

# "UNDOING LAW, FRAMING CONTEXTS. NORMATIVITY ACROSS THE DISCIPLINES"

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## ABSTRACTS - Conferences

Andrés Botero

### The context of the law on roads. Examples of the 'normative syndrome'

The issue of roads is a constant during the nineteenth century in Antioquia, a region in North-East Colombia. Three cases are chosen to see how the law continued to be obsessed with the construction and maintenance of roads. These three cases are: i) the First Republic (1811-1815), ii) the rules of the Provincial Parliament between 1848 and 1851, iii) and state legislation between 1856 and 1886. This phenomenon may well be elucidated by applying a fundamentally psychoanalytic allegory of origin: obsessive – compulsive neurosis. Based on this clinical structure we can describe a situation in which the “normative syndrome” and “symbolic efficiency” actually came to dominate the political and normative environment. This paper concludes that it is necessary to pay attention to the context of norms in order to identify other social phenomena (like the “normative syndrome” and “symbolic efficiency”) that surround the creation of norms.

Jean Clam

### La possibilité de normativités fortes

Le contexte axiologique et normatif qui est le nôtre est marqué par ce que Luhmann et la théorie juridique qui s'inspire de lui appellent la cognitivisation.

Cognitiviser du normatif, c'est précisément faire prévaloir dans son appréhension et même sa mise en œuvre la posture qui lui est directement antithétique – celle de l'apprentissage à partir des faits contre-normatifs, alors que la posture authentiquement normative est celle du maintien de la norme contre le fait par refus de l'apprentissage.

La discussion en théorie du droit et de la normativité en général dispose, avec le concept de cognitivisation, d'une des perspectives les plus éclairantes sur les phénomènes du présent. Cependant, elle néglige du coup de s'intéresser à ce qui constitue la source unique de l'adhésion normative: la résonance dans l'affect (collectif) d'atteintes extrêmement sensibles à certaines symbolisations.

La question se pose dès lors des dernières retraites du sens normatif et de ses sources affectuelles. La cognitivisation fluidifie certes constamment les consensus normatifs existants, mais a du mal à attaquer certains noyaux qui, justement, ne se

laissent identifier et circonscrire qu'à travers la reconnaissance des énergies d'affect qui portent leur évidence.

Prendre son départ de valeurs qui peuvent sembler parfaitement évidentes ou des normes fondamentales énoncées dans les préambules constitutionnels ne me semble pas la bonne approche. Il faut aller aux sources de ces formules normatives dans l'affect pour reconnaître la réalité de ces normativités fortes qui nous paraissent à l'abri de toute remise en question.

Or, l'exploration de ces sources nous incite à relire nos normes fondamentales et à déplacer leur évidence vers des narrations et des symbolisations d'un caractère particulier: elles n'ont aucun caractère positif, mais représentent le bassin affectuel de réjections inflexibles en lesquelles tous les consensus normatifs puisent leurs énergies évidentielles.

**Kevin Davis**

### **Legal Indicators: Prospects and Perils**

This paper focuses on recent efforts to use quantitative legal 'indicators' as guides to legal reform. Those indicators, by definition, provide highly simplified representations of legal systems, short of much information about the social, economic and political contexts in which they operate. The use of legal indicators has some very straightforward benefits for decision-makers, but also presents pitfalls. The benefits in terms of reduced decision-making costs and transparency should not be underestimated. Most notable among the pitfalls is the fact that although the construction of indicators invariably involves making decisions about a variety of contestable empirical, positive and normative issues, the use of indicators by lawmakers tends to obscure those decisions and limit accountability for them. This paper will illustrate these claims about the use of legal indicators by treating the indicators produced by the World Bank's Doing Business project as a case study.

**Mauricio Garcia-Villegas**

### **The Culture of Noncompliance in Latin America**

Noncompliance of rules in Latin America is a pervasive and complex phenomenon involving a number of factors. There are diverse disciplinary perspectives regarding this phenomenon. Each places particular emphasis on a specific factor. Three of these visions are analyzed here: a strategic perspective that focuses on self-interest; a political vision based on the perception of illegitimacy, and finally a cultural view that attempts to show how a belief in higher values can provide incentives for noncompliance of norms. Although none of these perspectives can completely explain the phenomenon of noncompliance, they all shed light on some of its basic aspects. More specifically, this

article focuses on the analysis of six non-complying characters, as well as the contexts in which they act, and the remedies needed to counteract their practices.

**Günter Frankenberg**  
**Constitutional Transfer – Introducing the IKEA Theory**

The controversy between Alan Watson and Pierre Legrand has dominated or, at least, shaped the debate concerning the possibility of transferring law. The IKEA theory is an attempt to intervene in this controversy and lead it out of the paradigmatic stalemate by suggesting a shift from the question whether transfer is possible to the question what happens when transfer happens. The focus is directed toward (a) the problems of de- and re-contextualization accompanying the transfer of constitutional norms and institutions, doctrines and arguments, ideas and ideologies, (b) the tensions between the global constitutions and “odd details”, and (c) the risks and side-effects of transfer processes.

**Mark Goodale**  
**Human Rights and the Moral Imagination in Contemporary Latin America**

This talk will explore the interconnections between the coming of a particular iteration of human rights discourse to much of Latin America in the 1990s and the crystallization of new subjectivities that are linked to shifts--some tectonic--in the region's legal, political, and moral geographies over the last ten years. Of particular interest are the links between law, political reform, violence, and the performance of new moral identities. Human rights operate both within and beyond the law in different ways in Latin America, a fact that creates dilemmas for political and social reformers, scholars, and human rights activists and this talk will describe these dilemmas with a particular focus on the way power is differently diffused across these multiple human rights registers.

**António Manuel Hespanha**  
**A pathway for a post statalist theory of sources of law: pre-statalist recollections revisited**

The whole construction of the theory of the sources of law was essentially based on a statalist model of the political body, as well as on a single leveled conception of constitution giving origin to a pyramidal hierarchy of legal normative acts. This approach – still dominating the overwhelming ordinary legal literature (namely in the introductory courses of Law Schools) – has to be fully reconsidered in an age of multiple normative *corpora* and of a clearly tarnishing hegemony of national states' constitutions. Although

history could not be recovered, the geometry of pre-modern political entities and of their legal order has – *mutatis mutandibus* – an impressive parallelism with today's legal constellation; even if we considered some newly acquired values, like the principle of the democratic legitimacy of law. The following essay aims to take advantage of these similarities – respectively contextualized – to draw a simplified draft of a plausible theory of law and legal sources for the days to come.

Marta Madero

### Ce droit si gênant : droits réels et *ius in corpus*

La réflexion porte sur les rapports, et en particulier sur le décalage entre, d'un côté, une norme de droit canonique, le droit au corps du conjoint, résultat de la minutieuse juridisation des rapports corporels qui commence au XIIe siècle, et de l'autre le mystère dont cette norme est née : Gen. 2.24 «ils seront deux en une seule chair». Le droit au corps du conjoint, indissolublement lié à l'aliénation du propre corps, est pensé dans ses moindres détails dans une casuistique que les historiens du mariage ont eu tendance à rendre opaque. Les discours qui disent le mystère en dehors de sa formalisation juridique, c'est à dire la théologie et la pastorale de l'Église, sont en quelque sorte le contexte dans lequel s'inscrit le droit, et j'essaierai de montrer que ce qui peut être perçu comme aberrant, comme la trahison de ce que ces discours proclament et dont la diffusion est en générale plus large que celle du vocabulaire du droit, ne se voit pleinement que dans l'analyse casuistique.

Aldo Mazzacane

### Il diritto fuori del diritto: letteratura, miti, immagini

Il diritto è onnipresente, in modo pervasivo, nelle società europee, oggi ancor più che in passato. Ma se come «scienza» – ossia come riflessione teorica ed elaborazione concettuale – può considerarsi in larga misura «autopoietico» e «autoreferenziale», in quanto dispositivo di disciplinamento del vivere associato non è né autonomo, né autosufficiente. E' un meccanismo di regolazione retto dal principio relazionale di equilibrio tra vari campi. Sia dal lato del comando, sia dal lato della obbedienza, vale a dire nell'applicazione concreta, si legittima e prende forza di vincolo da una pluralità di sistemi normativi, che a sua volta legittima ed ai quali dà forza: economici, religiosi, etici, culturali in genere (onore, correttezza, gusto, etichetta, ecc.). Per ricostruire con accortezza di storico la dimensione giuridica come fu vissuta in una determinata società è dunque opportuno tener conto di simili intrecci. Lo studio di «leggi» e trattati è indispensabile e costituisce il terreno proprio che lo storico del diritto è chiamato ad illuminare con il suo specialismo. Si possono però affiancare altre vedute per l'osservazione, suggerite dai metodi adoperati da altre scienze storiche.

Il diritto inoltre è un sistema comunicativo, parte dunque del sistema comunicativo complessivo che perimetra una collettività. Ma il linguaggio e le forme del

suo comunicare sono deboli e aggrovigliate. Nessuno conosce (né conosceva in passato) le centinaia di migliaia di norme vigenti. Nemmeno il giurista più esperto. Tanto meno il cittadino comune, oltre tutto privo di regola degli strumenti tecnici per interpretarle. Tuttavia regole giuridiche vengono spontaneamente osservate. Come può accadere? L'interrogativo rimanda alle osservazioni precedenti. E' necessario indagare l'intersezione tra i sistemi normativi e comunicativi. Non è privo di senso guardare *anche* al «diritto fuori del diritto».

Illustrerò alcuni esempi di letteratura, miti ed immagini che articolano la percezione dei precetti giuridici e ne confermano o ne modificano il significato, subendo a loro volta modificazioni. Gli esempi saranno presentati con la proiezione di immagini (realizzate da me in modo artigianale), sulle quali mi soffermerò in modo analitico.

**Ken Pennington**

**The Statute of Pisa, Authenticae, and Roman Jurists in the Early Twelfth Century:  
The Context is Everything**

The revival of law in the first half of the twelfth century has been a topic of great speculation and investigation over the past 100 years. Bologna's place at the center of the legal revival has been challenged, the importance of canon and Roman law for shaping local law and institutions has been questioned, and the role of legendary jurists, especially Irnerius, has been doubted.

These Abelardian challenges, questions, and doubts have had the salutary effect of forcing legal historians to look again at their evidence instead of resting on complacent conclusions. There is a lot of evidence in early twelfth century sources for evaluating the influence that Roman and canon law had on local legal systems. In this paper I will illustrate how the "authenticae" that were added to the margins of Justinian's Codex provide a rich source for gauging the work of the civilians who began to adapt their ancient texts to the realities of early twelfth-century society. Irnerius has long been considered the author of the "authenticae". However, a careful study of twelfth-century Codex manuscripts has demonstrated that many jurists participated in this attempt to make Justinian's Codex relevant to society's needs.

**Anton Schütz**

**The law and history of the undoing of law**

It is common wisdom that law today offers striking similarities to an exploding universe, but surprisingly, the proliferation leads into the two diametrically opposed directions of one identical axis. While law as a communicational system unfetters exponential chain-reactions of self-reinforcing legalizations, law as a theme and topic of discourses on politics and justice increasingly targets the *naught* of law's 'reasons', 'foundations', or 'names-in-the-name-of-which'. In-between evolutions that 'do law' and

campaigns that 'undo law', both perfectly 'compossible' (Leibniz) but structurally unable to convoke each other or attend to each other's judgments, gapes an uncanny zone of bi-stability and absent dialectical tension, and it is between those reciprocally contumacious vectors at work in law's double life today that the reflection about law is bound to find its way. -My second focus relates to a historical observation. Those upward cascades of system-generated legal proliferation, faster than their own sound (=their agents' perceptions), can be counted among the original contributions of our times; while critical-theoretical aspirations, and 'undoing the law' in particular, have, I shall argue, constituted throughout centuries if not millenia the hidden spine of the Western legal tradition. -There are finally some 'practical' points. A maxim like 'prétendre gouverner ce qui nous échappe' (passing oneself off as capable of mastering the all-too obviously unmasterable), has arguably formed the *raison d'être* of politico-legal intellectuals since times immemorial. In the light of some of the evolutions referred to, it now is recognizably out of use. What are the consequences ?

Massimo Vallerani

Intorno all'eccezione: privilegio, decreto, grazia nel linguaggio giuridico e politico italiano, secoli XII-XV

L'intervento cercherà di affrontare i dubbi e le contraddizioni nate intorno alla nozione di eccezione sia nel diritto comune, dalle prime letture critiche del XII secolo, in particolare di Giovanni Bassiano alle interpretazioni "estensive" del XIV secolo; sia nel linguaggio politico degli stati italiani dei secoli XIV-XV. Il problema centrale chiaramente riguarda la possibilità o meno della coesistenza della *lex* insieme al privilegio e del ruolo che ebbe l'eccezione nella costruzione degli apparati istituzionali del basso medioevo.