legally binding but unenforceable and legally non-binding. Part four reflects on the effects of the interplay between hard and soft law on the normative development of the climate change regime and assesses their relative advantages and disadvantages. The paper concludes that both hard and soft law have differential effects on both rule development and effective implementation of climate change rules depending on three factors: 'political saliency', 'the perceived state of scientific knowledge' and 'the bargaining power of the states' that favour either hard or respectively soft law.

Rechtstheorie

After Jacques Derrida and Niklas Luhmann: The (Im-)Possibility of a Social Theory of Justice (4209)

Paper Session

(Session Organizer) Gunther Teubner

Deconstructing justice and legal autopoiesis caused a sharp rupture in the continuity of theorizing about law. Both, Derrida and Luhmann, identified legal paradoxies as the non-foundational foundations of law which changed radically the conditions of possibility of a sociological theory of law and justice. Yet, while Luhmann constructed crystalline structures of a new sociological theory of law, Derrida questioned fundamentally this very possibility and suggested ways of thinking about law that transcends legal sociology and philosophy of law. In this situation, is it possible to re-formulate the relations between social structures and legal semantics of justice? Bringing together scholars from France and Germany, the session focuses from the angles of political philosophy and legal sociology on three fundamental concepts: Justice, (subjective) rights, and legal subjectivity. Chair: Gunther Teubner Papers: Gunther Teubner, Frankfurt: "Justice: Social Contingency versus Philosophical Transcendance" Christoph Menke, Potsdam: "The Abyss of the Individual: Social Preconditions of the Aporia of Justice" Jean Clam, Strasbourg: "Aging Postmodernity: Law Beyond Polycontexturality and the Fragmented Self"

Zeit: Samstag, 28. Juli 2007, 10:15 – 12:00 Uhr; Ort: Humboldt-Universität Hauptgebäude, Unter den Linden 6, Senatssaal

Participants

1. **Gunther Teubner** (Goethe Universität Frankfurt):

Justice: Contingency Formula versus Self-Transcendance of Law

Dominated by social and legal philosophers, the present debate on justice oscillates between the poles of universality (Rawls, Habermas) and alterity (Levinas, Derrida). In my paper, I contrast them with a third position, a sociological theory of justice in which justice appears as the "contingency formula" of law (Luhmann). Here, the question of justice is no longer primarily a problem for philosophy but for concrete social practices in the changing self-descriptions of law. This opens perspectives for historical analyses to investigate into affinities of varieties of justice with changing social structures. More important is its potential to reformulate the concept of justice under present conditions which could give not only directives for legal sociological investigations but also normative impulses for a different understanding of justice in legal theory and practice. I expect to expand this project by a confrontation with Levinas' and Derrida's ideas on justice. Parallel to Luhmann's concept, justice in their view is neither an internal legal norm, nor is it an external social, moral or political program, but aims - now in contrast to the case of Luhmann - at the transcendence of law, which is unattainable to legal operations but whose demands they are continuously subject to. Luhmann's sociology does not address this question; instead,

it is solely concerned with the immanence of law, the positivity of legal acts, legal rules, and law's relation with the social environment. To the extent that Levinas and Derrida emphasise the irreconcilable difference between positive law and such a form of justice, they formulate the transcendent dimension of law. Ironically, this would, precisely in Luhmann's sense, constitute an observation of law and world as unity of the difference of law / non-law which necessarily ends in paradoxes. From such a confrontation of contingency and transcendence in the concept of justice I expect to develop a deeper understanding for subversive practices of self-transcendance in law which are neglected in official legal theory and doctrine.

2. **Jean Clam** (CNRS, Berlin):

Aging Postmodernity: Law Beyond Polycontexturality and the Fragmented Self

The lections sociology of law has been taught by postmodern sociologies can be summarised and brought to a double point: polycontexturality of social meaning production and action; multiplicity of selfness of the subject - being the correlate of the polycontexturalisation of social communication. My thesis is: Both dynamics are no more the pulling ones and represent a sort of historical facts of the present. Postmoderniy is aging with the aging of this stimulative moment that defines in my account its central moment. The stimulative moment of postmodern culture, while accelerating its soaring, overwhelmed the multifaceted subject itself. It determined a recession or an intermittency of the subject. Our social present is determined by the transformation of the stimulative potency of Postmodernity into a contraction of the noospherical transmutation of the world which reached in it its last peak.

3. **Christoph Menke** (Universität Potsdam/Philosophie):

The Abyss of the Individual: Social Preconditions of the Aporia of Justice

Both Derrida and Luhmann conceive of law in view of a fundamental, indissoluble difference. To be sure, the difference that is constitutive of law follows a different logic in both cases: while in Derrida it is a difference that is internal to the very idea of justice, in Luhmann it is the difference between the legal (and, in general, social) person and the ("human") individual. The law-constitutive difference also, however, has a different status in both theories: in Derrida, the differance of law follows from the aporetic structure of any normative practice, while in Luhmann the difference of law is about the limit of the social as such (or, the "negativity" of the individual vis-à-vis the social). The paper will confront both approaches and argue that, on one side, Derrida's argument implicitly presupposes the difference between the social and the individual, while, on the other side, Luhmann's distinction has to be re-thought in terms of "crisis", hence "critique".