LIST OF ABSTRACTS

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KEYNOTE LECTURES

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No Transitional Justice without Attribution of Criminal Responsibility

Transitional justice is commonly understood as a bundle of measures and procedures by which a new and legitimate political order tries to react on past injustices which were committed by an illegitimate regime. The central question ist: How to do justice to the victims, to the minorities and groups who were maginalized, repressed, violated, tortured or killed. This justice is transitional, because it is considered as a central part of the political and social process which shall lead to a stable and functioning constitutional political order, governed by the rule of law. Among the measures and procedures criminal law has a prominanet, but also ambiguous place. On the one side, it is considered as neccessary for the rehabilitaion of the victims and tthe restoration of their status as equal citizens, on the other hand the threat of punishment for the members of the former elite and their clients could motivate them to hide themselves from prosecution and to distort the truth about their crimes. The paper argues

that the public ascertainment of the truth about the crimes as well as the public and justified attribution of repsonsibility to the perpetrators is a necessary requirement not only for a reconcialiation of the victims but also for a stable and functioning democratic political order. Then, punishment becomes much lesser important.

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The Morality of EU Constituition

The traditional (monist) constitution of democracy assumes a sovereign, a nation-state people who monopolize a given territory and establish over it a state under their own sovereign rule. Such a sovereign state democracy is indeed set up by and for the sovereign as its ultimate author and addressee. In Europe, by contrast, neither a Nation-state people, nor the European people as a whole, could any longer realistically be described as the holder of sovereignty. Instead, they both coexist as ultimately self-standing authorities over their partly overlapping territories and spheres of jurisdiction. Inherent to this pluralist, as opposed to monist, constitution is a challenge between both authorities that, if properly construed, could lead them dialectically through mutual refinement and into generating an inclusive pluralist constitutional formation that, in terms of its moral superiority, the traditional model could not reach. Instead of monopolizing its territory in the hands of a single group of people, such a morally superior constitution opens the possibility of democratic inclusion that was unavailable before, while not endangering the goods achieved thus far. In various ways, implications of such a moral constitution translate into constitutional law and policy, including that of immigration.

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Asymmetrical Recognition: A-Legality and the Politics of Boundaries in a Global Context

The problem of legal boundaries lies at the heart of a conceptual and normative inquiry into legal order. Conceptually, the law orders behavior by setting the boundaries which establish who ought to do what, where and when. Normatively, the question about legal order turns on the inclusion and exclusion wrought by boundaries: how ought boundaries to be set? This lecture interweaves these two strands of thinking about legal order in the following general question: what politics of boundaries could do justice to challenges to how legal orders draw their boundaries? It suggests that asymmetrical recognition is the normative core of such a politics of boundaries. In contrast to other accounts of recognition, it builds on a complex account of how boundaries do their work of including and excluding, arguing that boundaries not only include what they exclude, but also exclude what they include. This account rules out both universalism and particularism, pointing, instead, to a strongly normative interpretation of agonism in politics and law.

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Vulnerable Agency: Children's Rights and the Law

Scholars have recently pressed new arguments for children's political representation based on the universal, if diversely expressed, vulnerability and interdependency of all citizens. After discussing the new rationales for children's representation, I will argue that the case of Bolivia's 2014 child labor law raises uncomfortable questions—visible especially in the global north's response to it—about the coherence of children's representation, legitimate national law, and international standards for human rights in a situation of de facto inequality among nations. In the absence of meaningful children's representation in a powerful international forum, justice can require privileging representation and national law over enforcement of international standards.

Jürgen Moltmann

My history/story with Kelly Gissendaner on death row

Kelly Gissendaner, after being on death row for 18 years, was on 30 September 2015 put to death by the State of Georgia in the USA through a lethal injection. During her execution, she was singing the hymn "Amazing grace…" I will first tell you my history/story with her, next I will express my thoughts on guilt and penance/atonement, and at the end I will say something about the mystical spirituality of prisoners/inmates [*Strafgefangenen*]. (English translation by **Jan Jans**)

SHORT PAPERS

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Ehe- und Familienrecht, moralische Diskurse und Gerechtigkeitskonzepte

Die Entwicklung der deutschen Rechtsprechung im Ehe- und Familienrecht zeigt, dass sich das Ehe- und Familienrecht weg von identitätslogischen Bestimmungen und hin zum Vergleich von sozialen Verhältnissen führt.

Auf der Ebene der Moral und Ethik handelt es sich um den folgenden Wandel: Argumentationen darüber, was Familie ist und die sich aus einer (bestimmten) Sexual*moral* ableitet, zentriert in der Bestimmung der Zeugung eines Kindes, wird ersetzt über eine Fürsorge-, Bindungs- und Verantwortungs*ethik*. Diesem ethischen Ansatz folgen zunehmend auch Repräsentanten der evangelischen Kirche in Deutschland. Doch diese ethische Sichtweise scheint nicht ausreichend. Deren Intention, naturidentitätslogische Sichtweisen zu überwinden, verweist dennoch in die richtige Richtung.

So verweist die deutsche Rechtsentwicklung in eine deutlich andere Richtung. Hier wird wie gesagt *zunehmend* das eine Verhältnis – die Ehe – mit einem anderen Verhältnis verglichen – der eingetragenen Lebenspartnerschaft. Der Vergleichspunkt ist dabei nicht länger die praktizierte Sexualität der Partner und die „natürlichen" Bedingungen für die Zeugung eines Kindes. Naturargumentationen werden *hingegen* ersetzt durch die Kriterien der praktizierten (paar-elterlichen) Sozialität.

Ein (familiales) Verhältnis mit einem anderen vergleichen? Dass das deutsche Recht heute diese Möglichkeit überhaupt zur Verfügung hat, hat eine historische Voraussetzung: die vielumstrittene rechtliche Konstruktion der eingetragenen Lebenspartnerschaft. Allein schon diese rechtliche Verifizierung einer gelebten menschlichen Praxis, die rechtlich betrachtet keinen Mangel verkörpert, das das Recht als Recht betrifft, muss zum Überdenken von moralischen Vorstellungen führen, soll Rechtstaatlichkeit nicht als Abnorm zum Moralischen, sondern als normativitätsstiftend für Moralisches verstanden werden.
Ein Verhältnis mit einem anderen vergleichen als Überwindung von Naturidentitätslogiken: Also Aufgabe des Rechts? Sogar Einspruch des Rechts (und der Rechtstaatlichkeit) gegen falsche, wenigstens unzureichende moralische Vorstellungen?

Was ethische Konzepte betrifft, so landet man beim antiken Verständnis von *mores* und *ethicos* eines Platon und vielleicht sogar eines Aristoteles bei der Kritik an Identitätslogiken. Gerade Platon argumentiert gegen eine jegliche Naturvorstellung, Aristoteles hält dies zwar nur bedingt durch. Dennoch, Gerechtigkeit kann als wesentliche kritische ethische Größe gegenüber Naturidentitätsargumentationen stark gemacht werden. Indem das Konzept der Gerechtigkeit entsprechend profiliert wird, wozu die Entwicklung der deutschen Rechtsprechung aufgegriffen werden kann, können beide in einem hermeneutischen Zirkel weiterentwickelt werden. Zu profilieren ist, wie eine solche Konstellation geschärft werden kann, so dass Ethikdiskurse, Gerechtigkeitsdiskurse und Rechtsdiskurse einer gemeinsamen metatheoretischen Diskussion folgen können.

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Legitimacy, Authority, Reasons and International Obligations

International Law presents national legal system with new challenges, towards both its authority and legitimacy. Yet these questions are not as straight-forward as might first appear, especially in light of the specific particularities which the international legal order exhibits. First of all, in Hartian terms, the international community seems to have "law, but not a legal system"[1]; it portrays/contains legitimate binding obligations, yet we cannot exactly understand/study it in the same way we understand/study national systems. Within states we are used to this "luxury" - this unity and systemization - which the rule of recognition allows for us[2]. We are used to taking everything which is officially designated as "law" in an "all or nothing" basis; we are used to recognizing valid law through someone's "say so", through its "source" and its "pedigree" within the unbroken chain of rules - to the basic rule (of recognition).

In lack of an international rule of recognition (and an international authority to accompany it) international law, inescapably, lacks this systemization, this descriptive unity which we use to understand domestic legal norms[3]; this presents obstacles to its understanding and, yet, new opportunities. This "all or nothing" basis dissapears, and international law becomes abstract international norms/obligations or at least "sets" of them. This allows for more flexibility and *choice,* which is not possible within states. In Razian terms (using his legitimate authority conception) authoritative norms preempt even when not reflected/deliberated upon a correct balance of legitimate reasons[4]. This brings us to the second peculiarity of international law.

The Razian legitimate authority conception exhibits clearly the vertical relationship between authority and subject; the directives are created and applied vertically to (independently of) the subject - even if they are decided according to reasons which apply to subjects independently of the authority which decides upon them. Within the international community this vertical relationship collapses into a horizontal one; since, according to the traditional Westphalian conception of internationl law, states are both the (main) legislators and subjects. Although, through this "state consent" model the legality of international norms (at least domestically) inevitably depends upon the discretion of state officials; yet its "legitimacy" might not.

International norms, if legitimate, will stand for years to come and will be inherited by both the subjects of state authority, future authorities and generations to come. It is exactly this fact which raises anew the question of legitimacy of legal norms, this time from the international context - which in turn legitimizes the national one. As such, we cannot base the

[1] M.Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A Hart", (2011)
[2] Hart, H. L. A. *The Concept of Law*. Oxford: Clarendon, 1961. Print; Chapter X
[3] This was also recognized in Eric Posner, "Do States Have a Moral Obligation to Obey International Law?," 55 Stanford Law Review 1901 (2003)
[4] Raz, Joseph. *The Morality of Freedom*. Oxford: Clarendon, 1986

legitimacy of international norms using reasons which apply to passing/temporary authorities/governments. The reasons which legitimize international norms must run deeper than that. From this perspective, it seems fruitful to examine anew the relationship of authority between officials and subjects[5].

The state is an unavoidable actor within the international scheme, yet any (legitimate) authority it holds internationally it must still derive from the subjects which it represents, or the reasons which apply to them independently; perhaps we can work out the legitimacy of international norms through the existing relationship of authority which exists within the state. Raz's service conception provides a very useful instrument to understand this relationship through; the reasons which legitimize domestic norms could be the same reasons which legitimize international norms; and when state officials are correctly recognizing or refusing to recognize international norms, they could be argued as responding to moral obligations they owe their own subjects, primarily, and subjects of the international community in general.

Raz's service conception cannot be recreated internationally by forgetting the existing domestic relationship[6]. As such the existing national model needs to be extended to account for international norms[7]. Under this extention it seems possible to suggest that there is a moral obligation to follow (an) international norm(s) under three headings. When: 1) they contain directives which are reflected upon a correct balance of (dependent) reasons ; 2) reliance upon certain international norms, mechanisms and schemes equip state authorities better to respond to reasons which exist within the state; and 3) it falls within the obligation to support "just institutions" (which subject hold individually and, as such, is inherited by state authorities).

From this perspective, although iternational norms do indeed require some sort of state recognition in order to obtain legality, this recognition can only be a product of deliberation. Yet this deliberation, since it is done through a representative capacity, and upon dependent reasons requires the representative state authorities to act within a morally (and in extention politically) correct manner. This correct manner, might certainly be difficult to define, but it includes at minimum dependent reasons. This dictates that any state consent or denial must be a reasoned one, justified upon reasons which apply independently to subjects, real people. This approach does not prescribe results, but a certain type of deliberation within state-actors; a meaningful conversation and debate using dependent reasons; transparency. The further question is in what manner such actions can and ought to be organized in.

[5] Kumm attempts something similar from a constitutionalist perspective, see Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", European Journal of International Law, 2004

[6] Tasioulas in ch. 2 of their book does exactly this. See Besson and Tasioulas, "The Philosophy of International Law" (2010) Oxford

[7] Besson in her article extended Raz's conception in a more fruitful manner in Besson, S., "The Authority of International Law – Lifting the State Veil", Sydney Law Review [Vol. 31:343 2009]

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Ethical Aberrations and Dystopian Justice: Reflections on Law and Morality in India

There is a strong consensus among scholars and commentators on Indian affairs that the justice system in India is on the verge of collapse. Judges of the Supreme Court have also bemoaned the parlous plight of the judiciary and warned that it could lead to chaos. Scant respect for the rule of law is a ubiquitous phenomenon. The only time the law acquires sanctity is when one is trying to vindicate one's rights. On all other occasions, it is viewed as an impediment that must be circumvented. Violating the law and dodging the consequences, though legal transgressions, evoke social admiration. Defying the law is a low risk-high return activity; one that enhances one's social standing and begets recognition. The upshot is that virtually nothing is sacrosanct in India. Almost everything can be manipulated, fudged, misrepresented or made to disappear. School transcripts, land records, official documents, affidavits, court papers, legally established procedures, constitutionally guaranteed rights – nothing matters. Normlessness rules. India, as Galbraith once remarked, is 'a functioning anarchy.'

The grave anomalies of the justice system have garnered significant scholarly attention. Academics have critiqued endemic delays, caste based nepotism, lack of access to the courts, the prohibitive cost of litigation, the chicanery of lawyers, the pervasive skullduggery of the system, and language barriers. They have explained how these baneful trends add up to a dystopian dispensation. Others have zeroed in on more serious defects such as the lax enforcement of court orders, the corruption of the judges, prosecutorial misconduct, tampering of evidence and the intimidation of witnesses.

In the recent decades, the administration of justice has developed more anomic and aberrant features which could catalyze the subversion of the entire system. Vigilantism is rearing its ugly head everywhere. Vigilante justice is perceived as quick, fair, and prompt. Likewise, kangaroo courts, mostly caste based entities like the *Khap panchayats,* have sprung up to purvey medieval 'justice' whose touchstone is fealty to ascribed identities like caste, clan, and ethnicity. The mainstream courts are helpless. They are backlogged by millions of cases, hamstrung by a severe shortage of judges, and rendered ineffective by a recalcitrant state which perfunctorily upholds the law. Besides, the courts are plagued by judicial activism and inconsistent rulings, often driven by the ideological predilections of the judges.

Going beyond the apparent lacunae of law enforcement, I argue as follows. First, an inchoate justice system in a postcolonial country like India marked by severe inequality, social cleavages, sclerotic institutions, a soft state, low levels of human development and literacy, a society caught in a painful, uneven transition from feudalism to capitalism is bound to be blighted by its grotesque milieu.

Second, the incongruities of the system spring fundamentally from the profound disjuncture between the prevalent malformed social mores, twisted morality, and deviant ethical compass of the people and the demands of an inclusive, egalitarian system. As Durkheim stated: 'Where mores are sufficient, laws are unnecessary; where mores are insufficient, laws are unenforceable.' Several features of mainstream Hinduism, the religion of

the majority of Indians - such as a rigid, stultifying system of caste based stratification, the notion of Karma, religiously sanctioned discrimination, in-built biases against women, minorities, and the lower castes – militate against the evolution of nuanced sensibilities of fairness, equity, and social inclusion. For centuries, India practiced untouchability and social exclusion based on the accident of birth. The idea that people get just desserts based on their deeds in previous births has burrowed deep into the Indian consciousness. What India lacks is a culture of equity and freedom from the vice-like grip of injunctions against social solidarity. This explains the yawning trust deficit in contemporary India which manifests in a mad scramble for resources, power, and privileges.

Third, I posit that resolving the absurdities of the justice system requires a systematic interrogation of the philosophical, moral, and social underpinnings of its culture and religion. Just as critical is fostering the ethos of wholesome ethical standards which segue into the imperatives of a modern, democratic society. Among other things, it involves reinstating affirmative communitarian values such as social accord and non-discrimination. Furthermore, the notion that the law is a moral enterprise, one that is committed to human flourishing must be strongly underscored (Araujo, 2014).

Fourth, following Shapiro's Planning Theory of Law, I maintain that building the edifice of law involves two types of activities: social planning and instituting legal norms (Shapiro, 2011). The objective of this project is 'to remedy the moral deficiencies of the circumstances of legality' and to create legal norms that are part of 'a shared plan' of justice (Plunkett, 2013). India has a robust plan in the form of a progressive Constitution. Two things require urgent intervention: first, the Indian state has to evolve a common ethical consensus regarding the values enshrined in the Constitution; and, second, it must actuate this agreement through solid institutional mechanisms. This mammoth undertaking is the unfinished part of the noble task of nation-building in India.

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Borders, Culture, and Belonging

In this paper I offer a perspective on the ethical choices presented by the current difficulties facing Europe, particularly in relation to what has been described as border anxiety. The unprecedented movement of people has attracted two main responses. A core issue for both is the Schengen principle of open borders, at first popular, but now under question, and opinion is split between those who believe that the sheer weight of numbers of would-be migrants requires the reintroduction of strictly controlled frontiers, and those who demand a prompt and sympathetic response to the plight of refugees from war-torn countries. Supporters of these two conflicting positions are reluctant to compromise. The latter regard the moral commitment to help migrants, who might need food, housing, or medical care, as a human rights issue and, as such, an overriding responsibility of more fortunate countries. The former point to the practical problems resulting from unchecked immigration and consequent population increase in host countries. While accepting that decisions made here are not morally neutral, they argue that ethics also requires that sympathy for some must be balanced by recognition of the needs and existing rights of others. These two positions, however, do not constitute the sum of the moral debate which must take account of matters of culture and identity, partiality and preference, and also of some rather more arcane questions about the ethics of ownership, the notion of belonging, and the legitimacy of preferring your 'own', whether at a global, national, or personal level. These are matters that are essentially bound up with the question of who 'belongs' to a country and they raise further challenges involving both multiculturalism and religion. In doing so, they re-open an older and more familiar philosophical debate in which a duty to help those for whom you have special responsibility, or with whom you have a special relationship, is set against principles of equality and non-discrimination. The complexity of this debate and its internal paradoxes throw light on some contemporary concerns about the threat the current situation may pose to Europe's own historic culture and identity.

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The Call for Proximity: Towards a Phenomenology of Human Rights

The concept of human rights is increasingly accepted around the globe, and yet the question of their justification remains open. In liberal political theory, human rights are based on the dignity and autonomy of the subject, that is, the capacity to decide upon morally acceptable laws for oneself. In the posterity of Kant, "the categorical imperative would be the ultimate principle of the rights of man" as "reason yielding to reason" (Levinas 1998, 157).

According to the French philosopher Emmanuel Levinas, such a reliance on reason and knowledge must be questioned. For Levinas, morality based on reason does not capture the "childish virtue" of goodness, which is anarchical and prior to all abstraction. Such irreducible goodness is unthinkable without the irreducible alterity of the other. I am responsible for the other, I cannot do any good but for her. Sensibility towards the other precedes any formal universality. I experience human rights as "a right of the other man above all", as "goodness for the first one who happens to come along" (158). It is not the rational sameness of the other that gives her a human right, but her irreducible alterity that allows for and, in fact, commands an ethical obligation to respect her right as a human being.

For Levinas as well as for Kant, human rights are essentially related to peace. As the argument goes in Kant's "Perpetual Peace", if the rights of man are respected on all levels, peace will follow necessarily. In his essay on "Peace and Proximity", Levinas agrees that there is an intrinsic relation between peace and ethics. However, he questions the Kantian notion of peace. According to Levinas, peace cannot only be a common adherence to a universal principle. He calls this "the bourgeois peace of the man who is at home behind closed doors, rejecting that which, being exterior, negates him" (136).

Instead, he insists that *my relation to the uncontrollable exteriority gives me my obligation as an ethical subject.* The other, infinitely Other and close at the same time, calls for my proximity. Proximity is, then, not only a geographical but an ethical concept. It states the very paradox of an inexplicable and nevertheless infinite responsibility. "Proximity as the impossible assumption of difference, impossible definition, impossible integration. Proximity as impossible appearance. But proximity!" (138)

While Levinas criticizes Kant with respect to the abstract universality of reason, his account of a pre-political and alterity-based account of human rights needs to give an answer to the requirement of universality. If human rights are not valid for everyone and everywhere, they give up their essential characteristic. This tension is inherent in Levinas' account of human rights. Yet, if the notion of universality is understood not as a general form, but becomes itself part of an ethical obligation, Levinas' account does not fall behind the concept of universality. Rather, it can be read as the attempt to reverse universality into an ethical and not a formal notion. What I ought to do is always yet to be determined by the ethical command of the other. The proximity of the other bears a concrete "'difficult universality' of the face-to-face" (Cohen 2007), which exists prior to the formal and abstract universality of reason. In this understanding, human rights are essentially precarious, but it is exactly this precariousness, this weakness of the other, which commands me to subscribe unconditionally to her right and commands me to be the guarantor of their universality.

In this paper, Levinas' ethics of alterity will be presented as a questioning of the widely assumed reading of Kantian ethics according to which Kant is the spokesperson of the modern autonomous subject. In a first part, Levinas' account of anarchy and substitution is developed against the foil of a Kantian understanding of autonomy. According to Levinas, ethics cannot be founded on a principle but on an anarchical connection to the good, which is prior to reason. In a second part, the question of universality in Levinas' alterity-based account of human rights will be addressed. The other demands to grant her right and I constantly need to universalize my responsibility in response to the other's call.

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The *I* as a Symbol and a philosophical reflection on the Rejection

The paper aims at providing a new reading of the contemporary ontology as a re-interpretation of the existential condition of the *I*.

According to Levinas in front of the *I* there is the Face. The relationship is not symmetric but asymmetric, it is the responsibility of the *I* to take care of the Other. The Face to Face is where the philosophical discourse starts. In other words, if I am a being I am one of the other persons, but I am in the first instance the *I*, who lives in This world. The Face in front of me reminds me of an ethical imperative and a discourse on justice, namely to take care of the Other, the Other insofar as Other, as a being and not as the other person. For this reason, the Other is not simply a means, but it is part of the reality, which becomes intelligible through this dual relationship.

It is no more the philosophical question on the ontology of the being insofar as a being, but it is the encounter of the Other that forms the ontology for the questioning of the *I*. In other words, the Face reminds me of my ethical and moral obligation to not ignore the Other. To help him. To sustain him. To not let him alone. It is not the categorical imperative of Kant as a distinction of subject and object, and it is not the reunion of both of them into the Absolute or Idea of Hegel the starting point of the contemporary philosophy. The Face and the relationship between me, the *I* and the Face shapes the dialogic argumentation of the contemporary ontology. Nonetheless, the dual relationship between the *I* and the Face of the Other is so powerful that also a Negation of the Other is still a recognition of its existence. Nonetheless, this particular encounter can be interrupted by experiencing the destruction of the Other, of this particular being through his Rejection. Indeed, the paper is showing as the Rejection of the Other is not merely a Negation, but represents the new condition to start a philosophical discourse.

In this light, the destruction of the Other by its Rejection shifts the discourse on the same disappearance of the *I*. Since that Rejection This world is no more intelligible. There is no more a Face in front of the *I*, it has been rejected and the philosophical discourse has been shifted to a superior stage or feeling as sympathy or compassion (from ancient Greek συμπάθεια – to share the feeling with…, or Latin *cum patior* – I suffer with). Nonetheless, these words are not used with the same meaning of Schopenhauer where the compassion is the love as a justification of the observance of a moral rule, as opposed to the Kantian categorical imperative of the moral law, which is inside each being (the starry sky above and the moral law within). Therefore, at a first stage the compassion or the sympathy is the only possible status that the *I* can perceive in front of the disappearance of the Other by virtue of its destruction or Rejection. It is the only perceivable feeling of the intangible disappearance of the Other due to its Rejection.

Only in this way the *I*, that particular *I* can start to reflect and to share the pathos of the Other. Indeed, the sharing of the pathos is more than an ethical imperative or recognition/negation of the Face. The same Rejection can be identified in many other

circumstances of the reality today such as the possible Rejection of Muslims in America, the Rejection of Syrian refugees, the Rejection of asylum seekers in UK, the Rejection of applicants in job interviews due to the current financial crisis and crisis of employment, the Rejection of the legality of same sex unions etc.

In other words, it is possible to speak about the Other today only through a re-thinking of the ontology of the *I* because of this universal Rejection. When the Other has been destructed because of its Rejection, this status can take many forms such as the humiliation, the abandon or even its murdering, then the *I* starts to discover himself as a symbol (from ancient Greek the prefix σύμ – together, with the ancient Greek verb βάλλω – to put, literally it means to join together, to fasten together). It can be argued, therefore, that the Rejection of the Other is currently the new condition for an ontological re-configuration of the *I* as a being in terms of a Symbol. In this light, the perceivable feeling of the intangible produced by the sympathy or compassion can allow the *I* to become a Symbol and to restore justice and morality.

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The Law and the Creation of Interreligious Space: The Gifts and Challenges of France's Laïcité in the Work of Building Bridges Across Boundaries of Religio-Cultural Difference in the European Union

Ratified in 1905 under the Third Republic, France's law of Separation of the Churches and the State codified three principles: the neutrality of the State regarding religion, the freedom of religious exercise, and the establishment of public powers regarding the Church. While some in France who identify themselves as practitioners of a religious tradition point to what they view as governmental overreach regarding the state's regulation of religion under laïcité, others whose work focusses on forging deeper alliances among diverse religious and secular communities praise its advantages. Still others argue that the law defining laïcité is applied unevenly, and in some cases is used to affirm the hegemony of normative French religio-cultural traditions.

As the European Union grapples with the long-term implications of the current influx of immigrants from non-Christian cultures, the need for practical tools to promote cooperation and diffuse increasing tensions across boundaries of difference is becoming more apparent. This is particularly true regarding the current state of relations among French Jews, Christians, Muslims and Atheists – relations which have deteriorated not only in the wake of the attacks of November 2015 and on the offices of Charlie Hebdo, but also with the rise of nationalist sentiments whose proponents call into question the legitimacy of the European Union itself.

In light of these developments, this paper will pose the following three core questions. What could be the role of laïcité in promoting moral claims that could inform a new lived out ethic of engaged religious pluralism, one that equally honors the contributions to both French and greater European life and culture of Judaism, Christianity, Islam and Atheism? At the same time, to what degree have transnational ethical discourses – both explicitly religious and profoundly secular - already served to create the groundwork for an ethic of interreligious community which could be effectively applied in the context of the EU? In addition, how might the ethos of the law of laïcité, which equally privileges the importance of secular public space and religious private space, potentially contribute to a 21st century European ethic of sustainable religious and cultural pluralism beyond the boundaries of France?

This paper emerges from my ongoing work in Paris, where I am in the process of writing a book and refining a program I created for students from my university, whose aim is to examine Abrahamic Paris and interreligious engagement through the lens of four living communities: Union Libéral Israélite de France (Copernic Synagogue), Église Saint-Merry and its Centre Pastoral Halles-Beaubourg, La Grande Mosquée de Paris, and a constellation of Atheist thinkers and activists who are making significant contributions to building bridges among communities of diverse religious and secular identities. The questions my research and

program invites our students and those who act as our teachers in Paris to consider include the following: How have the historical circumstances and narratives that have influenced Judaism, Christianity, Islam and Atheism in France served to inform the way these traditions are understood and practiced in 21st century Paris? What are the requirements for building ethical, sustainable bridges among individuals and communities associated with Judaism, Christianity, Islam and Atheism in the French context, and what are the positive roles laïcité can play in achieving this goal? What unique insights regarding the requirements of building such bridges do those with religious and secular identities connected to Judaism, Christianity, Islam and Atheism have to offer, and in what regard are these insights drawn directly from the moral claims associated with these four traditions? How does a legal commitment to secular culture and secular space such as those found in modern France help and hinder such work? These questions are framed by the assertion that the challenges faced by the people of Paris are emblematic of the circumstances many other EU countries are currently facing or will likely face in the near future.

To this end, this paper's intention is to present both an ethical reflection and a report from the field, while inviting others to ask how similar circumstances are being addressed in their own countries and whether or not an adaptation of laïcité could prove useful in their respective contexts. At the same time, I want to address the observations of Pankaj Mishra, the Indian intellectual whose reflections on secular Europe's encounter with religion, the "Other" and Islam in particular necessitate what he describes as the "need for a new Enlightenment," one which features a new commitment to rigorous ethical self-criticism. While Mishra's reflections are ostensibly framed in the aftermath of the Charlie Hebdo attacks, they provide a compelling meta-narrative – one which goes well beyond the headlines, while interrogating popular assumptions about the role and efficacy of normative theological and secular intellectual frameworks for building community across boundaries of difference.

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Sexual Violence and Communities of Trauma on American College Campuses: Challenges and Possibilities for Christian Ethics

The silence surrounding sexual violence on college campuses is a theological and public health issue that impacts the entire community. Drawing upon interdisciplinary sources from theological ethics, forensic nursing and psychology, this paper will take a closer look at the "knotted" relationship between mental health and sexual violence as it appears at religiously-affiliated colleges in the United States. Implications for Christian ethics will be explored.

In 2011, the Obama-Biden administration highlighted the issue of sexual assault on college campuses with an expanded version of Title IX (1972). While this bi-partisan effort brought necessary attention to a social problem and public health issue that is often disregarded and shrouded in silence and shame, its implementation presents practical and theoretical challenges for many religiously-affiliated institutions of higher education. Donna Freitas explains:

> Questions arise about how to handle victims and alleged perpetrators, how to involve (or not) the police, and how and when to educate students around sexual assault. At religiously-affiliated colleges these questions can be even more complicated, especially if the institution is heavily invested in proving to itself and the public that sex doesn't happen on its campus. (2015, 256-7).

Religiously-affiliated schools for reasons ranging from concerns over enrollment to discomfort discussing sexuality and gender among faculty and administration.

Yet, college students are not talking either. Despite its presence, sexual assault is seriously underreported. This is often due to pressure from peers, embarrassment, self-blame, fear of others finding out, lack of support from the university and health services, and other factors. Irrespective of reporting, sexual assault can have lasting health consequences, many of which manifest in mental health issues. This cycle of violence-silence-violence (and lack of care) has consequences not only for victim-survivors, but also for the entire community. As I will argue, this cycle creates communities marked by fear, mistrust, and betrayal. Drawing upon interdisciplinary sources, this paper will begin to identify both the challenges this issue presents and the possibilities for healing.

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The Ethics of Democratic Conflict and the Transgression of Politico-Legal Boundaries. A Phenomenological Itinerary from Antagonism to Natality and A-Legality

Holding onto the paradigmatic distinction proposed by the German phenomenologist Bernhard Waldenfels between a radical and an absolute form of political contingency, this paper seeks to show its structural relevance and the unsettling consequences of its oversight especially when searching for an adequate model for seizing the transgression of politico-legal orders in a democracy-based ethical perspective.

In line with this basic assumption, through an analysis deploying a thorough confrontation with Chantal Mouffe's influential political theory, I will argue that an apt form of radical democratic contingency, conflict and challenge cannot be seized in her agonistic design of politics based on the appropriation of Schmitt's absolutistic model of antagonism, but rather in a configuration of politico-legal transgression which looks much closer at alternative forms which can thoroughly express extremely enhanced articulations of conflict and transformative impulses without having to decay into exorbitant figurations. As I will show in the last section of the paper a good candidate for such a scope can be traced by combining two trajectories of political alteration, one inspired by Hannah Arendt's notion of natality, the other drawing on Hans Lindahl's insights on a-legality.

Given this general trajectory, the paper will more specifically fall into three parts.

The first concentrates on what is to be capitalized by drawing on Mouffe's perspective. I will show here that Mouffe raises a major point that should be vigorously defended. It consists in her insistence on the fact that a radical democratic design of conflict demands eschewing an exodus from the extant polity and an absolute leap out of the modern institutional paradigm, proposals which have been insistently advocated by some currently influential theorists in the field of political activism (Hardt/Negri, Virno). For Mouffe, securing the possibility of radical democratic conflict requires looking more closely at what the modern democratic discourse already has on offer. Modern democracy entails, so Mouffe argues, the discovery of contingency and, consequently, the acceptance of plurality and conflict as its undeniable co-implication. As a result, the first part of my analysis, in convergence with Mouffe, will make explicit how the modern political paradigm is best able to frame the intimate connection between democracy and conflict in a radical form.

In the second part of my analysis, I will, however, diverge from Mouffe when examining in a deeper phenomenological way the sort of conflict that a democratic space and ethics explicitly demand. My disagreement will take the form of a critique drawing exactly on the aforementioned distinction between a radical and absolute design of contingency and conflict. I will argue that, in order to adequately unfold the kind of conflict required by the contingency proper to democracy, one cannot follow her strategy of anchoring the configuration of agonistic conflict to Schmitt's design of antagonism. The point I will raise is that Schmitt's theory only accommodates an absolutistic configuration of conflict, thereby remaining irreducibly inadmissible for any radically contingency-based and jointly democratic understanding thereof. As a consequence, by keeping these two paradigmatically opposite forms of conflict connected, Mouffe, far from deepening the articulation of a democratic ethic

of conflict, falls prey accentuating exactly the above illustrated ambivalence, by delivering a political discourse climaxing into two irreconcilable poles: one adhering to the condition of radical contingency proper to democracy, the other adhering to the Schmittian absolutistic design of politics.

A significant implication deriving from this alliance will be drawn in the third part of my analysis. In this concluding section I will show to which extent Mouffe's antagonistic-based model of agonistic conflict jeopardizes the delineation of a genuine appraisal of *an ethic of* transformative *democratic* conflict or *democratic* transgression of politico-legal boundaries. The point I will defend is that Mouffe, by placing exclusive weight to the moment of antagonism for the purpose of endorsing the ineradicability of conflict, not only transgresses the effective articulation of democratic conflict as such, but also misses the potentialities inherent in agonism itself. In fact, agonism, once freed from the bonds of antagonism, is best able to take up very promising and vibrant forms for democratic life – forms which can thoroughly express enhanced articulations of conflict and transformative impulses to politico-legal orders without having to decay into anti-democratic degenerations. As I will indicate, a good candidate for outlining such a form of hightened agonism can be traced by combining two trajectories of political alteration, one inspired by Arendt's notion of plurality and natality, the other drawing on Lindahl's phenomenological insights on the dynamic of a-legality.

Conclusively, by recurring to these dimensions of agonism free from the paradigmatic ballast of antagonism, an appropriate view of an ethic of a radically plural democratic space emerges. This configuration of conflict accommodates for politico-legal orders true and proper transformative mechanisms, on the one hand, and grants them a minimal condition of democratic articulation, on the other.

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Right to Life Includes Right to Die a Dignified Death: Public Opinion About Euthansia In India

The moral and ethical justifiability of euthanasia has been a highly debatable issue for the past few decades. The debate as to whether right to life includes the right to die a dignified death has infiltrated the boundaries of India as well. Even though the exact statistics on the number of euthanasia requests is not readily available, there have been numerous instances in India that have come up in news reports where people have demanded euthanasia (Satija, 2015; Mishra, 2015; HT Times, 2015). Public consciousness about euthanasia reached the pinnacle with the Aruna Shanbaug incident in 1973. Shanbaug, a nurse at KEM Hospital, Mumbai went into a persistent vegetative state when a sweeper sexually assaulted her. Even though the court in a landmark decision in 2011 went on to legalize passive euthanasia in certain instances[1], the judgement has been taken up for review by a Constitutional bench after a three judge bench (Common Cause vs Union of India, 2014) of the apex court held that the Shanbaug case was decided on the basis of an incorrect reading of the constitutional bench decision in *Gian Kaur v. State of Punjab* (Gian Kaur vs State of Punjab, 1996).

In 2008, a couple from Uttar Pradesh – Jeet Narayan and Prabhavati, sent a euthanasia plea to the President for four of their sons who were suffering from muscular dystrophy and paralysis (Deccan Herald, 2008). The main reason cited by the parents was their inability to pay such huge expenses for the medical treatment of their sons. In a developing country like India where a lot of people fall below the poverty line, expenses for healthcare come out as a major burden for poor families and this has made euthanasia requests very common.

An empirical study on understanding public opinion is India is administered. Based on literature review, a self-administered survey is formulated. The survey is administered on n= 7314 respondents from almost 15 states in India. The aim of the research is to assess the public attitude in India towards Euthanasia, the specific reasons and circumstances for which Euthanasia is favored or opposed. It is found that 59% of the total sample favored Euthanasia in some form: Passive Euthanasia, Active Euthanasia or Physician Assisted Euthanasia. The research gives an insight on varied reasons behind supporting Euthanasia: Vegetative State, Incurable disease, 90% paralysis, Affordability, Consent of the family. On the other hand, 41% of the respondents in the study do not support legalizing Euthanasia. The purpose of opposing Euthanasia is further examined which include Morality, Not a natural course of life, Social stigma attached to Euthanasia, Religious Sentiment, Social Stigma and Psychological impact on the family. It was also found that younger respondents, within the age limit of 18-30 years old were more likely to support dying with dignity than becoming dependent on the family, friends or relatives. The level of support among various subpopulations and understanding the perception, socio- psychological and attitudinal correlates of euthanasia in India.

It has been seen that countries that have legalized euthanasia are now facing the problem of too many people applying for euthanasia and terminating their lives (Battin, Heide, Ganzini, Wal and Philipsen, 2007). There is also the fear of exploitation of the old and the poor people. Poor people who are dependent on their family or are considered to be an economic

[1] The Supreme Court in its 2011 decision in Aruna Shanbaug v. Union of India held that passive euthanasia is legal for patients who are brain dead and for those patients who are in a persistent vegetative state. However, certain conditions need to be followed in order to carry out euthanasia.

burden on the family will be forced to undergo euthanasia in case euthanasia is legalised. Furthermore, religion plays a very significant role in deciding the society's perception towards legalizing euthanasia (Suarez-Almazor, Newman, Hanson and Bruera, (2002). In a nation like India where the most followed religions are Hinduism and Islam, there is large-scale opposition to the idea of taking one's own life. The study delves into understanding position of Euthanasia among Indian respondents who belong to different religions: Hindu, Muslim, Christian, Sikh, Jain, and Buddhist along with their religious inclination. The moral argument of this research is to assess if it morally justified letting somebody die a slow and ugly death than to help him escape such misery. An effort is made to understand status of Euthanasia and the public opinion in Indian context. Based on our findings, we aim to offer a proposal for legislators and decision makers by examining current law of euthanasia in India.

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***The Heard, the Lived, the Negotiated and the Enforced*: Normative Reflections on Undercurrents in South Asian Judicial Systems**

The present paper examines the dynamics of undercurrents that are decisive both in formulating and implementing legal rules in the South Asian context, identifies possible intersystemic interactions that might generate crosscurrents, vindicates the problem of normative vacuum presently existing in judicial systems, and justifies the necessity of normative adjudication procedure. The major undercurrents discussed are: 1) *the heard*, which denotes oral and written traditions that involve *sruti*, *smriti*, and *sabda*, 2) *the lived* that signifies traditionally followed unique patterns of living that significantly determine the identity of a specific society, 3) politically *negotiated* policies that claim democratic justifications, and 4) legally *enforced* rules that guide judicial systems. South Asian democratic societies, which are collectivist in nature, are much swayed by these undercurrents and judicial systems are not resistant to this force. Given that legal rules are largely derived from oral and written traditions that represent the idea of good conceived by the dominant group, it is hard to presume that the rules will safeguard everyone's interests. Likewise, a major share of the laws that are enforced is the offshoot of political negotiations which may not necessarily take any recourse to truth contents and normative justifications. Some of these laws might introduce prescriptions that are counterintuitive and morally blameworthy. Keeping the generic and holistic frame aside, at times the laws adopt an intrusive strategy which dictates on almost all matters such as what one should eat, what to wear, and what faith one should follow. The paper takes this problem quite seriously in analyzing the normative concerns over disputed judicial rules that are recently enacted. Furthermore, paying attention to ethnic, political, and religious foundations of law and morality, the paper discusses three modes of interaction, such as, competition, coercion and collaboration (Wallace, 1966), and identifies the emergence of judicial and ethnic activism when collaboration is absent. Among other things, the paper argues that a major reason for pendency of legal suits and poor performance of judiciary is the unavailability of a collaborative environment, and it inevitably causes a huge cost. Performance of judiciary may be measured in consideration to its 1) independence, (2) efficiency, viz. explicitly referring to unreasonable delays and case backlogs (3) accessibility, (4) accountability, and (5) effectiveness, i.e. the degree to which both legislation and judicial decisions are actually enforced (Staats et al, 2005) and, as the paper vindicates, these virtues take us to normative considerations. Finally, the paper suggests that the turn to substantive normative foundations appears to be the only available means to improve performance of judicial systems and to ensure fairness in enforcing justice.

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(In)visible through the veil: re-thinking the secular and the religious subject

The image of a silent Muslim woman under the shroud of a burqa has been one of the most recurrent during the ongoing Western 'war for democracy'. The veil which, since the colonization period, has been a powerful symbol associated with the 'backwardness' of Muslim culture, is still one of the most debated issues when thinking about religious freedom. However, while in the last two centuries the meaning of the veil as a 'sign of' Muslim women's oppression remained unchanged in Western culture, in Muslim majority societies veiling is an immanent and performative ever-changing phenomenon which takes different meanings, colors and forms in different cultural and historical contexts. I argue that it is exactly the operation of collapsing differences among Muslim women through the reading of veiling as a monolithic symbol of something intrinsically 'other' that nowadays reproduces neo-colonial thought.

This paper argues that western semiotic ideology, which give to images and signs a fixed meaning arbitrarily defined by social convention or by law, does not take into consideration the "affective and embodied practices through which a subject comes to relate to a particular sign"(Mahmood 2009, 841–2) and naturalizes and define the religious subject as an individual who simply submits him/herself to a set of recommendations based on general beliefs: in other words, secularism conceives religion as a simple belief, and so as a matter of personal choice. This understanding is strictly linked to the place of religions within the secular state and to the role of the law in regulating religious practices, such as the veil, in the public space. In this sense, secularism is not understood as the mere separation between temporal and spiritual power, but as the re-conceptualization of religious sensitivities and religious practices in the modern world (Mahmood 2009; Asad 2003): thus, while secular thought has come to define concepts of state, economy, religion and law, it simultaneously create a specific law and religious subject.

I consider this issue through the lenses of the passionate debate that the European legal decisions over the practice of veiling have developed in the last years which rely on the assumption that veiling is '*irreconcilable* with the principle of gender equality' and thus '*incompatible* with Western democratic values'.

I draw on Mahmood's study (2005) of 'pious women' to argue that non-liberal traditions have developed different understanding of religion and bodily practices: if, on the one hand, secular rationality defines religion (and religious signs/practices) as a 'private matter', then on the other 'pietists women' disclose a performative/affective understanding of (religious) bodily practices. Mahmood's analysis is of particular interest as it reveals that what is often ignored is the way in which liberal thought defines and universalizes a specific Christian/liberal/secular rational based on very specific concepts of religion and, along with it, of women's agency and

freedom. I argue that these universal(ist) concepts are expressed in the juridical regulation of women's bodies which reveals the inadequacy of western universal(ist) discourse over the notion of bodily practice, and women's freedom and agency within non-liberal pluralistic contexts: by taking into consideration only a very liberal/secular understanding of religious practices and women's freedom and agency, not only European judges exclude different concepts of freedom and agency and different forms of 'humanity'(Esmeir 2012), but they also bring private sentiments into the public sphere. In the case, by defining the veil as a fixed 'religious symbol' in contrast with liberal values of gender equality, the secular state defines the proper place of religion and religious practices in the 'modern world'.

Thus, it is not through the analysis of women's freedom, but through the symbology conferred on the practice of veiling that the gender dimension of the problem can be unfolded. Drawing on Goodrich's study of the power of images (1995), and Asad's analysis of the secular (2006), I argue that the definition of veiling as a fixed 'symbol' in contrast with democratic values allows for an *exercise of sovereignty* aimed at maintaining the unity and homogeneity of a people: through the juridical regulation of symbols and images in the public sphere, the sovereign state gives to religious practices their proper place within secularized democracies. In this sense, as Mancini argues (2014), the regulation of (Muslim) women's attire can only 'defend' a very specific kind of democracy which is based on a form of 'substantial homogeneity', as the one described by Schmitt. It is in the name of an 'imagined' European homogeneity that "secularized religion and secularism are used in order to exclude the other and protect the culturally homogenous character of European societies that is perceived – and even explicitly described – as threatened by pluralism and globalization"(Mancini 2008, 2666).

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Different paths to justice

We have the last decades seen many examples of claims for justice and reconciliation after war, oppression, racial discrimination and colonial trespasses. Even when peace is restored, the soars of previous injustices are still open and there is a need for both rectification and reconciliation.
In South Africa a process of truth and reconciliation started after the end of apartheid, in former Yugoslavia the international Criminal Tribunal for the former Yugoslavia (ICTY) was established with the aim of prosecuting war criminals, in Argentina court trials against those responsible for atrocities and human rights violations during the military regime has so far led to the imprisonment of at least 600 persons, in South Korea a Truth and Reconciliation Commission has investigated war crimes during Japanese occupation and human rights violations in post-war South Korea, in Britain the government in 2013 publically apologised and rectified for human rights violations in the combat against the Mau Mau-movement in Kenya in the 1950s, and in 2013 the heads of the Caribbean states claimed rectification for slavery and the slave trade from the former slave-trading nations, just to mention a few examples.

In my presentation I first make some terminological clarifications. I then present some reasons for why rectification after war and injustices is important. In the next part I discuss some requirements for rectification and whether there is a cut-off date and finally reflect on the relation between rectification and reconciliation. How rectification and reconciliation are achieved are influenced by contextual factors, such as traditional ways to process justice and reconciliation. For example are the procedures of Rwandan Gacaca courts different from the ICTY, and the procedures for reconciliation practiced in Mozambique after the civil war in the 1980s goes back to local traditions of reconciliation. This fact raises the question of what is contextual and what is universal with respect to rectificatory justice and reconciliation.

In the discussion on historical justice the terms “rectificatory justice”, “corrective justice”, “reparatory justice”, “compensatory justice” and “restorative justice” are often used in the same or at least similar meanings. Further, in some cases of historical justice, like for example former Yugoslavia and Argentina, justice is done through court trials, i.e. “retributive justice”. The aim of this part is to clarify the meaning of the different terms used in the discussion.

What then is required for rectification? To start with, we have a situation when someone is harmed. According to Renée Hill, “compensatory justice” means that a harm is compensated, and the injured party is “made whole” implying that he or she is “…as well as before the transgression occurred” (Hill 2002, p. 398). No apology is needed. Hill’s perspective is strictly legal. If we look at rectification from a moral point of view Hill’s suggestion is too narrow. The previous harm was perhaps abusive, and resulted in lasting tensions and distrust between

victims and perpetrators. To overcome the tensions something more than compensation is required. Rectification also requires that the perpetrator acknowledges and apologizes for the harm done.

Why then is acknowledgement and apology required for rectification? An apology is a performative; something happens when someone apologizes. When a perpetrator acknowledges and apologizes a past injustice, the victim is assured that the perpetrator is aware of what he or she has done, that he/she regrets it and is prepared to change his/her behaviour. Often acknowledgment and apology seems to be more important for victims than compensation. In the case of political rectification, acknowledgement might include truth commissions, memorials etc.

How is rectificatory justice related to retributive justice? Both rectificatory and retributive justice are back-ward looking in the sense that they refer to some previous harm. Rectificatory justice refers to a state of affairs; a previous harm is rectified. Retributive justice, on the other hand, refers to a person or group that deserves to be punished due to some harms committed. Retributive justice then means that a perpetrator is taken to court and penalized according to national or international law. However, there is often a link between retributive justice and rectificatory justice. Retribution is normally connected to some kind of rectificatory duties. For example, a perpetrator who is convicted can be obliged to compensate the victim.
Finally, I discuss the relation between justice and reconciliation. How are different forms of justice related to reconciliation? If both justice and reconciliation are valuable and final aims; what do they require and how are they related? Is perhaps retribution an obstacle to reconciliation or does reconciliation instead require that perpetrators are put on trial?

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Die ethische Praxis der Buße als Prüfstein für rechtliche Innovation

Neben technischen Innovation ist seit einigen Jahren die soziale Innovation Gegenstand soziologischer Forschung (Howaldt 2014). Daneben gibt es Versuche zu sozialer Erneuerung und zu Reformen, die nicht die gewünschte Wirkung erzielen (zur Kritik des Reformprozesses „Kirche der Freiheit" vgl. Karle 2010). In diesem Beitrag wird die ethische Praxis der Buße als Prüfstein vorgestellt, um soziale Innovationen auf ihre Wirksamkeit und Nachhaltigkeit hin zu überprüfen.

Das Potential der Buße zu rechtlicher Innovation hat die mediävistische Rechtsgeschichte herausgearbeitet (Trusen 1997). Im 4. Laterankonzil von 1215 entstand die Prozessform des Inquisitionsprozesses mit den wesentlichen Kennzeichen der Instruktions- und der Offizialmaxime als rechtliche Innovation gegenüber dem frühmittelalterlichen Akkusationsverfahren. Kirchenrechtliche Untersuchungen (*inquisitiones*) von Amts wegen (*ex officio*) mit dem Ziel, durch Beweise die Wahrheit zu ermitteln, traten bei der Urteilsfindung an die Stelle des Leumundes und der Zahl der Parteigänger für eine Rechtsposition.

Die juristische Orientierung an einer objektiven Wahrheit geht an der Wende zum 2. Jtsd. aus der kirchlichen Bußpraxis hervor. Die spätere Kritik am Inquisitionsprozess bezieht sich auf die Praxis der Beweisführung mittels peinlicher Frage und Folter. Erst die Reformationszeit führt zu grundlegenden Änderungen: 1. Der Ewige Landfrieden 1495 richtet ein reichsweites Gerichtswesen mit Berufungsinstanzen ein, welches das kanonische Nebeneinander von *forum internum* und *forum externum* (Goering 2004) aufhebt. 2. Die grausamen Methoden mittelalterlicher Beweisführung werden erst Anfang des 17. Jhs. durch den Nachweis abgeschafft, dass Folter nicht der Wahrheitsfindung dient. Diese Einsicht wartet auch im 21. Jh. noch auf ihre Durchsetzung in manchen Verhörräumen.

Für die Rechtstheorie ergibt sich daraus die Schlussfolgerung, dass Strafrecht und -vollzug nicht allein der Herstellung und Aufrechterhaltung von öffentlicher Sicherheit und Ordnung dienen, sondern dass ihnen auch eine Aufgabe für die Möglichkeit zur Buße der Delinquenten innewohnt.

Die Buße ist jedoch nicht nur ein privates Phänomen. Auch ein post-säkularer Liberalismus kann nicht mehr exklusiv mit Religionen umgehen, sondern deren Perspektiven sind Teil des öffentlichen Aushandlungsprozesses liberaler Demokratien (Honnacker 2015). Die Umkehr (*metanoia*), von der die biblische Botschaft spricht, ist ein öffentliches Phänomen und kein Aushandlungsprozess zwischen Delinquent und Gefängnisseelsorge. Das Rechtsverfahren zielt auf die Veröffentlichung einer bisher verborgenen Schuld.

Öffentliche Verfahren haben zu gewährleisten, dass verborgenes Unrecht in angemessener Weise, insbesondere unter Wahrung des Schutzes der Persönlichkeitsrechte oder der öffentlichen Sicherheit, bekannt werden. Dieser Begriff von Öffentlichkeit orientiert sich an der Aufgabe der Wahrheitsfindung im Unterschied zu einer „gemalten Öffentlichkeit"(Iwand 1948). Das ethische Urteil bekommt unter Umständen den Charakter

eines Bekenntnisses, das als Schuld- oder Glaubensbekenntnis sowohl begangenes Unrecht als auch die Möglichkeit zu einem Neuanfang festhält.

Die Möglichkeit eines neuen Anfangs nach einem Scheitern oder Versagen hatte Hannah Arendt als Pointe des Verzeihens herausgearbeitet (*Vita activa*). Die Perspektive der Hoffnung, dass nach einem Scheitern oder einem Bruch im Leben, ist eine begründete Hoffnung geknüpft, die sich von der Utopie unterscheidet (Sauter 1967).

Den Öffentlichkeitscharakter dieser Art von Umkehr hat in seinen Spätschriften Michel Foucault durch die Auseinandersetzung mit der frühchristlichen *parrhesia* herausgearbeitet, in der Manifestation einer Wahrheit über das Selbst ihren Ort findet (Foucault 1980). Judith Butler knüpft mit ihrer Kritik der ethischen Gewalt an, indem die Rechenschaft über das Selbst (*Giving Account of Oneself*) dazu beiträgt, die Brüche des Lebens narrativ zu verwinden und gleichzeitig aus den Zwängen moralischer Vorgaben und ethischer Gewalt zu befreien.

Jedes öffentliche Verfahren zur Aufdeckung von Unrecht, sei es ein Rechtsprozess oder eine Dokumentation des investigativen Journalismus oder eine medizinische Untersuchung, dient nicht nur der Umkehr von Individuen, sondern hat auch die Frage nach der Notwendigkeit systemisch-rechtlicher Innovation zu klären.

Damit aus einem Veränderungswunsch eine soziale Innovation werden kann, sind aus der ethischen Praxis der Buße folgende Schlüsse zu ziehen:

1. Auslöser der Buße ist eine *Krise*, die öffentlich festgestellt werden muss. Wer Reformvorschläge unterbreitet, muss auch benennen, welches Unrecht damit beseitigt werden soll.
2. Die Buße dient der *Überwindung von Gewalt* und widerspricht dem „Mythos der erlösenden Gewalt“ (W. Wink). Auch wenn z.B. für den Strafvollzug der Einsatz von Gewalt nötig wird, darf es dabei nur um einen instrumentellen Einsatz von Gewalt gehen (Arendt, *On Violence*). Gewalt wird im Sinne der Buße niemals zum Selbstzweck.
3. Ein wesentliches Moment der Buße ist die *Reue*, die auf die Einsicht zielt, dass auch das Rechtssystem mit Unrecht konstruiert sein kann. Der säkulare Staat braucht sich nicht vor der Umkehr zu fürchten, denn das biblische Zeugnis erzählt davon, dass selbst der allmächtige Gott umkehrt und Reue zeigt (Gen 6,5; Hos 11,8f. u.ö.).
4. Die ethische Praxis der Buße beruht auf einem *Urteil*, das als *Bekenntnis* einer verfassten Gruppe öffentlich wird. Darin manifestiert sich die Wahrheit über ein soziales Selbst.
5. Die Umkehr zu einem neuen Recht bedarf der *Sühne* als einer Praxis, in der die Geschichten der Opfer von Unrecht erzählt und weitergeführt werden (Espeel 2010).

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ABOLISHING DEATH PENALTY IN INDIA: PUBLIC OPINION, ETHICS AND RIGHT TO LIFE

There is a worldwide movement on abolishing Death Penalty. The present study attempts to understand the public perception about Death Penalty in India. In India, death penalty is awarded in rarest of rare cases.[1] The rarest of rare doctrine prevents the Indian Judiciary from giving Death Penalty to convicts for all crimes. Only in certain crimes where the gravity is such that Death Penalty is the only remedy and no other alternative seems fit as a punishment. The Indian Supreme Court has allowed the death penalty to be carried out in only 4 instances since 1995.[2]

Based on literature review, a self-administered survey was formulated and administered on 25210 respondents and it was found that 20% of the total respondents (n= 5047) supported abolishing death penalty in all its form. The survey had been carried out using a random sampling method. The survey was also done by means of a convenient sample where the data was collected based on the social contacts of the author.

The objective of the research is to examine:

- The purpose was to assess public attitude towards capital abolishment, the level of support among various subpopulation and understanding the reasons, socio-psychological, attitudinal and demographic correlates for abolishing death penalty in India.
- To examine the reasons behind supporting abolishment of death penalty by Indian respondents which includes: Violates right to life, Barbaric & Inhumane, Uneconomical, Not act as a deterrent, Irretrievable in nature, Acts against poor & socially vulnerable, reduced reformative opportunities.
- Assessing alternative forms of penalties if death penalty is to be abolished even for 'worst of the worst' crimes.

The results and findings from the research conducted shows that only 20% of the Indian population wants death penalty to be abolished. Logistic regression and association rule analysis revealed that generally people who supported abolishing death penalty tend to be males, young and middle-aged, lower and middle economic status, Muslim, professionals & businessmen. It was further revealed that 16% favor abolishing death penalty because it violates right to life and 23% believed that no person should be subjected to barbaric and inhumane treatment.

[1] Bachan Singh v. Union of India (1980), AIR 1980 SC 898
[2] Law Commission of India,. (2014). Consultation Paper On Capital Punishment. Government of India.

This paper will look at the trend towards abolishing death penalty and give an analysis based on Right to life in Indian Perspective. It will trace the development of right to life and death penalty in India through the public opinion and Judgments of Indian Judiciary. The perspective will be argued on the lines of Morality and Death penalty. It has been argued that taking away someone's life is immoral.[3] Right to Life is a fundamental right of every human.[4] and based on this many conventions and resolutions have been passed in United Nations. Death Penalty is considered a violation of a person's right to life and the right not to be subjected to cruel, inhumane, and degrading punishment.[5] Despite the predominance of abolitionists in intellectual community, public support for the death penalty persists. The discussion critically reviews the impact of rehabilitation and reformation on crime and criminal justice, examines at length the questions concerning deterrence and morality of punishment.

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[3] Nathanson, S. (2001). An eye for an eye. Lanham: Rowman & Littlefield.

[4] Article 21 of Constitution of India, Article 6 of ICCPR, Universal Declaration on Human rights

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Mercy and Justice: An Uncomfortable Pair in Penal Law

(0) Introduction

As Pope Francis proclaimed the Holy Year of Mercy, he streched the relationship between justice and mercy as of "two dimensions of a single reality that unfolds progressively untill it culminates in the fullness of love."[1] Yet by pointing out this relationship he admits the fact that both terms are spontaneously felt as a uncomfortable pair.
Within this framework of questioning the relation of both terms I will put and defend the thesis that a penal law which is not based on mercy as ethical principle becomes injustice.

I first will put the question systematically starting by what penal law is about (1). Then, secondly, I try to put in evidence the emotional indications of experienced injustice and requested justice (2). Thirdly I clearify how ethics always focusses on future, which makes mercy to become an ethical principle (3). Finally I show the catholic canon law as a example of a on mercy based human penal law (4) and raise the question about religion as presumption for such a mercy based human penal law (5).

(1) What is penal law about?

The question raised by catholic and protestant ministers in service of prisoners in 1972-73 in Germany while expecting a reform of penal law has been put in a typical way by high court judge Ernst Benda and lawyer Eduard Naegeli[2]. Benda represents the classical position of penal law being first of all an instrument of punishment, whenever it should be a multilateral instrument to serve other aimes as well. Naegeli is a protagonist of abolishment of the current penal law and votes in favor of a so called law of measures (Massnahmenrecht). The classical position says: punishment is necessary to react at non tolerable behaviour as far as it does harm other people, but the punishment has to be limited by the human dignity of the criminal, who as human being has the right of freedom. The new way of looking starts with the circumstances in which one person is harming the other, asking how this behaviour could have been possible and what to do to change the circumstances and prevent the criminal from repeating what he has done. This difference is based on what values are decisive in judging the seriousness of the crime, and this judgement has to do with the emotions caused by the crime. Which feelings arise at serious offences and what do they mean?

(2) Justice fed by feelings?

1 Pope Francis, Misericordiae vultus, 20.

2 S. die Diskussion in Balthasar Gareis/Eugen Wiesner (Hrsg.), Hat Strafe Sinn?, Freiburg-Basel-Wien 1974, 15-54.

Injustice first of all is a matter of feelings. People are hurt by the harm other persons are afflicting. The main feeling is to be outraged by what happened. Indignation, emotion which point towards the moral fact, i.e. the discrepancy between the reality suffered and the reality which should be. So injustice is a reality felt, suffered and therefore to be blamed as far as it has been shaped by human doing or failing. These feelings seek to be softened, need to be moved away by acts which causes other feelings that satisfy the hunger of justice, of putting right what has been done wrong. This hunger of justice allows, sometimes needs the criminal to be punished. Punishment can afford satisfaction. So the law of punishment follows the human need to satisfy fundamental human feelings.

But this look at punishment as a satisfying process only focus on the harm afflicted, the crime committed, the wound inflicted.
Yet this way of looking at the moral fact which is injustice, is unilateral. Because the offender also suffers feelings: either shame or triumph.

(3) Ethics focusing on future

Starting at the other's side the offender will feel guilty looking at the harm he caused, the victim will feel angry towards the offender. Both sentiments reflect a status quo: guilty in accepting the fact of harm which has been caused, angry in having the offender felt the harm. But in both cases victim and offender take eachother serious as human persons with their human dignity. That is the ethical base of justice: things should be done in a way that respects the dignity of the human person, of victims as well as offenders. It is the victim who has the key to break open a new future, but the very condition is the readiness of the offender to seek forgiveness. So awareness of guilt at the side of the offender is such a condition, not the key itself, which only can be the mercy of the victim.

(4) Mercy main ethical principle of a human penal law

Penal law should be based on the ethical principle of mercy, not as a privilege but as a matter of justice. At the same time mercy cannot be a juridical principle, since nobody can be forced by law to show mercy to his offender, even if he shows himself guilty and ask for forgiveness. Nevertheless juridical justice cannot limit itself to revenge and satisfaction by punishment. Justice aims at new relationships between human persons.

This is why catholic canon penal law, while it is a most elaborated proceedinglaw, at the same time seems to avoid as much as possible to declare offenders guilty and punish them. Punishments in the eyes of canon law are per definitionem medicinal instruments, to have the offenders to become better persons.

(5) Mercy: exigence of humanitarian ethics or fruit of a religious view?

Finally: If penal law should be based on mercy as ethical principle, is this founded in sound humanitarian reasoning or does this view presume religion? This I think depends on the underlying anthropology. Since repentance and mercy cannot be forced or sanctioned the

humanitarian base of this approach can only be a optimistic view upon the capacity of selfconsciousness of human persons. Perhaps we need religion not to understand and agree with this necessary optimistic view on humanity but to be able to put it in reality.

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The Foundations of the Philosophy of Human Dignity and the Law

The view that human dignity is the basis of human rights is widely endorsed, but also highly problematic. Critics have convincingly shown that both the notion of dignity itself and its relation to human rights are objectionably obscure. This paper defends the view that dignity can be seen as the foundation of human rights against such charges. It develops a novel, detailed analysis of dignity. It integrates inherent and contingent features of dignity in a coherent fashion, explicates the precise relation between dignity and human rights, and shows how human rights can be sensibly conceived as both derived from and protective of dignity.

Contemporary human rights literature typically interprets dignity as what has been called a 'metaphysical value property': an inherent, inviolable and inalienable preciousness that all human beings possess, no matter who they are, what they do, or what is done to them. Such an understanding of dignity at first seems attractive as a basis for human rights because it ensures both that all human beings always have dignity and hence human rights, and that human rights can trump all other concerns. This universality and absoluteness also lead to major conundrums, however, as they seemingly make dignity irrelevant for practical purposes. If nothing done to us affects our dignity, then what function do human rights serve in relation to dignity? Take, for example, the common view that human rights protect dignity: if nothing done to us can affect our dignity, then what is it that human rights protect dignity against?

Dignity literature commonly distinguishes inherent conceptions of dignity (like the one just introduced) from contingent ones. Contingently understood, dignity is something that some people have, but not others. It is something that must be bestowed or recognised, and hence also something that can be taken away or lost. Kings, presidents or judges, for instance, are said to have specific dignities, whereas slaves had no dignity at all. Citizenship, too, can thus be thought of as a dignity. If dignity is understood contingently, it is easy enough to explain why we should be concerned about our dignity and would want to see it protected. At the same time, however, contingent understandings of dignity cannot carry the weight human rights advocates want to put on dignity. If we would make human rights dependent on contingent dignity only those people who possess the relevant dignity will have human rights, and we would no longer be able to denounce many gross mistreatments as human rights violations when they are inflicted on people who lack the relevant dignity. To summarise the dilemma: to apply universally dignity must be inherent, but to be practically relevant dignity must be contingent.
In this paper I develop a novel account of dignity that brings inherent and

contingent features together in a coherent fashion, and show how human rights can be based on dignity thus understood. First, I argue that dignity can be usefully understood as a relational, hierarchical notion – a point taken from Sensen (2011).1 Then, I argue that only a very specific form of hierarchy is relevant to dignity, namely the hierarchy that is inherent in lawgiving. The connection between lawgiving status and dignity is very prominent in Kantian ethics, but it is by no means an exclusively Kantian idea and can be found throughout the history of political thought. I develop the notion of lawgiving in more detail and distinguish three essential features of dignity: that of moral-legislative, moral-adjudicative and moral-executive status.
I
then show that the first two of these features directly follow from faculties that are inherent to personhood, but that the possession of the last will always be a contingent matter. I demonstrate how this allows us to make sense of human rights as protecting dignity. Our inherent dignity is argued to necessarily bring with it a claim to (certain forms of) contingent dignity, as it is crucial to our moral agency that we not only qualify as moral agents, but also that we can express ourselves as such. Human rights are then shown to follow directly from inherent dignity – ensuring that we always have them – whilst what they protect is contingent dignity.
The paper concludes by discussing the implications of conceiving of dignity in this way, exploring the 'image of man' that it leads to. It is argued that the propounded account of dignity should be appealing to anyone who (1) believes that it is our moral agency that makes us of special moral concern, and (2) has a view of moral agency that allows for a distinction between inherent faculties that enable us to form moral beliefs on the one hand, and our contingent ability to act on these on the other.

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On Naturalism, Consensus and Practice

The philosophies of human rights are now often divided into three basic categories: naturalism; theories of consensus; and the practical or "political" approach (e.g. Beitz, 2009). Furthermore, these three categories are often seen as mutually exclusive. In my presentation I criticize this view. I show that the three theories in question are different because they respond to three different philosophical problems, respectively, on the philosophical foundation of human rights, on the pervasiveness of doctrinal pluralism, and on the nature or character of the contemporary practice of human rights. The three theories that I mentioned above are not incompatible precisely because they are answers to three different problems.

My aim in this presentation is mainly analytic, but not exclusively. In other words, I distinguish what is not always considered distinct in the Philosophy of Human Rights, but I also suggest that these distinctions are relevant to the definition of what we should mean by human rights today.

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A Future Tinted by the Past – South African Justification Strategies for Peacebuilding

Frequent referencing to moral values and ethical principles within foreign policy discourses indicates that ethics has a role to play within the topic of international relations, in parallel as well as intertwined with legal and political reasoning. I am making this argument based on a case study on the foreign policy discourse of South Africa in relation to the country's engagements in peacebuilding missions abroad. The paper contributes both by shedding further light on the normative dimensions of foreign policy as well as with the findings from the case study. Foreign policy is often centered around the realist paradigm with a focus on national security, sovereignty and national interests but regardless of this main focus, ethical principles are continuously being used. Within the liberal paradigm, ethical principles have a more natural place even though still a limited role. In addition to paradigms of how international relations should be organised, foreign policy is also to some extent governed by international law.

The ethical principles being referred to in foreign policy are here operationalised into what I call justification strategies, used in order to justify and create legitimacy for certain decisions and initiatives. A crucial distinction that I make in the paper is the difference between justification and attempts to justify. This theoretical discussion is enriched by the findings from the case study. The analysis of the case study on South African foreign policy shows that three overarching approaches can be clustered into a typology of justification strategies. The typology is also a contribution made by the paper, which is drawn from the case study but which is also applicable to other cases. The analysis is based on reviews of South Africa's main foreign policy documents as well as interviews with decision makers and scholars.

The first justification strategy is the continuous reference to liberal values such as human rights, democracy and multilateralism. The second justification strategy is the African Agenda, or the African Renaissance, which is justifying the primary focus on the African continent. The third justification strategy is the referencing to south-south cooperation. This is explained as a way of taking distance from colonialism and imperialism, and is based on the importance of being in solidarity with the south. South Africa has taken on a role as a voice of the African continent in for example the UN, and has for example been lobbying for a reform of the UN Security Council into a more equal setting. The analysis show that the justification strategies are explained by historical, cultural and geographical explanations in each case they are being used.

The paper contributes to the literature on justification, the ethics of foreign policy and ethics of international law. This is done by the case study and also given the specific focus on the justification strategies of engagement in peacebuilding initiatives, shedding light to a fairly dark corner in previous literature. My analysis is in addition also relevant for the larger discussion on the relationship between international law, moral and international politics in different countries across the globe.

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Böse oder determiniert? Der determinierte Straftäter und die Folgen für die Strafrechtspraxis

Die Frage, ob die Willensfreiheit existiert, ist bis heute nicht zur Gänze geklärt. Die neuesten Forschungsresultate der Neurowissenschaften, wie beispielsweise diejenigen des Neurologen John- Dylan Haynes, behaupten, dass die Willensfreiheit nicht existiert. Es gibt nicht nur neurowissenschaftliche Forschungsergebnisse, die die Existenz der Willensfreiheit untergraben, sondern auch evolutionsbiologische Ansätze, die die Freiheit der handelnden Personen in Frage stellen. Aber was bleibt ohne Willensfreiheit von Moral, strafrechtlicher Schuld und unserer derzeit bestehenden Strafrechtspraxis übrig? Ist es das Ende von Schuld und Verantwortung, wenn der Mensch determiniert ist?

Im Vortrag wird sich zeigen, dass sich deterministische Kompatibilisten[1], agnostische Kompatibilisten, Inkompatibilisten, Libertarier, Freiheitsskeptiker und harte Deterministen jeweils sehr unterschiedlich zu der soeben aufgeworfenen Fragestellung positionieren.
Wenn es den Neurowissenschaften eines Tages gelingen sollte, zu beweisen, dass es die Willensfreiheit im Bereich von menschlichen Handlungen nicht gibt und somit alles, was der Mensch tut, determiniert erfolgt, gilt es zu diskutieren, ob Straftäter, die die Tat nicht in Willensfreiheit, sondern sozusagen determiniert verübt haben, anders zu bestrafen sind. Es gilt zu klären, ob der determinierte Straftäter nicht mehr als Verbrecher, der für seine Straftat zur Übernahme einer moralischen Verantwortung gezogen wird, sondern als Opfer einer Krankheit oder als ein Getriebener zu verstehen ist. Im Falle, dass die Inexistenz der Willensfreiheit bewiesen werden könnte, würde es auf der Ebene des Strafsystems bzw. in der Art und Weise, wie Straftaten betrachtet und Strafen konzipiert werden, dazu kommen, dass Straftaten und Strafen nicht mehr länger in den Bereich der Moral, sondern vielmehr in jenen der Medizin fallen. Die Tat des Mörders würde dann nicht mehr als unmoralisch, sondern als Ergebnis eines neurologischen Fehlers, als Resultat eines pathologischen Gehirns[2] begriffen werden.

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1 Alle im vorliegenden Text verwendeten Bezeichnungen sind geschlechtsneutral zu verstehen.

2 Der Biologe und Hirnforscher Gerhard Roth formuliert in Bezug auf Straftäter die provokante These des „Schuldparadoxons“, welches den folgenden Zusammenhang zwischen begangener Tat und Schuldfähigkeit des Täters besagt: „Je verabscheuungswürdiger eine Tat ist, desto eher wird man eine hirnorganische oder psychische Störung feststellen, die die Schuldfähigkeit des Täters beeinträchtigt oder gar ausschließt.“ [Pauen, Michael/ Roth, Gerhard: *Freiheit, Schuld und Verantwortung. Grundzüge einer naturalistischen Theorie der Willensfreiheit.* Frankfurt am Main: Suhrkamp 2008. S.164.] Roth zufolge hängen gerade besonders abscheuliche Delikte nachweislich oft mit angeborenen oder in der frühen Kindheit erworbenen neuronalen Schädigungen zusammen. Tendenziell lässt sich beobachten, dass immer mehr Verbrechen von Neurologen und Genetikern pathologisiert werden. Als Beispiel für den Versuch einer Pathologisierung lässt sich der Fall des dreifachen Vergewaltigers und Mörders Brian Dugan anführen. Im Jahre 2009 versuchte Dugans Verteidiger mittels Hinzuziehung des Beweismittels

Die derzeit bestehende Strafrechtspraxis, die auf der Idee einer Vergeltung persönlicher Schuld basiert, müsste, wenn die Willensfreiheit widerlegt wäre, einer grundsätzlichen Modifizierung unterzogen werden, da der heutzutage vorherrschende normative Schuldbegriff, der vom deutschen Strafrechtler Reinhard Frank[3] begründet wurde, besagt, dass Schuld die Voraussetzung dafür ist, dass dem Täter sein vorsätzliches oder fahrlässiges Verhalten vorgeworfen werden kann. Und Schuld setzt wiederum die Willensfreiheit voraus. Die Voraussetzung für die Vorwerfbarkeit ist, dass der Täter sich hätte anders entscheiden können. In einer determinierten Welt wäre das Schuldprinzip nicht mehr argumentierbar, da dem Menschen so die Fähigkeit abgesprochen würde, zwischen Recht und Unrecht zu unterscheiden. In diesem Zusammenhang gilt es aus meiner Sicht zu diskutieren, ob es nicht sogar eine moralische Pflicht der Gesellschaft wäre, die Vergeltungstheorien abzuschaffen und diese durch ein System zu ersetzen, welches ausschließlich darauf abzielt, menschliches Verhalten durch medizinische Maßnahmen und durch Prävention zu regulieren, wenn sich herausstellen sollte, dass der Mensch tatsächlich keinen freien Willen besitzt. Der Philosoph Ted Honderich, um an dieser Stelle ein Beispiel anzuführen, fordert die Abschaffung von Strafrechtssystemen, die nur die Vergeltung persönlicher Schuld zum Ziel haben, wenn der Determinismus bewiesen werden könnte: „Falls der Determinismus zutrifft und falls […] es eine Strafeinrichtung gibt, für die nichts weiter spricht als der […] Vergeltungscharakter, dann *sollte* diese Einrichtung abgeschafft werden.“[4]
Doch welche Probleme erwarten uns in einer Welt, in welcher alle Handlungen jeglicher moralischen Beurteilung und Verantwortungsübernahme entzogen sind? Braucht unser Strafrechtssystem einen Bezug zu moralischen Wertesystemen? Können Strafrecht und Moral ohneeinander sein?

Für den Neurophysiologen Wolf Singer gibt es den freien Willen nicht, wodurch es für ihn auch die Fähigkeit des Straftäters nicht gibt, sich in der gegebenen Situation gegen die Straftat zu entscheiden. Aus seiner Freiheitskritik leitet Wolf Singer die rechtspolitische Forderung nach einer allgemeinen Abkehr vom Schuldprinzip ab. Die moralische Beurteilung von Menschen, welchen ein angepasstes Verhalten unmöglich ist, betrachtet Singer als diskriminierend: „Keiner kann anders, als er ist. Diese Einsicht könnte zu einer humaneren, weniger diskriminierenden Beurteilung von Mitmenschen führen, die das Pech hatten, mit einem Organ volljährig geworden zu sein, dessen funktionelle Architektur ihnen kein angepaßtes Verhalten erlaubt. Menschen mit problematischen Verhaltensdispositionen als schlecht oder böse abzuurteilen, bedeutet nichts anderes, als das Ergebnis einer schicksalshaften Entwicklung des Organs, das unser Wesen ausmacht, zu bewerten.“[5]
Thesen wie diese, welche der Position des neuronalen Determinismus zuzuordnen sind, entkoppeln das Rechtssystem von der Moral, da sie davon ausgehen, dass es die Möglichkeit

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der funktionellen Magnetresonanztomografie (fMRT) das Gericht davon zu überzeugen, dass Dugan aufgrund einer pathologischen Gehirnphysiologie schuldunfähig sei.

3 Vgl. Frank, Reinhard: *Über den Aufbau des Schuldbegriffs.* BWV. Berliner Wissenschafts- Verlag 1907.

4 Honderich, Ted: *Wie frei sind wir? Das Determinismus- Problem.* Stuttgart: Reclam 1995. S.183.

5 Singer, Wolf: *Verschaltungen legen uns fest: Wir sollten aufhören, von Freiheit zu sprechen,* in: Geyer, Christian [Hrsg.]: *Hirnforschung und Willensfreiheit. Zur Deutung der neuesten Experimente,* Frankfurt am Main: Suhrkamp 2004, S. 63.

nicht gibt, dass der Täter hätte anders handeln können. Sie entfachen die Debatte, ob man nicht auf ein Strafrecht verzichten sollte, welches gegen den Täter einen persönlichen Vorwurf erhebt, da ja die notwendige Voraussetzung jeglicher individueller Schuld bzw. die Möglichkeit, dass man auch anders hätte handeln können, nicht gegeben ist.

In meinem Vortrag möchte ich diese Aspekte mit den Zuhörerinnen und Zuhörern diskutieren und den Versuch unternehmen, darzulegen, warum ich eine Entkoppelung von Strafrecht und Moral als problematisch erachte. In diesem Zusammenhang werde ich meinen Standpunkt verteidigen, aus welchen Gründen ich die Ersetzung des Schuldprinzips durch präventive Maßnahmen nicht gezwungenermaßen als die humanere Beurteilungsmethode von Straftätern erachte. Denn je nachdem, wie stark sich eine Gesellschaft bedroht fühlt, könnte das Strafmaß ohne Rekurrieren auf das Schuldprinzip als eingrenzender Maßstab inadäquat hoch ausfallen, wodurch sich der vermeintliche Humanismus, welchen sich die strafrechtskritischen Hirnforscher erhoffen, als reine Illusion erweisen würde. Bei einem präventiv orientierten Strafrecht könnte sich bei der Bekämpfung von Gefahren, wie es zum Beispiel bei der Bedrohung durch terroristische Anschläge der Fall ist, welche gegenwärtig eine hochaktuelle Problematik manifestieren, die rechtsstaatliche Balance zwischen Freiheit und Sicherheit zugunsten der letzteren verschieben. In einem solchen System würde es dann nur noch darum gehen, den frühestmöglichen Zeitpunkt zu finden, um in eine determinierte Abfolge von Ereignissen vorbeugend einzugreifen, welche ohne Intervention zu einem Schaden führt. Die Neurowissenschaften und ihre Theorien über jene verhaltenssteuernden Determinanten, mittels welcher sich potentielle Gefahren prognostizieren lassen, würden dann zu einem Instrument werden, um drohende Schäden zu verhindern. In einem solchen Strafrechtssystem geht es nur noch um potentielle Verbrecher, welche möglichst früh aus dem Verkehr zu ziehen sind. Am Ende wäre ein Szenario denkbar, in welchem jede Bürgerin und jeder Bürger pauschal kriminalisiert würde, mit dem Ziel, potentielle Gefahrenquellen zu bekämpfen und diese im Keim zu ersticken. Die Idee des „gläsernen Menschen“ würde immer mehr zur Realität werden und das Recht auf Freiheit, welches wir uns in der Vergangenheit so hart erkämpft haben, könnte durch ein Rechtssystem, welches ausschließlich auf Prävention setzt und sich von jeglicher Moral distanziert, allmählich zu einer leeren Worthülse verkommen.

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Assessing the legitimacy of investment arbitration: Can the EU's 'Investment Court' make Investor-State Dispute Settlement (ISDS) legitimate?

Since the entry into force of the Lisbon Treaty in 2009, the European Union (EU) has competence for the negotiation and conclusion of international investment agreements (IIAs), as a part of the common commercial policy. Unsurprisingly, as foreign direct investment (FDI) has become an important driver of the global economy, investment protection has taken a prominent place in the EU's recent trade negotiations.

Although some agreements also aim to liberalize cross-border investments, the main objective of IIAs is to protect investment in the post-entry phase. The most crucial aspect of international investment law is its distinct mechanisms for the settlement of disputes, known as Investor-State Arbitration or Investor-State Dispute Settlement (ISDS). Contrary to traditional international legal disputes which take place between states, ISDS *gives foreign investors direct access to an international remedy* to pursue claims against states for violations of their treaty obligations. Consequently, the relevant investment treaty provisions become *directly applicable* to investor-state relations. Moreover, even though the procedural rules remain similar to private commercial arbitration, a broad range of governmental activities can be at issue in investor-state disputes, transforming many cases into 'regulatory disputes' rather than private conflicts.[1]

In contrast to the scarce attention paid to the numerous IIAs which were previously concluded by almost all European countries, the inclusion of investment provisions in the prospective comprehensive economic agreements with Canada and especially the US have stirred up the debate on the desirability and legitimacy of the international standards of investment protection, specifically in relation to ISDS. For many commentators, ISDS is a dangerously unbalanced and flawed system.

Faced with the growing controversy over ISDS, the EU is trying to redefine its position. Both in the context of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) negotiations and the ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations, the EU has proposed several changes to the rules regarding ISDS, including the establishment of an 'Investment Court System' (ICS). The key question, however, is whether or not these reforms are sufficient to address the most fundamental problems of the system

[1] In this context, it is also important to note that IIAs and arbitral awards often define the concept of 'investment' very broad. By implication, the scope of the jurisdiction of the arbitrators can extend to almost any domain of governmental regulation, on the condition that it directly or indirectly influences a foreign investment.

and increase its normative legitimacy - i.e. 'the moral right' to take binding decisions regarding states' compliance with the relevant substantive standards of investment protection.

Accordingly, we examine what adequate criteria for the legitimacy of ISDS as a mechanism for international adjudication could be and subsequently compare these with the current adaptations to ISDS procedures in the CETA and TTIP texts. In order to address this question, we will draw form insights in legal theory and political philosophy that deal with the question of the legitimacy of international law and institutions more generally. More specifically, we will explain why both traditional approaches to legitimacy of international institutions – i.e. state consent and the goals or expected outcomes of international institutions – are not satisfactory criteria for assessing the legitimacy of ISDS. Based on this analysis, it will become clear that an international investment tribunal can only be minimally legitimate if (1) its procedures guarantee the effective participation of 'all those affected' and (2) legal mechanisms are included that ensure their legitimate interests can be taken into account.

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Refugees rights - the ethical dilemma

Individual refugees, do not pose any big social or economic burden on the host population, however exodus of large population poses a heavy burden. Yet, huge exodus of immigrants is not a usual phenomenon, except at the time of disasters like revolutions, genocides, famine, mass-murderous wars and civil conflicts as of French, Polish, Gypsies and Jews during WWII, during civil wars as in Bosnia, N. Ireland, Cyprus, East Pakistan, Congo, Afghanistan etc., after defeat in wars as of Germans from Poland, Czechoslovakia and other European colonies after WWI and WWII.

However, such conflicts are not always natural and sudden but have often been pre-planned. For example, it was a standard policy of the ancient Roman Empire to displace whole conquered nations into other lands, to plant them into new lands and socially rearranged according to Roman conventions. Jews after Roman conquest of Judea 70 CE were enslaved and planted as Romans agents, mostly in Germany and other parts of Europe. Such policy continued in the Byzantine Empire, and the French, German, British, Spanish, Portuguese, Dutch and now the American empires. Those who refused were slaughtered en masse as Saxons were under Charlemagne. Similar was the fate of rebellious German women who neither fled nor yet accepted Pope and Emperors' hegemony; 100,000 German women were arrested, investigated and tortured by the priests, monks and Jesuits, 50,ooo of whom were burnt alive or drowned. The same tactics were used against the unwilling Red Indians in America famously known as "Trail of Tears" for their 1000 miles long travel on foot.

New powers displaced unfavorable populations and planted their favorite tribes and nations in their areas of influence, this creating exodus of large population e.g. wars by Byzantine and the Osmania Islamic Empires created waves of exodus of refugees which crossed the mountain range and arrived in Indian planes further displacing the local populations.

According to Professor Asher Susser of the Tel Aviv University, the Jewish refugees started arriving in Palestine after WWI in accordance with the British mid-war promise of creation of Israel, there started the emigration of Palestinians. Soon after WWII as Israel started its nationhood in 1948, it started expanding, particularly after the Arab-Israel wars, Israel controlled most of Palestine and parts of Syria and had a strong influence in Lebanon, and other countries around.

As the politically inexperienced and an eye surgeon Bashar el-Assad took over as the president of Syria and allied himself with Iran, the delicate balance of power in Middle East started crumbling.

Saudi Arabia, had been able to create its vast Islamic Sunni spiritual Empire, it recently bought a huge amount of weapons, translating its spiritual empire into a physical empire, on the line of Byzantine and Osmania Empires. While Iran with Shia powers and populations is proving to be a challenge to it.

Direct destabilization and destruction of Iraq by the US and its indirect support for the civil wars in Syria, Yemen and Libya has turned the whole area into turbulence. ISIL duly resulted

as a reaction to the US destruction of Iraq and it has started killing Syrians and Iraqis en masse; Israel sees this as its area of expansion. Suddenly there were strategic Paris and Brussel bombings after which thousands of Jews immigrated to Israel, as have happened after pre-planned anti-Jewish bombs and harassment of Jews in Middle East, as Israel needed more Jewish refugees for its expansion.

ISIL, the American supported anti-Assad rebels and Israeli undercovers and Western Christian mercenaries started killing people en masse while the Western Christian powers like US, Britain, Canada, Australia, The Netherlands etc. started indiscriminate mass-murders and destruction, killing people by unjustified aerial bombardments, forcing large number of people to seek refuge in Turkey, Jordan, Germany and other European countries. And it is a pity that it is their only chance of survival….

Implications on the host countries: Germany and some other countries have welcomed refugees with open arms, however, such a large number of refugees means a whole lot of problems with economy, health, housing, food, clothing, transport and policing etc. Some of these problems may be seen as temporary, which education, assimilation, integration and later return of refugees may solve, however, problems of national identity and culture of the host countries may find itself under attack. Lebanon's culture and identity changed from Shia to Sunni because of the influx of a large number of Palestinian refugees, a strategy already applied during Western Christian wars of Counter-Reformation. Some may say that the influx of huge number of less developed refugees may be as challenging as the influx of less sophisticated Germanic tribes into the Roman Empire.

The rights of refugees have to be balanced with the right of the host population, and that is the dilemma, which always have two horns.

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Moral Grounds for Human Rights: A Dualist Approach

Exploring moral grounds for human rights has long been a great challenge to legal and political philosophers. The challenge is currently even more enormous as some leading authors, notably Charles Beitz and Joseph Raz, dismiss the project of providing ethical justifications for human rights and instead propose the practical account of these rights. To defend and develop the philosophical conception of human rights as opposed to the practical one, proponents of the former conception must offer solid moral foundations for human rights.

A significant contribution to the project of offering ethical grounds for human rights is James Griffin's *On Human Rights*, in which he maintains that a central idea in justifying human rights is that of personhood. Personhood includes three components: first of all, autonomy demands that a person chooses her path through life; second, the notion of minimum provision requires that an individual has at least the minimum of resources and capabilities to act based on his choice; third, liberty claims that one is not forcibly stopped by another from pursuing what one sees as a valuable life. Thus autonomy is here considered as more fundamental than minimum provision and liberty. However, Griffin's autonomy-based approach fails to cover some of what are recognized as human rights. For instance, this approach does not succeed in justifying infant's liberty from abuse because an infant lacks the capability of autonomous choice of her path. To remedy such problems, we need to pay attention to human vulnerability and basic needs when exploring moral foundations for human rights.

David Miller bases human rights on human needs and criticizes Griffin's personhood view. One of the reasons why he prefers the needs account to the personhood account of human rights is that the latter appeals to such values as autonomy and liberty, which are prominent in liberal societies but are not highly regarded in others. In contrast, the former account can obtain support not merely in liberal societies but in non-liberal societies by admitting that needs of people vary from society to society. When contrasting the needs argument with the personhood argument in this way, he seems to suppose that in a non-liberal country there is a broad, if not overwhelming, consensus among people about various aspects of social life including religion, culture, and politics. The reality is frequently the opposite: people in a non-liberal country are no less divergent than those living in the liberal one. Therefore, religious, cultural, and political minorities in a less liberal society need freedom of religion, free speech, and many other forms of individual liberty, as such people in a liberal society do. At the first glance, Miller's needs approach appears to show tolerance toward non-liberal societies by permitting a variety of interpretations of human needs, but in fact it involves the risk of leaving minorities therein unattended. The examination of Griffin's and Miller's views suggest that the idea of human right requires a twofold theory of moral foundations, which takes into account both individual autonomy and human needs.

To meet the requirement previously mentioned, the current paper begins by noting the significance of developing moral justifications for human rights. Next, Griffin's autonomy-based approach is closely examined, with a special reference to the cases to which it cannot

apply. Then, I turn to the examination of Miller's needs-based view and identify the perils it involves. Based on my assessment of the two conceptions of human rights, I try to develop the third conception by identifying two distinct features of human life and to explain how these features relate to each other. One is voluntariness, which denotes that an individual chooses her course of action, forms her way of life, and pursues her values and goals. The other is vulnerability, by which I mean that a person's life depends on its natural and social environment. Then, the paper goes on to argue that institutional arrangements are required to show respect for human voluntariness on one hand, and to provide a group of particularly vulnerable people with rescue on the other hand. It is argued that the principle of respect is promoted by free speech, freedom of religion, freedom of movement, among others, while that of rescue is served by freedom from want, the right to education, and the right to decent medical care. The paper concludes by saying that this dualist view on human rights is more promising than (semi-)monist views presented by Griffin and Miller.

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Gender, Identity, Ideology: Sex Difference as an Article of Faith

Affluent countries in Central, Western, and Northern Europe, North America and Australasia seem to have become increasingly accepting of non-traditional gender identifications and non-traditional relationship forms. Same-sex marriage is a legal reality in many countries in the region, and trans and intersex people have become increasingly visible and audible in their quest for legal recognition and legal protection. At the same time, we are now witnessing a cultural backlash against these developments. In the United States, cities and states have passed or tried to pass so-called "bathroom bills" that would make public bathrooms subject to "gender policing" and force many trans person out of the bathrooms that fit with their lived and experienced gender. In Germany, several federal states have had heated public debates about new school curricula, simply for the reason that these new curricula aimed to inform pupils about "sexual diversity" (among other things, gay and trans identities). New extreme-right parties and candidates in many countries have made "traditional family values" a part of their agenda and stoke fear by suggesting that increased acceptance of non-traditional sexualities will undermine the fabric of state and society. A more marginal but no less telling example is the attention paid in professional sports to enforcing gender segregation and "measuring" the true sex of an athlete. Caster Semenya's case is only the most prominent of several sad examples in this regard. (It deserves mentioning that the last time there was such a public interest in matters of gender in sports was when obligatory gender testing was introduced – at the height of the Cold War).

Generally, we can say that not only is there a clear backlash, there is also a clear gap between gays and lesbians on one side and trans and intersex persons on the other in terms of their general acceptance and their legal protection. Indeed, it could be suggested that trans and intersex identities have become the new battleground of the "culture wars" after same-sex marriage has become an irreversible political reality in many countries – that is, the reactionary energy that was once pumped into resisting civil unions and "gay marriage" now finds its outlet in targeting the more vulnerable groups within the QUILTBAG-umbrella. The flipside of this explanation is so-called "homonationalism", that is, an attitude that is accepting of non-traditional sexualities as long as these can be read as "contributing" to the national community and identity. In homonationalist fashion, same-sex marriage can be read as a wholesome extension of traditional partnership (thus embodying "traditional" values) while trans identities, for instance, can be read as undermining those same values, because of their connotations of impermanence and fraud.

It is no surprise, then, that in extreme right propaganda, queer persons are often accused of promoting a "dangerous" multiculturalist and pro-immigration agenda – and ridiculed when they fall victim to "immigrant violence" (e.g., religiously motivated attacks on gay persons). There are, indeed, parallels between suspicions toward queer persons and toward immigrants.

Both are treated as potentials risk factors and fraudsters, and for both, administrative hurdles are in place when they aim to "naturalize" their identities. Trans persons, for instance, are typically asked to provide medical proof of their trans status, often in conjunction with requirements for unnecessary surgery. Naturalized citizens must, even if only symbolically, prove their loyalty to their new home. Both, it seems, cannot be taken by their word when it comes to matters of identity.

But why is the issue of identity important in these cases? Neither gender nor nationality are of particular help for the identification of individuals (that is, for matters of national security and policing). On identification documents, we could do without them without any great loss for security. This suggests that the reason these categories are widely viewed as relevant and in need of securitization is symbolic – in other words, that they are based on ideology rather than evidence. What makes this situation particularly ethically sensitive is the fact that in this case, we have an ideology that masks itself as science. That is, sex and gender differences are marked as "natural" differences, based in biological evidence. The question to what extent biology as a science is itself rooted in a certain social agenda is raised only at the social margins. In this regard then, sex differences have become an "article of faith": they are the basis of (and not the evidence for) particular ways of classifying and policing people.

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Das Recht auf Religionsfreiheit – Status und Stellenwert einer provokativen Norm in der religionspluralen Gesellschaft

Das Recht auf Religions-, Weltanschauungs- und Gewissensfreiheit bildet einen konstitutiven Bestandteil der Freiheitsrechte jedes Menschen. Es schützt sowohl die Glaubens- und Überzeugungsfreiheit (forum internum) als auch die individuelle und gemeinschaftliche Religionsausübungsfreiheit (forum externum); es impliziert die positive wie die negative Religionsfreiheit. Ich vertrete *erstens* die These, dass das religiöse Freiheitsrecht in der weltanschaulich pluralen und nicht selten konfliktiven Situation der Gegenwart einer doppelten Infragestellung ausgesetzt ist: Es ist einerseits gegen den Verdacht zu verteidigen, es diene bloßen Partikularinteressen oder Privilegien, sowie andererseits gegen Versuche, Religionsfreiheit tatsächlich partikular zu vereinnahmen und damit ihren menschenrechtlichen Charakter zu unterlaufen. Deshalb ist grundlegend der Charakter als ein Recht der Person hervorzuheben, das unabhängig ist von der individuellen religiösen oder weltanschaulichen Überzeugung. Dieser Ansatz, der nicht mit einer Privatisierung des Religiösen zu verwechseln ist, bildet die zentrale Verknüpfung zwischen dem (säkular durchgesetzten) Recht auf Religions-, Weltanschauungs- und Gewissensfreiheit und der Anerkennung / Aneignung des religiösen Freiheitsrechts in der Lehre der katholischen Kirche im Zweiten Vatikanischen Konzil. Unter den Bedingungen wachsender religiös und weltanschaulicher Pluralität / Heterogenität und einer in vielen Gesellschaften nicht mehr vorauszusetzenden „religiösen Aphabetisierung“ zeigt sich der Charakter des religiösen Freiheitsrechts als Provokation nicht nur für viele säkular denkende Zeitgenossen, sondern auch für die Religiösen und ihre Gemeinschaften in neuer Schärfe.
Unter solchen Bedingungen ist neu nach den Voraussetzungen für Achtung, Schutz und Durchsetzung des religiösen Freiheitsrechts zu fragen. Dazu vertrete ich *zweitens* folgende These: Das Recht auf religiöse Freiheit verpflichtet nicht nur wie alle Grundrechte den Staat zu Achtung, Schutz und Förderung eines Rahmens, in dem die gesellschaftlichen Akteure ihre geistigen Freiheiten entfalten und ausdrücken können. Zugleich fordert es die ganze Gesellschaft und in ihr die religiösen und weltanschaulichen Akteure (Kirchen, Religionsgemeinschaften, Weltanschauungsgemeinschaften) heraus, Mitverantwortung für die sozialmoralischen Grundlagen – für das „Ethos der Religionsfreiheit“ – zu übernehmen. Sie müssen sich dem provokativen Charakter des religiösen Freiheitsrechtes gegenüber dem eigenen Wahrheitsanspruch konsequent stellen, und sie müssen lernen, das, was ihnen an der eigenen religiösen Überzeugung und Praxis als schützenswert gilt, nicht nur als solches zu behaupten, sondern kohärent und nachvollziehbar zu vertreten.

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The concepts of personhood and autonomy as they apply to end-of-life decisions, especially to palliative sedation

In this presentation I would like to discuss the concepts of personhood and autonomy as they apply to end-of-life decisions. In the article titled "Concepts of personhood and autonomy as they apply to end-of-life decisions in intensive care", the authors Walker and Lovat propose broadening the classical concept of autonomy – as the ability to make independent decisions based on conscious and rational choices – to include the relational aspect of human nature. A person who is able to make his/her own decisions would make them in consultation with his/her family and close friends. Being in relationships with other persons would be the reason to make end-of-life decisions together. Based on the concept of *relational autonomy* (Mackenzie and Stoljar 2000), Walker and Lovat propose a broader concept of patient autonomy in the context of end of life decisions in intensive care. According to this concept, end-of-life decisions would be made with family and close friends not only in the light of social customs, but also according to law and clinical standards. (Walker, Lovat, 2015, 311-314). In my presentation, I would like to analyse this concept in relation to palliative care [PC], in particular the procedure of palliative sedation.

The idea of holistic patient care is included in the philosophy of PC. Hence, relatives can be involved in this type of care. However, as for decisions on deep palliative sedation, the patient's own autonomy should come before other factors. In this presentation, I will argue for the widest possible autonomy of the patient in decision-making in situations of death and dying. I believe that each patient has the right to die in accordance with her/his own personal preferences, even when they are not in line with the preferences of those closest to him/her. The right to a dignified death should be closely tied to respect for the autonomy of the dying. My position is not an expression of opposition to accompanying the dying, however. On the contrary, I believe that accompanying persons should have a far-reaching understanding and acceptance of the patient's preferences, even when those choices are difficult for them.

In the concept of personhood and autonomy as they apply to end-of-life decisions in PC, the optimal situation would be a decision based, on the one hand, on the personal preferences of the patient, while on the other hand taking into account the preferences of his / her family and loved ones. In order to come to such a decision, it is necessary to fulfil the conditions of two-way communication based on the mutual acceptance of choices and preferences combined with courage and openness to conversation about dying and death, and the patient must be accompanied. In making such decisions, the recommendations developed by the medical teams undertaking them may prove useful. I propose a similar development of recommendations for the families and loved ones of the dying. Education in this field is a prerequisite for the development of the concept of personhood and autonomy as they apply to end-of-life decisions in PC, which is also an expression of the principles of IT, as holistic care is not just for the patients themselves, but also for their families at the time of death, and later during the mourning period.

The French recommendations for medical staff may be a helpful example in deciding whether to put a patient in a state of palliative sedation. The authors of "La sédation pour détresse en phase terminale. Recommandations de la Société Française d'Accompagnement et de soins palliatifs" propose that the entire care team making the decision answer the three following questions:

1. Why are we making this kind of decision? (This question concerns discernment of intentions accompanying this sort of decision)
2. For whom we intend to make this decision? (This question is related to ensuring that the patient's autonomy is respected)
3. For what reasons are we making this decision? (In this question, the most important thing is the values which form the basis of the care staff's decision; this question is also connected with standards of clinical practice, the law of the country where this decision is made, and the scope of responsibility of the person providing palliative sedation) (p.39).

Similar indications are included in the EAPC recommendations and other documents. In this presentation I will argue that, on the basis of existing recommendations, it is necessary to develop standard recommendations for the relatives of patients who have entered into a state of deep sedation in PC, as an aid in making a joint decision in this regard [in the sense of the concepts of personhood and autonomy].

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"The East" meets "the West": the Intellectual Solidarity of Abdullahi Ahmed An-Na'im, Naser Ghobadzadeh, and David Hollenbach on Religion and the State

What should be the legal relationship of the Church—or the Mosque, or the Synagogue—to the State? In the West, this question has been largely resolved in two broad ways: in the first case, there is a separation of church and state along the lines of the First Amendment of the American Constitution; in the second, the church is deemed subordinate to the state but endowed with various privileges, e.g., the Evangelical Lutheran Church in Scandinavia, the Anglican Church in England, the Orthodox Church in Greece, and the Catholic Church in Liechtenstein, Monaco, and Malta. The Catholic Church, of course, belatedly but nonetheless significantly changed its teachings on this matter at the Second Vatican Council by renouncing its commitment to the ideal of a Catholic State and embracing religious liberty. The question remains one of the most significant issues in the world today, however, because of its pertinence in Muslim lands.

In this paper, I will explore the work of two contemporary Islamic thinkers—the Sudanese-American Sunni thinker, Abdullahi Ahmed An-Na'im, and the Iranian-Australian Shi'ite scholar, Naser Ghobadzadeh—who wish to separate religion, specifically the development and enforcement of Shari'a (religious law), from the state. Both An-Na'im and Ghobadzadeh advocate a "secular" state. But, as they admit, this term tends to imply in a Muslim context the exclusion of religion from public life. To help meet this charge, I will try to show how a Western thinker—the Catholic ethicist, David Hollenbach, S.J.—might shed some light on the efforts of these Islamic scholars.

Hollenbach argues that religion can help people to get engaged in a positive way in their communities and thus contribute to the broader common good. But he does not envisage a "theocracy" in which the church—or any other religious body—constitutes the state or plays an established or direct role in affairs of state. Rather, he upholds a separation of church and state, as taught at Vatican II, whereby the church, like the other bodies of civil society, influences the state *indirectly* through lobbying, contributing to debates, etc.
Wiesbrock
Thus Hollenbach's distinction between the state (which is deemed "separate" from religion) and society (which is clearly not separate from it) allows him to articulate the positive ways in which religious actors may influence the state (albeit in an indirect manner) and help to build the common good. Seen in this light, the vision of An-Na'im and Ghobadzadeh appears less "irreligious" than some fellow Muslims tend to think.

Working in the tradition of Rashid Rida and Ali Abd al-Raziq, An Na'im contends that the state is a political rather than a religious institution and cannot therefore codify or enforce Shari'a principles. In his view, Muslims must be able to live their own belief in Islam instead of being coerced by the state. But this does not mean Islam should be excluded from the formulation

of public policy or from public life in general. For public policy should reflect the beliefs and values of citizens, including religious values, provided this is not done in an exclusive manner, which might favor the views of those who control the state. Akin to Hollenbach, then, An-Na'im maintains a clear distinction between religion and the state while regulating the connectedness of religion and politics.

Drawing on the work of Abdolkarim Soroush, Ghobadzadeh likewise challenges the legitimacy of the Islamic state. His argument incorporates "two corresponding components": first, Iran's experience demonstrates that the Islamic state transforms religion into a political instrument to justify state policy; and, second, despite the clergy's claim of divine sovereignty, Islam is compatible with the secular democratic state, which offers believers a more conducive environment in which to cultivate their faith.

Where Hollenbach calls for religious convictions to play a prominent public role as part of an "overlapping consensus" regarding moral principles, and An-Na'im calls for religion to be subject to the requirements of civic reason (i.e., consensus and compromise), Ghobadzadeh calls for a democratic state rooted in popular sovereignty in order to capture the true spirit of religion: justice. He calls this vision "religious secularity." It reflects not only an emerging discourse in Iran regarding the appropriate political role of religion, but also, to my mind, an affinity with the work of Hollenbach.

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"Laws and their humanity. Considerations on Erasmus of Rotterdam and his concept of *humanitas legum*"

The sources of my paper are Erasmus of Rotterdam's political writings, *Institutio Principis Christiani* and *Querela Pacis.* I will try to analyse his central concept of the *humanitas legum* and to embed it in a broader theoretical context: I will show how the Erasmian ethical discourse on *humanitas* (humaneness) – with its patterns of natural philosophy and natural law – determine and frame the concrete concept of the 'Humaneness of Law(s)' in the mentioned works. I will firstly speak in my paper about the historical phenomenon of humanism and its (etymological) connection to 'Humaneness'. The next step is the analysis of Erasmus' understanding of humaneness as cross point of nature, education, and ethical conduct. In the conclusion I will show that the concept of '*humanitas legum*' represents the concretization of this philosophical and ethical system around 'humaneness' and describe the two applications, Erasmus proposes for his concept: the Pan-European peace and the 'Humane' (Christian) State.

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Law, justice and juridification of religion

Law and human rights play a central role, some would even say crucial role, in how we approach issues of justice, equality, and non-discrimination, be it in the area of religious matters or other issues. Human rights have emerged as an authoritative voice and a language for utopia in times of 'post-modern insecurity', having achieved an almost hegemonic position when it comes to envisioning (decent) human life. Thus, their role in relation to perceptions of the human being must not be underestimated. We usually imagine human rights as above and beyond mundane politics, that is the utopian feature. We also attach certain expectations to human rights in their legal configurations. And sure enough, neutrality or impartiality is intrinsic to our image of law. This concerns both international and national law. The same is the case with our understanding of law's relationship to religion. Even so, law sets fort frames of meaning and shapes our vision of human life and behaviour. Law makes sense of some things while downplaying the significance of other things. Beyond addressing disputes that arise and regulating societal life, law is "a species of social imagination".[1]

In fact, it seems to have become an increasingly significant one if we are to believe those scholars who direct our attention to the various dimensions of what they have titled *juridification*. Juridification denotes the expansion of legal regulation on area after area of human life, as well as the fact that society to an increasing extent seeks to settle conflicts with the help of law. This leads to redistribution and displacement of power, e.g. to lawyers, courts and judges. A certain group is held up as experts and authorities. Lastly, also 'legal framing' forms part of this juridification, meaning that individuals, groups and other entities start to articulate their self-understanding ever more in legal terminology, as 'legal subjects' with individual rights etcetera, in accordance with the articulation of religion which the legal framework provides.[2]

What this means, I argue, is, that if our aim is, e.g., to analyse thoroughly the way in which society organises, regulates and meets religious manifoldness and religious minority positions, and to find out if this societal response is to all its part sufficient or in need of constructive revision (and how), we need to analyse the various dimensions and consequences of juridification of religion. We need to move beyond a 'superficial' mapping and analysis of the legal framework (consisting of religious law, i.e. religions' own regulation, and religion law, i.e. 'external' regulation of religion of national, regional and international kind). In order for the perspective to be meaningful, it has to be complemented. We have to ask questions like: How does power shift and how is it divided between the state and different religious actors? Where

[1] Rosen, Lawrence, *Law as Culture*, Princeton: Princeton University Press, 2006, 8-9, 11-12.
[2] Blicher, Lars C. & Molander, Anders, 'Mapping Juridification', 14 *European Law Journal* 1 (2008), 36-54; and as regards the juridification of religion, also e.g. Russell Sandberg, *Law and Religion*, Cambridge: Cambridge University Press, 2011, 193-194.

does the decision-making take place, who are held out as experts and what does expertise in religious matters seemingly consist of? What does it mean to formulate oneself about religion in legal vocabulary and to construe religious identity in close affinity to legal positions? What are the results of this process of translation, the distributive consequences?

In my paper, I propose to explore these matters regarding juridification through examples from (primarily) European human rights law and – arbitration, critically analysing the articulation of religion and religious freedom currently put forward there, the conceptual presuppositions and deep structures of the legal framework, and its limits when it comes to envisioning life, freedom and equality in matters of faith. It will lead me to claim that the 'egalitarian imaginary' of human rights, e.g., that is ostensibly neutral, 'non-political' and 'agnostic', when it comes to religion *de facto* privileges some believers over others. Law is exclusionary in a way that contradicts the ideals it praises.

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Die Freiheit des Glaubens aus phänomenologischer Perspektive

Dieser Beitrag möchte sich aus religionsphilosophischer und theologischer Perspektive mit der Frage nach der Religionsfreiheit, wie sie sich z.B. in GG Art 4 oder in der AEMR Art 18 wiederfinden lässt, beschäftigen. Diese schon lange brisante Frage scheint besonders in letzter Zeit im gesellschaftlichen Diskurs mit neuer Dringlichkeit aufzukommen: Das Aufeinandertreffen von verschiedenen Religionen und Kulturen verstärkt die Frage nach der Religionsfreiheit im Horizont der Pluralität von Neuem. Dem Staat kommt hier eine gewichtige Aufgabe zu, die sich u.a. in der Gewährleistung der Religionsfreiheit wiederspiegelt. Damit verbunden ist jedoch auch eine Artikulation der Grenzen derselben. Wie ist nun jedoch mit dieser Religionsfreiheit aus philosophischer, religionsphilosophischer und theologischer Perspektive umzugehen? Im ‚historischen Wörterbuch der Philosophie' und im ‚Handbuch der politischen Philosophie und Sozialphilosophie' wird deutlich, dass Glaubens- und Religionsfreiheit in enger Verbindung aber auch Abhängigkeit mit dem individuellen Freiheitsrecht steht, sodass sie als spezielles Thema des individuellen Freiheitsrechts behandelt werden kann. Ob nun diesem individuellen Freiheitsrecht ein ‚naturrechtlicher' Status zu kommt oder nicht, ist doch die Tendenz zu erkennen, dass das Recht auf Religionsfreiheit von diesem individuellen Freiheitsrecht abgeleitet wird. Wichtig ist dabei immer, dass die Religionsfreiheit ‚im Dienste' der öffentlichen Ordnung und Sittlichkeit steht, diese unterstützt und sie deshalb eingeschränkt werden muss, sobald sie dieser schadet. Doch so stellt sich dann die Frage: Haben wir es hier mit einer Ableitung der Religionsfreiheit aus der Sittlichkeit, vielleicht sogar aus einer durch Kants Autonomie Begriff geprägten Sittlichkeit zu tun? Theorien einiger Theologen und Philosophen deuten dies kritisch an, wenn sie hier die Gefahr einer Zivilreligion erkennen, eines Deismus, der die positiven Religionen als Ableitungen aus der ‚Religion der öffentlichen Ordnung' denkt. Wie auch immer diese Kritik zu bewerten ist, der Gedanke einer Ableitung der Religionsfreiheit aus dem individuellen Freiheitsrecht scheint ‚zumindest' religionsphilosophisch und theologisch nicht befriedigend zu sein: Das Prinzip des Glaubens wird aus dem Prinzip der Sittlichkeit abgeleitet, vielleicht sogar nur eingeführt, um die Ordnung zu schützen – so z.B. Kants Idee Gottes, der als Garant der Sittlichkeit dient – oder um der individuellen Freiheit Ausdruck zu verleihen.

In der Religionsphilosophie und Theologie zeigen sich nun auch andere Möglichkeiten zum Umgang mit der Thematik um Pluralität und Religion. So z.B. Hegel und seine Tradition bei Wolfhart Pannenberg, welche die Religion als hohe (vielleicht sogar höchste?) Stufe der Entwicklung des Geistes bestimmen und die Stufe der Religion selbst noch einmal in verschiedene Grade der Selbsterkenntnis des Geistes einteilen. Dem Christentum kommt darin die höchste Stufe zu. Natürlich kommen auch hier problematische Fragen auf: Wie ist das Verhältnis von Philosophie und Religion zu fassen? Ist die Religion erneut nur abgeleitet von einem philosophischen Prinzip? Selbst wenn nicht, so ergibt sich das Problem der Hierarchisierung: Dem Christentum als höchste Stufe sind alle anderen Religionen als ‚unterentwickelte' untergeordnet. Dies hat eschatologisch sogar die Aufhebung der Pluralität

in eine letztendliche Totalität des Christentums zu Folge.

Eine weitere Möglichkeit bieten Schleiermacher und seine Tradition bei z.B. Eilert Herms. So wird eine allgemeine Bewusstseinslehre, die im Gefühl basiert, entworfen, der kategorialer Status zukommt. Als grundlegendes Moment dieses Bewusstsein wird die Frömmigkeit als schlechthinnige Abhängigkeit bestimmt. Das Bewusstsein bleibt nun nicht für sich, sondern bildet die positiven Religionen aus, die von Schleiermacher je nach Entsprechung zum allgemeinen Modell des Selbstbewusstseins hierarchisiert werden. Das Christentum ist auf der höchsten Stufe verortet. Erneut stoßen wir auf Probleme: der Transzendentialismus des religiösen Bewusstseins, also die religions-anthropologische Grundannahme, die Kategorialisierung und schließlich die Verabsolutierung/Hierarchisierung des Christentums als diesem Kategorialen und Universalen am meisten entsprechende positive Religion. Andere Religionen sind dem Christentum untergeordnet, da sie der Eigentlichkeit weniger entsprechen.

In meinem Beitrag möchte ich in Auseinandersetzung mit solchen Theorien eine weitere Möglichkeit ins Spiel bringen, die Religionsfreiheit philosophisch zu thematisieren. Diese Möglichkeit liegt in einer pathisch-grundierten Responsivität, die Bernhard Waldenfels in seiner Phänomenologie des Fremden entwickelt: Die Religionsfreiheit soll so, anstatt aus einem Prinzip abgeleitet zu sein, auf Grund der unterschiedlichen Antwortmöglichkeiten, die auf einen Anspruch ergehen, argumentiert werden. In diesem Modell beziehe ich mich auf verschiedenste Motive der Philosophie Emmanuel Levinas', Jacques Derridas und Bernhard Waldenfels', wie Anspruch, Antwort, Außerordentliches, Ordnung und Gerechtigkeit. Damit verbunden ist dann auch die Frage nach der Artikulation der Begrenzung der Religionsfreiheit. Nicht weil sie einer kategorialen individuellen Freiheit untergeordnet ist, von der sie abgeleitet ist, sondern auf Grund der Figur des Dritten. Im Anspruch des Anderen begegnet mir immer schon der Dritte. So kommt es zu einem Gleichmachen des Ungleichen, zu einem Moment der Ungerechtigkeit in der Gerechtigkeit, zu einer Begrenzung oder zu einem In-Ordnung-bringen des Außerordentlichen. Den Überlegungen zur Responsivität scheint bereits Politisches, Soziales und Rechtliches inhärent zu sein. sodass auf der Ebene der Gerechtigkeit andere Ansprüche hinzutreten und diese in den politischen und sozialen Diskurs miteinbezogen werden müssen. Dadurch wird jedoch der Eigenwert der religiösen Erfahrung nicht gemindert, da jede Begrenzung nie ein Grundsatzurteil darstellt, sondern immer ein notwendiges Moment der Ungerechtigkeit in der Gerechtigkeit.

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Die Ableitung der Moral- und Rechtsgründe aus dem ökonomischen Prinzip bei Adam Smith.

Der Anfang der politischen Ökonomie als Wissenschaft ist zugleich der Beginn des Siegeszuges des ökonomischen Prinzips in allen Bereichen menschlichen Handelns. Dieser gesellschaftliche Umbruch, der zweifelsohne bis heute den Rahmen für die Fragen nach Ethik, Recht und Gesetz bestimmt, geht aus einer ideengeschichtlichen Konzeption hervor, die vor allem mit Adam Smiths *Wealth of Nations* verbunden ist. Um allerdings der Tragweite und dem Wesen dieser Revolution im Ganzen gerecht werden zu können als auch die Voraussetzungen und Bedingungen dieser Entwicklung verstehen zu können, muss der Versuch unternommen werden, das zugrundeliegende Verständnis von Wirklichkeit überhaupt und menschlicher Vernunft eigens in den Blick zu nehmen. Im Vortrag soll dieses Verständnis aufgezeigt werden, indem sowohl Smiths Ökonomie als auch seine Moral- und Rechtslehre sowie seine philosophischen Schriften auf dieses Verständnis hin befragt werden. Entgegen der verbreiteten Vorstellung, dass man bei Adam Smith das Ethische vom Ökonomischen trennen könne oder gar müsse, zeigt sich, wie sich das eine und das andere bedingtermaßen wechselseitig durchdringen und deshalb für eine tiefgründigere Einsicht in die Sache nicht unabhägig von einander in den Blick genommen werden dürfen.

Im Zentrum des Vortrages stehen die beiden Begriffe *nature and reason*, Wirklichkeit und Vernunft, aus denen sich der genannte innere und zugrundeliegende Zusammenhang als solcher erschließen lässt. Als unmittelbare Folge daraus ergibt sich eine Erörterung von Smiths Verständnis von Wert und Tauschvertrag. Bei der Explikation dieser Begriffe wird deutlich, dass und wie bei Adam Smith alle Fragen, seien es philosophische, ethische, juristische oder eben ökonomische, aufgrund der im Vortrag thematisierten Vorstellung von Wirklichkeit und Mensch von vornherein im Horizont von Wertvorstellungen und Tauschbeziehungen angesetzt werden müssen. Dabei findet eine grundsätzliche Reflexion über Wesen und Begriff des Wertes bei Smith eigentlich nicht statt. Vielmehr bewegen sich die Betrachtungen und Analysen fast ausschließlich auf der Ebene der optimalen Ordnung und der zu bewerkstelligenden Einrichtung bestimmter letztlich aber unzureichend hinterfragter Wertvorstellungen

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International Society as Civil Association: Law, Morality and Responsibility

In *On Human Conduct* (1975) Michael Oakeshott distinguished between two 'modes' of human association, 'enterprise association' and 'civil association'. The former type of association is instrumental to the pursuance of a common cause, common interests, or a specific purpose shared by its members. An enterprise association is a business firm, a football team, a university or a trade union. A civil association, by contrast, is established around pragmatic rules of conduct that are not designed to further particular goals. Civil association first and foremost is a rule-governed activity that flows from what Oakeshott labels the 'civil condition' and 'a relationship in terms of the conditions of a practice'. A practice, he argues, is 'continuously reconstituted in being used' and 'only in virtue of having been learned and understood' (Oakeshott, 1975, 119-120).

Oakeshott theorised the modern European state as a particular expression of civil association which he labels *societas*. In such an association 'laws are understood as conditions of conduct, not devices instrumental to the satisfaction of preferred wants' (Oakeshott, 1975, 202-203). However, as far as contemporary international relations are concerned Oakeshott seems to have been largely a realist rejecting the notion of an international civil association of states. Nevertheless, Oakeshott's concept of civil association has inspired international society theorists to conceive of international society as not just a 'purposive association' in which states pursues their self-interest but also as a 'practical association' providing formal and pragmatic rules that are not instrumental to particular goals of state policy, i.e., as a *societas* (Nardin 1983; Jackson 2000). While this paper is generally supportive of the Oakeshottian turn in international society theory it suggests that somewhat different conclusions should be drawn from it. The paper sketches out an alternative conception of international civil association that transcends the boundaries of communities and suggests that such a notion of *societas,* when sustained by a particular legal conception, would promote an effective transformation of moral responsibility into political responsibilities across borders.

The first argument is that the limitation of the two views of 'civil association' as either confined to the political life within a state or as applicable to the organised international relations of states is unsatisfactory and that there are good reasons to conceive instead of a third notion when understanding 'civil association' as a mode of association that is capable of transcending the boundaries between the two conceptions, i.e., between the 'civil association' within the state and the 'civil association' in the society of states. The view defended here is that it makes sense to conceive of the modern state and the international society of states as necessarily connected in the sense that both associations are linked when sharing the same mode of association. Drawing on the work of among others Kant and Habermas it is argued that such a notion is not only possible in a philosophical sense but that it is and always has been a practical possibility in the context of modern political relations.

The second argument is that civil association corresponds to particular notions of legal relations. Civil association rejects the idea of an omnipotent law-maker supporting instead the position that law is a practice requiring an intersubjective account of its authority through what H.L.A. Hart once labelled 'the internal point of view' (Hart 1994; Frost & Lechner 2015). Moreover, civil association is consistent with both the notion that of law as the codification of practices as well as the view that law makes moral norms obligatory (Orsi 2015). It is argued that the distinction between, on the one hand, the law of the bounded community and, on the other hand, international law is unsatisfactory for realising the potential of a transnational civil association in international society. International law is too vague and the law of the bounded community is too limited to effectively sustain such practices. What we should look for instead is a transnational legal conception, labelled by Terry Nardin as a 'civil-confederal model' of international law (Nardin 2011).

The third argument is that the notion of international society when understood in this way reconstructs the notion of political space in international society and when sustained by a particular notion of law, is conditional for an effective transformation of moral responsibility into political responsibility across borders. Richard Beardsworth (2015) has recently emphasised the importance of a practical concept political responsibility across borders to be developed 'through a marriage between the national and the global' (p. 89). While sympathetic to Beardsworth's view that political responsibility of this kind is called for in today's world this paper claims that in order to work effectively such an endeavour requires an enhanced practice of civil association across borders.

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Befreiung, Andersartigkeit, Gemeinschaftlichkeit. Fall Slowenien

Als Lessing noch vor der französischen Revolution sein letztes und wohl auch sehr berühmtes Werk *Nathan der Weise* veröffentlichte, hatte er sicher nicht vorgesehen, dass auch nach mehr als 230 Jahren seine Vision ein unverwirklichtes Ideal bleibt. Abgesehen von dem Unterschied zwischen Fiktion und Realität, ist die Idee einer friedlichen Welt, wo verschiedene Religionen und Kulturen zusammen leben könnten, einfach zu schön um sie zu vergessen und als eine Unmöglichkeit proklamieren. Mehr als 100 Jahre später hat auch ein großer russischer Philosoph Wladimir Solowjow sein letztes Werk zur Frage der Einheit der Religionen gewidmet. Hier war nun die Spaltung des Christentums als Hauptthema gewählt. *Kurze Erzählung vom Antichrist* beschreibt die Welt im Jahre 2077. Europa wand eine langjährige islamische Vorherrschaft über, die eine Mischung von den Religionen zusammenbrachte. Viele Menschen sehnten nach einer Versöhnung, die aber ganz anders als sie vorgeplant wurde, vorkam. Als wöllten die beiden Geschichten uns zeigen, dass Europa auch in aktueller Zwischenzeit eine Vereinigungsgeschichte brauchen würde. Nehmen wir ein einziges Land im Europa und versuchen einige Leitmotive solcher Geschichte herausfinden.

Slowenien ist ein Land, das momentan viel in Medien wegen der Flüchtlingskrise präsent ist. Daneben wurde in letzten Jahren auch infolge der ökonomischen Krise ausgesetzt. Slowenische aktuelle Geschichte zeigt jedoch auch eine starke politische Polarisierung, die sich in allen Bereichen der Gesellschaft zeigen lässt. Ursprüngliche Zerrissenheit der Nation beginnt aber schon am Beginn des 20. Jahrhunderts und eskaliert in dem zweiten Weltkrieg. Es ging um einen Bürgerkrieg zwischen Kommunisten und ihren Gegnern, die letzten Endes auch mit dem deutschen und italienischen Besatzer kollaborierten. Nach dem Krieg handelte es sich um eine massive Mördern von der siegreichen kommunistischen Seite. Nach der Unabhängigkeit im Jahre 1991 verfallen mehrere Versuche für die Versöhnung. Immer wieder kam zu einer politischen Auseinandersetzung. Die letztere verfraß sich so stark in alle Poren des alltäglichen Lebens in Slowenien, dass viele kein Wort über die Versöhnung mehr hören wollen. Heute traute sich kaum jeder über das Thema zu sprechen.

Ein Symposium in einem anderen Land ist die gute Gelegenheit für einen Abstand von der Situation. In unserem Beitrag wollten wir uns jedoch noch eine weitere Aufgabe stellen. Ist es möglich über die Einheit der slowenischen Nation auch mit der Hilfe der Religion zu sprechen? Solche These wurde bisher so gut wie nichts durchgedacht. Wir sehen das für notwendig umso mehr, denn in den politisierten Debatten ist die katholische Kirche immer wieder nur auf eine Seite gesetzt. Wo ist hier die Einheit der Religionen, die Einheit des Christentums?

Mit dem Titel „Befreiung, Andersartigkeit, Gemeinschaftlichkeit. Fall Slowenien“ stellen wir eine direkte Alternative zur Parole der französischen Revolution. In vielen europäischen Ländern, auch in Slowenien, hat dieses Ideal offensichtlich versagt. Auch heute ist mit den Migranten auf eine Bewährungsprobe gestellt. Kann Slowenien überhaupt sich zu den anderen Kulturen öffnen, wenn sie nicht in ihrer einigen den Frieden finden kann? Diesen

Frieden verschafft nach unserer Meinung nur tiefes spirituelles Leben oder anders gesagt ein neuer Humanismus. Damit kehren wir zurück zu unseren zwei philosophischen Werken.

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The Foundations of the Philosophy of Human Dignity and the Law

My lecture points out a few basic problems of the philosophy of human dignity. First a short introduction is given on various meanings of dignity and on the notion of human dignity; then an outline is drawn on the major traditional interpretations of human dignity. Since according to certain views the notion of human dignity is vague, I take a closer look at several critical remarks. This is followed by my attempt to answer the question why it is important today to create a philosophy founded on human dignity. On this ground, only a moral-philosophical theory can be the one against whose backdrop it is essential to have a "minimal" image of man. The principle of respecting human dignity is discussed within the framework of discourse ethics, after which certain aspects of the possible interpretation of this principle are drawn**.**

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The Aesthetic Sense of Law: Tragedy in Nietzsche and Christianity

In philosophical perspective, ethics and aesthetics are known to be firmly intertwined. Fundamental thought on the relation between ethics and law also implies careful reflection on the subject matter of the aesthetics of law. This field of interest necessitates a philosophical inquiry into the art and beauty of jurisprudence, lawgiving and legal adjudication. It needs to clarify the aesthetic dimensions of law, to explore to what extend law is aesthetically conditioned and in what sense legal judgments can be seen as aesthetic judgments.

While in general, the relevancy of philosophical aesthetics with respect to law is rather underappreciated, the importance of Nietzsche, and in particular his *The Birth of Tragedy* (1872), has been largely ignored. This is remarkable considering what this work has to offer for anyone interested in the art of law as *ars inveniendi*. Nietzsche's inspiring intuitions and impressions concerning the archaeology of philosophy and science emerging out of music and tragedy, radically question the existential and aesthetic legitimacy of any subsequent system of law. Since Socrates' 'emancipation' of thought (of the Apollonian from the Dionysian element), the art of politics and law has been founded almost exclusively on scientific knowledge, on logic and rational deliberation. As a consequence to this historical process of rationalization, universal laws and regulations (legal, moral and religious) have taken on an unhealthy importance in almost every part of life. Justice however remains illusory when the autonomous reason and its self-evident necessities are left to determine the limits of the possible and the impossible (e.g. negativities, contradictions and paradoxes).
With respect to jurisprudence, this tradition of 'optimistic socratism' - the 'primal sin' of philosophy and science - eventually culminated in a nihilistic legalism and legal positivism that almost entirely subdued the acknowledgement of life, tragedy, subjectivity and creativity. This also explains why traditionally questions concerning the aesthetics of law did not arise, or were ruled out of order.

Against this pervading Socratic tradition and in accordance with Nietzsche, the paper explores the prospective - in the theory and practice of jurisprudence - of a 'rebirth of tragedy'. In contrast to Nietzsche however, the paper designates this rebirth to develop from out of the spirit of Christianity. To this account, it argues that early modern and contemporary Christian existentialism best interprets this original spirit, in sharp contrast to the (Socratic) religious traditions of natural law (Thomas Aquino) and idealism (Kant and Hegel). The religious thoughts of Pascal, Kierkegaard, De Unamuno, Berdyaev and Shestov typically resound a tragic sense of law, which is strongly affiliated with the Nietzschean concept of tragedy. Their biblical personalism in relation to God (*sola fide*) and the neighbor inspires towards an essential critical stance in respect to the rule of law. It also fuels a vital sensitivity towards a creative ethics of a beauty *beyond Good and Evil*. It is tragic wisdom not to see the good in goodness. Christianity seeks a God who is higher than 'the good'. It seeks a God for whom 'everything is possible'. 'Lead us not into temptation': the renaissance of tragedy works against the sickening

temptation of reason that threatens to degenerate ethics into a rigid and legalistic morality that tends to undermine the legitimacy of law.
The paper argues that law is much the same as faith. Law is a form of art in service of which man's natural desire for knowledge, a desire credited so highly by Aristotle (Met. I 980 a 25), needs to be critically assessed and held in check. The further exploration of the aesthetic dimensions of jurisprudence (their theoretical development and methodological deployment) can very much benefit from the tragic theology of Christianity as well as from 'the religious turn' in postmodern philosophy (Derrida).

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Catholic Church and its defense of human rights during Second World War

Catholic Church as institution of moral authority and defender of individuals symbolical and religious nature, has a right and an obligation to defend human rights, especially in the time of war. In time of war, laws of ethics are often disrupted and the state as a primary protector and an insurance of human rights fails in this task. Regarding state's failure in defending human rights, the only competent institution to step into its place was the Church (Stres 1989, 9-11). At first the Church has been the main component in the social, economic, political and cultural life of individuals, but later other philosophical, social and political systems tried to override this role. Those systems also tried to took over the Church's and religion's place in defending faith, religion and human rights. Communist leaders, wanted to fit all the people in the system, regardless their interest and their freedom. This is represented by »tendency of dictators to be guided by their fears and to turn into enemies all who could conceivably threaten their power— including the more idealistic among their own original adherents.« (Bennett 1948, 123) Such politics and ideology directly oppose christians ethics and human rights to life and freedom. It also demands opposition and resistance. As an example I will concentrate on Slovenian territory during the time of WW II (Granda 2008, 210-220; Griesser Pečar 2004, Lowe 2012, 265-280). This will give us an insight into Church's doctrine toward communism as a system that threatens human life, and it will present concrete actions of Slovenian clerics in the time of war. Slovenian clerics were convinced that resistance towards communism is necessary in order to defend human rights, which were violated by it (Juhant 2010, 73). Church's, intellectuals' and also every human beings' role should be in defending human life and freedom, which were seriously endangered in communism. Because of direct attack of communism toward the Church and its ethics, the defense was also meant to protect the Church itself. Fajdiga claims that Church did everything it could and should be done (Fajdiga 33, 1945). During the WWII the Church tried to protect human rights in many different ways. Most of the defence was closely related to Church's doctrine, other forms featured individuals that took an active role in defence against communist regime. In this paper I will try to verify which methods were acceptable and compatible with the Church's doctrine in order to secure human rights and dignity against communism and why it was necessary for the Church to protect those rights.

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Rights Depending on Ethics: Sharing the Responsibility for the Undocumented Migrants' Right to Health

Encountering the New Fragility of Health Rights

The conflicts in Syria and its surroundings as well as the subsequent mass migration to Europe have brought about an escalated challenge to the right to health. In 2015, the worst year in this respect in the Syrian war to date, 122 attacks on hospitals were documented by Physicians for Human Rights (2016). Yet the right to health is notoriously fragile also among the millions of displaced persons on their way towards Europe.

Securing the asylum seekers' and the undocumented migrants' right to the access to basic health care has a firm grounding in the human rights thought and law. The magnitude of the present migration phenomenon, however, indicates a need for a profound reassessment of also the corresponding responsibilities. How far is each European state responsible for the displaced persons' right to health within its territory, within the European Union, and also beyond? And given that the European states have so far been unable to shoulder all their proper responsibilities, how then should we understand the role of voluntary organizations in this field?

This article provides, first, an analytical review of certain relevant European level guidelines about health care for the undocumented migrants, particularly those delineated by Picum (2007; 2009). Second, it takes a look at some voluntary organization endeavoring to fill in the deficit in the emerged public sector health care provision, especially The Global Clinic operating in Finland. And third, it will argue that the law has become in this context unreasonably dependent on ethics stemming from the civil society. For one thing, without a sufficiently viable transnational ethics, the politicians of each European country are unable to make balanced decisions on the undocumented migrants' rights. For another, until such balanced decisions have been reached, the rights of these migrants depend on the ethical virtues of individual third sector actors to a worrying degree.

The Idea of a Fair Nation-Wide Cooperation and beyond

Struggling under public sector austerity, the most European countries have found it challenging to finance a sufficient range of health services to the undocumented migrants. But there are issues of principle involved as well. In particular, given that these migrants do not belong to the societal collaboration scheme of the nation in question, usually neither *de jure* nor *de facto*, should they nevertheless be entitled to similar health services as the natives?

A possible negative reply to this question gains support by the idea of a liberal democratic society as a fair nation-wide collaboration scheme, an idea most famously developed by American Philosopher John Rawls (1993). Subsequently, Thomas Pogge (2002) and many others have argued for justice with a global scope. Neither Rawls nor Pogge has addresses the case of undocumented migrants explicitly, but their approaches can be helpful in the elaboration of a balanced stance on the issue.

The present paper supports, on the one hand, the idea of the persistent political relevance of the Ralwsian idea of a fair nation-wide collaboration. Even the above-mentioned Picum documents, although they are specifically devoted to promote the rights of the undocumented migrants, distinguish rather clearly between the relevant human rights standards and national standards. On the other hand, it will be reminded that already the human rights conventions, perhaps most importantly the *The International Covenant on Economic, Social and Cultural Rights* (ICESCR, Art. 12), affirm "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." It will thereby be argued that a proper human rights approach implies no cynical health rights minimalism but a rather strong sense of transnational ethics among the citizenry of each European nation.

Dependency on the Virtues in the Third Sector

What then is actually attainable in practice depends not only on state policies. Indeed, the provision of commonsensical or reasonable standards of the right to health in the case of undocumented migrants has so far heavily depended on the responsibilities that voluntary organizations have been able to shoulder.

The Red Cross and Red Crescent Movement, Time to Help, and many other humanitarian organizations have assumed big roles in the field. In the present paper, the case to be analyzed in more detail is The Global Clinic operating in Finland. Supported by certain Finnish Evangelical Lutheran deaconess institutions in addition to some non-confessional associations, it has crucially complemented the health services provided by the public sector institutions to the undocumented migrants. This case thereby warrants further the main argument of the paper: presently the undocumented migrants' right to health depend on voluntary ethical virtues rather heavily—in many cases arguably to an unreasonable degree.

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From ethical analysis to legal reform: Methodological reflections on translation and incorporation

Ethicists frequently provide evaluations of law and recommendations on legal reform, based on their ethical analysis. For example: "The tax system is unjust, as it favours the rich." "The law with regard to euthanasia (or biotechnology, abortion etc.) should be changed." This is an important and legitimate role for ethicists.

However, in order to do so properly, they should be aware of the characteristics of the law they want to change and of the legal order in which this law is embedded. Ethical analysis needs to be translated and incorporated into a legal framework. This paper attempts to identify a number of issues that need to be addressed when an ethical analysis is the basis for legal reform. Its specific angle is that of analysing how these issues are made more complex by various forms of pluralism.

There are three major clusters of issues to be addressed: the institutional characteristics of a legal order, the question under which conditions morality can or should be translated into law, and the problem of ethical (as distinct from moral) pluralism.

First, law is a relatively autonomous practice with its own institutional characteristics (Taekema 2011). For example, law usually relies on general rules and thus cannot deal adequately with exceptional cases: hard cases often make bad law. Legal orders have specific rules of proof, as proof has to be assessed from a third person perspective, whereas ethical theories usually presuppose a first person perspective. Law is an institution in which often enforcement agencies with substantive powers play a role. Moreover, as Fuller has argued, law has its internal morality – or principles of legality – based on its institutional characteristics. As Selznick and Taekema (2003) have argued, law is oriented towards distinctly legal ideals such as legality and justice. If we want to translate our ethical analysis into suggestions for legal reform, we should take these institutional characteristics seriously. Moreover, we should take account of the differences between certain subfields of law (such as criminal law, administrative law, tort law and disciplinary law), each with their own institutional peculiarities.

This is made even more complex by the phenomenon of global legal pluralism (Berman). Whereas most studies of law and morality in the literature implicitly presuppose sovereign legal orders associated with the state apparatus, such a restricted view of law is no longer tenable. Global legal pluralism recognizes different types of law, such as international law, *lex mercatoria*, EU Law, Council of Europe law, but also contractual law and internal regulations of certain organizations and groups. This leads to a pluralism of conceptions of law – each type having its own distinct institutional characteristics and its own internal morality.

Second, even if we accept that law and morality cannot be separated, they are at least distinct (Van der Burg). Not every moral norm can or should be translated into legal norms. There are sociological restraints: because of its own institutional characteristics, it is often not effectively possible to legislate morality, as both Prohibition and the war on drugs have shown (Cotterrell). Similar remarks can be made for actions that are effectively protected by privacy or professional confidentiality, such as consensual sexual acts and euthanasia. There are also straightforward normative restraints, discussed in the famous legal moralism debate. Here too, the issue has become more complex than was presupposed in the Hart-Devlin debate and the ensuing literature. Even if, *arguendo*, the thesis of a conceptual separation between law and morality could be defended – a thesis which the author has criticised recently – in modern societies law and morality are intertwined in many ways, e.g., through the use of open norms and vague clauses. More importantly, Devlin's presupposition that there is a shared social morality has become even much more problematic than in the early 1960s. Even if on many issues there is an overlapping consensus, in most of the debates to which ethicists contribute, there is not. Moral pluralism provides an important challenge.

Third, there is ethical pluralism. It is surprising how often in legal debates ethicists argue as if there is only one objective ethical analysis, namely, their own. Of course, in the academic debate, authors can consistently elaborate the implications of a Kantian, utilitarian or Thomist perspective. However, from the point of view of a legislator, there is no good reason to choose for one of those theories over the alternatives. That would be a partial and arbitrary choice. Therefore, ethicists, if giving advice on legal reform should address ethical pluralism. There are at least four possible strategies here: the search for an overlapping ethical consensus, ethical triangulation, restriction to prima facie, partial advice, or restriction to critical analysis rather than positive analysis.

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