Special Workshop "Virtues and Vices for the Rule of Law"
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Special Workshop "Virtues and Vices for the Rule of Law"
World Congress of the International Association for Philosophy of Law and Social Philosophy
July 7-July 12, 2024, Seoul – Republic of Korea, on "The Rule of law, Justice and the Future of Democracy"

Convenors
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Special Workshop proposal
The rule of law is commonly defined in contrast to the rule of men. Rule of men systems are governed by the unpredictable whims of the few, which in worst cases may be capricious and abusive. On the contrary rule of law systems are those where general rules enacted beforehand and impartially applied play a significant role.

The historical opposition between the rule of law and the rule of men is in mostly laid out with reference to certain characteristics of the rules, and even checklists of institutional requirements. This prominent focus on the features of the rules has been called the anatomical approach. Yet, one of the primary functions of the rule of law is to temper power and it always involves a human factor.
This workshop aims at exploring the subjective side of the rule of law and will focus on the features and abilities of human agents that can strengthen the rule of law, as well as the vices that can weaken it or even boost it. In this framework, abilities, virtues, and vices are understood widely as habits, skills, or moral and immoral features of characters of moral agents. The focus is not only on the professional actors, but also on lay people. The inspiration could be brought from classics, from current studies, from empirical researches.

The workshop aims at addressing the following issues among others:
1) Is the subjective side of the rule of law relevant or non-applicable, and why?
2) Which virtues are required for a rule system to properly work?
3) What vices, if any, may be tolerated or even prompted?
4) What classical thinkers can teach us on the subjective side of the rule of law?
5) In which sense moderation, temperance, hypocrisy, can be useful for the rule of law?

6) What other virtues can be useful and for whom? Legal practitioners (lawyers, judges, public officials)/lay people/citizens/government?
7) Can legality be severed by a more general attitude towards virtues and vices?
8) What effects may automation measures prompted by IA on citizens and lawyers' virtues and vices, and ultimately on the concept of the rule of law?

Tuesday 9th July

2pm *First Session. Chair: Isabel Trujillo*

Martin Krygier, 'Well-Tempered Power: A Cultural Achievement of Universal Significance'

Iris van Domselaar, 'Large-Scale Miscarriages of Justice: Lessons from and for Virtue Theory'

Lucia Corso, 'Rule of Law, Spirit of Equality and Spirit of Extreme Equality: drawing on the Spirit of the Laws'

Mortimer Sellers, 'Rule of law, Virtue, and Good Faith'

4:15pm *Second session. Chair: Lucia Corso*

Fabio Macione, 'The Rule of Law in the Workplace: Artificial Intelligence and its Impact on Human Confidence'

Sergiy Maksymov, 'Fundamentals of the Rule of Law in the Ukrainian Context'

Giovanni Bombelli, 'Rule of Law and the "Cognitive (ethical) Jurist: Remarks between Modernity and Post-modernity'

Silvia Corradi, 'Judges and Virtues: Rethinking phronesis for the Rule of Law'

Thursday 11th July

2pm *First session. Chair: Amalia Amaya*

Gerald Postema, 'Fidelity: The Animating Spirit of the Rule of Law'

Isabel Trujillo, 'The Legal Virtue of Reflexivity'

Cosimo Nicolini, 'The Juridical Virtue of Moderation and the Ethical Obligation beyond the Limits of the Law: Some Questions through Maimonides and Levinas'

Antonia Scaravilli, 'Rule of law and the Crisis of Representative Democracies: The Role of Judges and the Possible Definition of a Deontology of Judicial Action, Shared in a Supranational Dimension, as a Safeguard for the Defense of the Constitutional State'

4:15pm *Second session. Chair: Isabel Trujillo*

Tomasz Widlak, ‘The Relevance of Judicial Virtues for the Rule of Law’

Amalia Amaya, ‘Virtue as an Enhancer of the Rule of Law’

Liesbeth Huppes-Cluysenaer, ‘Ethical Legal Practice in Ancient Athens’

Luis Pereira, ‘The Discipline of Legality: a Defence of Kelsenian Neutrality’

List of participants and abstracts

Amalia Amaya is British Academy Global Professor at Edinburgh Law School and Research Fellow at the Institute for Philosophical Research at the National Autonomous University of Mexico. She has also held visiting appointments at the University of Texas at Austin, University College at Oxford University, and Queen Mary University of London. She obtained an LLM and a PhD from the European University Institute and an LLM and a SJD from Harvard Law School. Professor Amaya works primarily in philosophy of law, although she is also interested in some issues in moral and political theory. Her previous research focused on coherence in legal reasoning, the main outcome of which was the book *The Tapestry of Reason* (Hart, 2015). Her current research project explores the relations between law, virtue, and community. On this topic, she has co-edited *Law, Virtue and Justice* (with Ho Hock Lai, 2012), *The Faces of Virtue in Law* (with Claudio Michelon, 2020) and *Virtue, Emotion and Imagination in Legal Reasoning* (with Maksymilian del Mar, 2020). She is now working on a monograph that develops a virtue approach to legal reasoning and judicial ethics. In addition, she is engaged in research on three themes: the role of exemplarity in legal and political culture, fraternity as a legal and political ideal, and ambivalence in legal decision-making.

Title: **Virtue as an Enhancer of the Rule of Law**

Abstract: A critical objection against virtue theories of adjudication is that they are in tension with the rule of law. Virtue theory of adjudication, so the argument goes, fails to give to legal rules their due, thereby undermining the rule of law. This paper claims that a virtue account of adjudication far from being incompatible with rule of law requirements is, to the contrary, an enhancer of the rule of law. Three lines of argument are provided in support of this claim. First, virtuous adjudication enhances the practice of reason giving, which is a pillar of the rule of law. Secondly, it aims at substantive justice, which is a central element of a substantive account of the rule of law. Third, it grounds the judicial application of the law (and deviance) on loyalty (and loyal opposition), which enables adjudication to serve the community ideal that ultimately underpins the rule of law.

Giovanni Bombelli is Full Professor at the Catholic University of the Sacred Heart (Milan, Italy). He graduated both in Philosophy and in Law and holds a PhD in Philosophy of Law. He teaches Philosophy of Law, Legal Methodology and Informatics at the School of Law of the Catholic University of the Sacred Heart of Milan and is member of many research associations

(Italian Society of Philosophy of Law, CERMEG, Center for Philosophical Studies of Gallarate) and scientific journals ('Teoria e Critica della Regolazione Sociale', 'Diacronia' and others).
Furthermore he belongs to the steering Committe of the Psychological, Law and Policy Lab (Psylab) of the Catholic University of the Sacred Heart and is member of the doctoral teaching staff of the doctorate "Person and Legal Orders" activated at the School of Law of the Catholic University of the Sacred Heart of Milan. He has been speaker or keynote speaker in national and international congresses, conferences, advanced graduated level courses, workshops and other academic and non-academic meetings.

Title: **Rule of Law and the "cognitive (ethical) Jurist". Remarks between Modernity and Post-modernity**

Abstract: Two premises. First. The "rule of law" is a sort of cognitive machine (theoretical *depositum*), which is based on a "common sense" (or cognitive tools: checks and balances, transparency, individual rights, anthropological categories and so on).
Second. The role of the "jurist" (conceived in an extended manner: legislator, judge, common people) is oriented to implement the "rule of law": it elicits a cognitive engagement within the contemporary democracies (by assuming the nexus 'rule of law-democracy'). The complex concept of "cognition" (Cominelli 2018) involves different legal fields and encompasses rationality as well as emotion, which mould the legal behaviors. In this way, the relation jurist-rule of law entails a double "duty" (i.e. commitment).
a) *Acquisition of information*. From the beginning of the modernity, the enlargement of "knowledge" produced by the stake-holders is a sort of "civic virtue" for increasing the "common sense" (Hart 1961) underlying democratic frameworks.
b) *Circulation of information*. From the enlightenment up to the habermasian idea of "public debate", the pair 'rule of law-argumentation' implies a "public virtue": an epistemic responsibility in order to sustain the rule of law (a "cognitive-Kantian" duty as a virtue of the post-modern "enlarged" jurist).
These points are connected: the epistemic commitment postulates an ethical obligation. The "jurist" is required to improve the "common sense", also according to some Weberian insights (Weber 1922) concerning the "jurist" and the "beliefs" underlying institutional paradigms.
Some classical references (Aristotle's idea of *endoxa*) as well as contemporary suggestions (the virtue in Skinner 2002 or MacIntyre 1981, maybe the "claim of correctness" in Alexy 1989), make two points clear: a) the connection 'rule of law-cognitive level'; b) the nexus 'rule of law-anthropological (implicit) orientations'.
Is the epistemic/ethical virtue a *forma mentis*? Should we rethink the pattern of "legal actor"? Can we understand the epistemic/ethical reflexes (virtues/vices) of some post-modern elements (i.e. IA and neurosciences) in view of the future jurist and for a "cognitive democracy"?

Silvia Corradi is assistant researcher at the Department of Law of the University of Palermo, within the P.R.I.N. project *The virtues of the rule of law as an institutional ethos* under the supervision of Prof. Isabel Trujillo. She holds a Ph.D. in Philosophy of Law obtained at the Faculty of Law of the University of Trento, program in *Comparative and European Legal Studies*. She spent research periods at the University of Amsterdam (UvA) and at the University

of Granada and she attended international courses related to her research topics, mainly concerning the relationship between law and (techno-)science and the epistemological aspects dealing with these areas of knowledge, rhetoric and theories of argumentation, and virtue ethics.

Title: **Judges and virtues. Rethinking *phronesis* for the rule of law**

The paper proposes to investigate the role of *phronesis*, as a judicial meta-virtue, in the context of rule of law. The analysis is developed in two parts. The first part is aimed at rethinking the concept of *phronesis*. In Solum's virtue jurisprudence (Solum 2003), the judicial virtue of *phronesis* is understood as one virtue among others, alongside judicial temperance, judicial courage, judicial temperament and judicial intelligence. Following the "virtue molecularism" (proposed by De Caro, Vaccarezza, Marraffa 2021; De Caro, Navarini, Vaccarezza 2024) the paper intends instead to assign *phronesis* a different position. That is, it is intended to elevate *phronesis* to a virtue par excellence, that is, a kind of meta-virtue that enables the development of the others. The second part is aimed at understanding what are the effects of such rethinking in the area of rule of law: if *phronesis* is assumed to be a virtue par excellence, this implies that the virtuous subject will be able to understand, from time to time, which specific virtue is necessary in the light of the concrete case. This thus makes it possible to accommodate and implement a substantive conception of rule of law.

Lucia Corso is full professor of philosophy of law at the University of Enna, Kore. Her research interests include the relationship between constitutionalism and legal theory, with a special focus on populism; the relationship between religion and politics; the role of emotions in legal reasoning; virtue theory and the rule of law, with peculiar attention given to the writings of Aristotle and Maimonides. She holds a Ph.d through the University of Naples; a LL.M at the New York University, School of Law and has been visiting fellow in various universities and international academies, such as NYU, LSE, Cambridge University, the American Academy in Rome. She has extensively written on the US constitutional and legal culture.

Title: **Rule of Law, Spirit of Equality and Spirit of Extreme Equality: drawing on the *Spirit of the Laws***

Abstract. In chapter VIII of the Spirit of the Laws, Charles de Montesquieu makes the contention that "The true spirit of equality is as far from the spirit of extreme equality as heaven is from earth. The former does not consist of seeing to it that everyone commands, or that no one is commanded; but in obeying and commanding one's equals. It does not seek to avoid having masters, but to have only one's equals as masters".
Drawing on this distinction, the paper aims at discussing the relationship between these two kinds of *spirits* and the rule of law.
It will be argued that while the rule of law cannot survive outside the spirit of equality, it may be threatened by the spirit of extreme inequality.

Liesbeth Huppes-Cluysenaer taught legal philosophy and legal sociology at the University of Amsterdam.

She coordinated the project about leading Dutch legal theorist Paul Scholten (1875-1946). Her research area is the relevance of theory of science for Jurisprudence, about which she wrote her thesis in 1995. Since 2009 she has (co)convened special workshops on the philosophy of Aristotle at the bi-annual IVR conferences, which resulted in three edited volumes, Aristotle on Truth, Dialogue, Justice and Decision (2023), Aristotle on Emotions in Law and Politics (2018) and Aristotle and the Philosophy of Law: Theory, Practice, and Justice (2013). All publications at Researchgate.

Title: **Ethical legal practice in ancient Athens**

Abstract. The contribution will focus on Kelsen's statement that in the field of the technical development of law the centralization of the law-applying function precedes the centralization of the law-creating function. The first stage of law-creation is the formulation of the rules which govern the law-creation. The system created in Athens installed the rule of the unpredictable whims of the many in court-procedures: further creation of law arose as *a result of these court-procedures* in the form of public opinion (*endoxa*) or law of the people (*ius gentium*).
The nineteenth century has turned this state of affairs upside-down. By this maneuver it replaced agency of magistrates by influencing anonymous social processes, which got more and more de-located and were more and more understood in universal global terms.
Virtues and vices make only sense when choice, responsibility and guilt can be addressed to human agents in person. Character is formed by responsible agency, not by participating.

Martin Krygier, Gordon Samuels Professor of Law and Social Theory, University of New South Wales, Sydney.
IVR Plenary Lecturer, see bio in https://ivr2024.org/html_file.php?file=person_06.html&file2=sub_default.html

Title: **Well-Tempered Power: 'A Cultural Achievement of Universal Significance'**

Abstract. According to Laurent Pech, the rule of law was described as a "'buzzword' by [Hungary's] justice minister; a fiction by a Fidesz MP; and a 'magic word' by the Fidesz-KDNP Delegation to the European Parliament. Not to be undone, a judge from Hungary's (captured) constitutional court, has presented the rule of law 'as a normative yardstick' which is little more than an empty nineteenth century ideal and a political joker [sic] for all purposes" (L. Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law,' (2022) 14, 2-3 *Hague Journal on the Rule of Law,* 128)
In contrast, the English historian, E.P. Thompson, notoriously and controversially called the rule of law 'a cultural achievement of universal significance.' I agree with Thompson. Each word in that phrase, I seek to demonstrate, deserves emphasis and respect.
However, it makes a huge difference what one takes the rule of law to be about. What is universal is the notion and realization of a state of affairs in which power is reliably *tempered* so as not to be available for arbitrary abuse. It is *that* which is a cultural achievement of universal significance. It is a mistake to identify it, as so many do, with any allegedly canonical arrangement of forms and institutions and rules that are enlisted or assumed to embody it. Many people make that mistake.

Many people make that mistake. Some do so, because they naively think that installation of familiar institutions they associate with 'the rule of law' is the same as generating the rule of law itself. The disappointing history of rule of law promotion around the world shows that is not the case. On the other hand, modern illiberal, often populist, regimes are happy to endorse such a mistake and pretend that they are committed to the rule of law by making a show of conformity to legal forms, while systematically subverting and abusing the rule of law itself. Both the naïve and the malicious interpretations should be rejected.

Fabio Macioce is full professor of Philosophy of Law and Bioethics at LUMSA University, School of Law, Rome. LUMSA University, Rome, Italy, PhD. He held visiting positions at the Cambridge University, UK (Faculty Visitor at the Centre for Law, Medicine and Life Sciences, 2018); Universidad de Valencia (Visiting Professor, Facultad de Derecho, 2017), and University of Oxford (Visiting Scholar at the Centre for Socio-Legal Studies, University of Oxford, 2014). He has collaborated since 2019 with the Council of Europe as an expert in the field of bioethics.
His research interests lie in the field of individual and group vulnerability; migration and social integration; democracy, minority rights and legal pluralism; collective rights; bioethics and informed consent; law and religion; AI and human rights. In recent years, he took part in a number of research projects; (2019-2022) BRIC-Inail, "Risk analysis and mitigation strategies for workers' health and safety protection in contexts subject to digital transformation" (UniRoma1 – Lumsa – UniTo), Unit coordinator; (2017-2020), H2020-SwafS-2016-17, "i-Consent. Improving the guidelines for Informed Consent, including vulnerable populations, under a gender perspective" – Participant; (2017-2019); ongoing projects are: (2022-2025) NHNAI - New Humanism at the time of Neurosciences and Artificial Intelligence, Unit coordinator (with prof. S. Biancu); (2023 - 2025) PRIN - National funding program: Vulnerabilities arising from human-robot collaboration in the workplace: ethical and legal perspectives.

Title: **The Rule of Law in the workplace: Artificial Intelligence and its impact on human confidence**

Abstract. Whatever the definition of rule of law is, its basic idea is that those in positions of authority must exercise this authority according to established public norms and not arbitrarily, and this must be true in all contexts. More in detail, Fuller understands the rule of law as a combination of the formal institutions of society together with 'the inner morality of law', highlights the necessity of both formal guarantees (rules must be prospective, published, intelligible, etc) and a substantive adherence to the 'morality of law' (which is made of principles of equality before the law, accountability, fairness, separation of powers, legal certainty, etc).
Such an understanding of the rule of law is applicable to the whole structure of society, as well as to single contexts, such as that of workplace regulations. The rules governing workplace relationships must be inspired by the same principles, limiting employers' powers and guaranteeing workers' rights. In this context, too, the enforcement of specific rules goes along with the presence of an "inner morality of work", made by reciprocity, confidence, loyalty, and so on.
The paper aims at discussing the effects of AI in the workplace, with a specific focus on this 'morality of work' and its consequences on the rule of law. It assumes that the rule of law is a

mechanism for human flourishing, and such a mechanism runs the risk of being diminished as AI is becoming entrenched within society and workplace relations.
First, the paper focuses on the impact of AI on transparency, fairness, and explicability, which are usually associated with the rule of law. These notions are the prerequisites of the accountability of decision-makers, and at the core of mechanisms and norms that secure non-arbitrary decisions, and more generally prevent the arbitrary use of power. The paper explores how the lack of transparency of AI technologies and the diminished ability to understand the operation of these systems (increasingly used for the management of public and private corporations) may challenge traditional notions underpinning the rule of law, in its more substantive aspects.
Second, the paper discusses potential harms and benefits of AI for individuals and groups, especially the more vulnerable. In addition to evaluating the technical features of a particular technology, it is necessary to analyze the requirements of AI's accountability: if AI technologies provide a range of opportunities for the improvement of human lives and the functioning of government (by taking over tedious, dangerous, and complicated tasks from human workers), they can also have the potential to negatively impact workers' rights (by reproducing harmful bias and other fallibilities of human judgement in ways that are harder to identify than when done by humans).

Sergiy Maksymov is Professor at the Department of Human Rights and Legal Methodology of the Yaroslav Mudryi National Law University (Kharkiv, Ukraine) and Chief Researcher at the Institute of State Construction and Local Self-Government of the National Academy of Legal Sciences (NALS) of Ukraine.
He is PhD in Social Philosophy (1985) and Doctor of Legal Sciences in Philosophy of Law (2002), Corresponding Member of the NALS of Ukraine, Deputy Academician-Secretary of the Department of Theory and History of Law of the NALS of Ukraine. Vice President of the All-Ukrainian Association of Philosophy of Law and Social Philosophy and Editor-in-Chief of academic journal "Philosophy of Law and General Theory of Law".
Professor Maksymov is author of books: "Legal Reality: The Experience of Philosophical Understanding" (2002), "Philosophy of Law: Contemporary Interpretations" (2010, 2012) and co-author of more than 15 books, including "Immanuel Kant: Heritage and Project" (Moscow-Berlin, 2007), "The Legal System of Ukraine: Past, Present, and Future" (2008 - Ukrainian, 2011 - Russian, 2013 - English), "Ukrainian Legal Doctrine" (London, 2015), author of many academic articles on the nature of law, natural law theory, phenomenology of law, foundations of law, legal consciousness, human rights in universal and cultural perspectives, the rule of law, legal values and others. He was co-editor the book: Eugenio Bulygin. The Selected Writings in Theory and Philosophy of Law. Transl. from English, German, Spanish. S.-Petersburg: Alef-Press, 2016 and Chairman of the Editorial Board Vol. 2: Philosophy of Law in Great Ukrainian Legal Encyclopedia: in 20 volumes. Kharkiv: Pravo, 2017.

Title: **Fundamentals of the Rule of Law in the Ukrainian Context**

Abstract. I would like to touch on non-institutional, or cultural, foundations of the idea and practice of rule of law existing alongside institutional ones and constitute their inner content. The goal and objective of rule of law - restriction of arbitrary power - applies to its universal core

recognized and implemented through different cultural contexts. Such a context in the Ukrainian culture is made up of phenomenological features of national worldview (national character): emotionalism, desire for freedom, and social mobility ("a propensity for revolutions"), as well as historical ones, connected by life experience in despotic regimes. These features are not an insurmountable obstacle to establishing the rule of law but still create a specific socio-cultural background in their implementation. Among other points, peculiarity of non-institutional foundations of rule of law in process of implementing anti-corruption and judicial reforms in Ukraine is revealed.

(online) Cosimo Nicolini Coen is a PhD candidate at Bar Ilan University (Israel), at the Department of Jewish Philosophy. He has taken part in *Forum Matanel of French Jewish Philosophy*. His research, under the direction of Prof. Hanoch Ben Pazi, concerns the relationship between ethical ordination, hermeneutics and the limit of law in Levinas' thought, focusing on some Jewish law features. Nicolini Coen had worked on the topic of legal minority opinions in Jewish and Western Law (*Rivista di Filosofia del Diritto – awarded with 2022 HaNassì Prize*; *Politica del Diritto,* 2020. He published a book consecrated to a critical comparison of some facets of Carlo Sini's thought and the ethical and theoretical implications of Jewish hermeneutics (Durango 2020; French edition, Harmattan 2022). He has published the Italian edition (Translation and Introduction) of Abraham Melamed's book *Dat: From Law to Faith*. This year, he received a research grant from the University Kore of Enna (Italy) for a project, under the direction of Prof. Lucia Corso, on the played by the ethical virtues of moderation and phronesis in the juridical field and in Jewish thought.

Title: **The juridical virtue of moderation and the ethical obligation beyond the limits of the law: some questions through Maimonides and Levinas**

Abstract. Focusing on some traits of Jewish tradition, I suggest delving deeper into the notion of law as limit, by looking at the juridical virtues of moderation and of *phronesis*, and comparing it to the infinity of ethical obligation. With the Rambam, we shall see Jewish law as an expression of the Golden Mean and we will ask about the relationship between the formal character of law and the virtue of phronesis. With Levinas, we shall see in phronesis a virtue that prevents the law from degenerating into formalism, and we will ask if the law implies a mitigation of the ethical imperative. The Rambam, based on Aristotle's ethics, recognizes in the Torah's prescriptions the expression of the Golden Mean (although some precepts, such as humility, mark the gap between Athens and Jerusalem's legacy). The respect of the law becomes an *habitus* to the moderation, a precondition for Dianoetic Virtue, through the Torah allegorical reading. Furthermore, the Golden Mean finds specific expression in the bodily dimension, where the individual is called to guard against extremes (libido and asceticism), and where the virtue of phronesis plays a key role. Rambam's reading of the halachic prescriptions as an expression of the Golden Mean might be seen as compatible with his work of halakhic codification, though in this last one – devoted to the definition of general and abstract norms – the virtue of phronesis seems to be lacking. Nevertheless, the codification always proceeds hand in hand with the study of the Ghemarà as well as by the juridical process of the Poskim (legal scholars): dimensions where the attention paid to the singularity of each case is relevant. Then, if by the codification the law emerges as the perimeter conveying the right mean, this same perimeter requires the maintenance of a certain

degree of phronesis. Looking at two articles of Levinas – one dedicated to the Rambam commentary to the Talmudic treatise *Makot*, the other to the Talmudic episode of Ahkhnai's oven – we may recognize, in a philosophical manner, some virtues of the halakhic ponderation. Firstly, it is a process devoted to apply the Torah norms in everyday life, demanding a form of mitigation, showing the balance between *Din* (Judgement) and *Hesed veRahamim* (Piety). Phronesis reveals a peculiar ethical value, in preventing the degeneration of law in formalism, by reminding us of the surplus of each case compared to the abstract categories of law. This brings us to the relationship in Levinas between the ethical ordination, asymmetrical and infinite, and the juridical obligation, demanding delimitation and symmetry. If the Torah is the trace of the ethical ordination, it is necessary to ask what kind of mitigation Halakah implies. An issue reflected in the tension between the prohibition to sacrifice our own life for the Other and the obligation to be read to be killed for not killing someone other; but also in the balance between the limit of the law and the measure of piety [*midat hassidut*], permitted by the Halakhah and reminding us its ethical source.

Gerald J. Postema, Professor Emeritus, The University of North Carolina at Chapel Hill
Professor of Philosophy and Law; Goodhart Distinguished Visiting Professor of Legal Science, Cambridge (2013-14). He holds an honorary doctorate from the University of Athens and is former Guggenheim, Rockefeller, Netherlands Institute for Advanced Studies, and National Humanities Center fellow. He has held visiting posts at the European University Institute (Florence), University of Athens, Yale University, and University of California, Berkeley. He is author of *Law's Rule: The Nature, Value, and Viability of the Rule of Law* (Oxford, 2022), *Bentham and the Common Law Tradition, 2nd edition (OUP, 2019); Utility, Publicity, and Law: Bentham's Moral and Legal Philosophy* (OUP, 2019); *On the Law of Nature, Reason, and the Common Law: Selected Jurisprudential Writings of Sir Matthew Hale* (OUP, 2017); *Legal Philosophy in the Twentieth Century: The Common Law World (Springer, 2011). He* served as associate editor of *Treatise of General Jurisprudence and the Philosophy of Law*, 12 volumes (Springer, 2005-2016). Recent lectures include Sir George Turner Lecture, "The Rule of Law in a Messy World," University of Melbourne School of Law; Bloustein Lecture in Law and Ethics, "Inverted Judgment, Indifference, Stumbling Truth and Other Threats to Law's Rule," Rutgers Law School.

Title: **Fidelity: The Animating Spirit of the Rule of Law**

Abstract. The rule of law is about the *law's* ruling. When law rules in a polity, it provides protection and recourse against the arbitrary exercise of power through the distinctive instrumentalities of law. The rule of law prescribes a mode of governance and the infrastructure of a valuable mode of association; as it binds, it endows a social bond. But law cannot rule; only people rule. Law can rule in a political community only when those who exercise ruling power are held accountable to that law; that is, only when its members (official and lay members alike) take responsibility for holding each other accountable under the law. The rule of law is robust in a polity only if there is deeply rooted in the practices and arrangements of a polity a distinctive way of members regarding, recognizing, and relating to each other—an *ethos* of mutual commitments to make law effective by holding each other accountable to the law that we can call *fidelity*. Fidelity is the essential ground and animating spirit of the rule of law. This essay

explores the distinctive dimensions of the *ethos* of fidelity, its moral foundation in the complex ideal of membership, and the deformations to which it is susceptible. It will then canvas the major threats to which it is most vulnerable.

Luís Pereira Coutinho is associate professor at the University of Lisbon's School of Law and a research fellow at LPL - Lisbon Public Law. Beforehand, he lectured at Nova's Faculty of Social Sciences. His main research interests are Constitutional Law and Constitutional Theory. His publications include *O Estado como Representação* (AAFDL, 2019), *O Constitucionalismo como Discurso do Direito* (Almedina, 2024) (as author), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Springer, 2015), *The Political Dimension of Constitutional Law* (Springer, 2020), or *Populismo e Democracia* (Edições 70, 2021) (as editor), and numerous papers published in different international journals.

Title**: The discipline of legality: a defence of Kelsenian neutrality**

Abstract: Constitutional law amounts to a discipline of legality, in the sense that legality may be valid or invalid under it. This paper addresses the problem raised by a discipline of legality which appeals to concepts regarding which different conceptions exist in a context of pluralism – concepts such as "human dignity", "justice" or "rule-of-law" (in case the latter is understood as the rule of *ius* or the rule of *Recht*).

Kelsen, being acutely aware of this problem – and understanding that no legal method could settle interpretative conflicts surrounding the said concepts – sustained that provisions appealing to concepts such as those should be understood as "mere postulates which are not legally binding". The meaning of those concepts was therefore to be determined at the discretion of the legislator. Otherwise, the power of constitutional courts to invalidate laws would be "unbearable" in a context of pluralism. For Kelsen, therefore, not all provisions included in constitutional texts are properly "constitutional *law*", interpreters being required to consider the said "postulates" as "non-law" – as "expelled from the law" in Itzkovitch words. Of course, it is impossible to sustain this perspective except as a political perspective demanding that the discipline of legality remains a neutral discipline amongst unshared moral conceptions.

Despite Kelsen's political perspective (even if undeclared as such), the fact is that, in the last decades, constitutional courts – even if widely believed today to be justified in the terms of Kelsen's theory – considered themselves legitimated to carry out an "internal critique of law" (so-called "internal" in this case) by appealing to the said concepts. Challenging the Kelsenian view, Frank Michelman recently attempted to justify that practice from a political perspective. According to him, the existence of political conflicts does not oppose a robust involvement of constitutional courts in their settlement in case they become interpretative conflicts. In other words, the "circumstance of politics" – using Waldron's expression – does not oppose what Michelman names as "justification by constitution". Rather, a "strategy of deflection" will be at play, one with virtuous effects in the pacification of political conflicts.

This paper is intended at discussing Michelman's proposal, claiming that it fails. In fact, no legitimacy or pacification can be enhanced by placing law (or the courts) at the centre of political conflicts.

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Title: **Rule of law and the crisis of representative democracies: the role of judges and the possible definition of a deontology of judicial action, shared in a supranational dimension, as a safeguard for the defense of the constitutional state**

Abstract. The focus of this paper is represented by the interinstitutional relations that characterize the Rule of Law, with particular reference to the relationship between judicial offices and the powers that belong to the political-representative direction area.
Some reflections are proposed on the possible revival of the virtuous functioning of the Rule of Law through the elaboration of a shared scheme of elements that are believed to characterize judicial action, in a supranational context that seems to show scenarios of a return to authoritarianism as a possible consequence of the crisis of the democratic state and its main features, starting from the dynamics that invest the traditional principle of the separation of powers.

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Title: **Rule of law, virtue, and good faith**

Abstract. It has been a commonplace observation since antiquity that without virtue in the citizens -- or at least in the rulers -- there can be no rule of law. This arises from the unavoidable human agency in understanding, interpreting, and enforcing the law. As Cicero, Grotius, Washington, and many others insisted, the necessary virtue in this context is above all *bona fides* -- good faith. When we act in good faith, the rule of law remains possible. Without good faith, we fall into corruption, and the rule of law will fail.

Put in narrower and more conventional terms, good faith is the central component of the virtue of *justice*, which is the ultimate purpose and justification of the rule of law. To act in good faith is to take the interests and well-being of others (and everyone) into account. To act unjustly is to exhibit bad faith, by disregarding the interests and well-being of others.
This thesis could be put more strongly, because good faith is the central virtue, not only of justice, but morality. The rule of law requires rules and institutions that seek the welfare of all, taking everyone into account and disregarding no one. This extends beyond law. To be a good and virtuous person is to be someone who respects the welfare of others, and takes their interests into account, even when law does not strictly require it. Thus virtue, morality, and the rule of law all seek a world in which all persons are taken into account, and can live worthwhile and fulfilling lives. But virtue is broader than the law. Vice consists in disregarding the welfare of others -- and oneself.
The rule of law (*legum imperium*) controls the arbitrary exercise of public authority. The rule of man (*hominum imperium*) empowers the unrestrained power of private interests. Virtue makes the first possible. Vice inevitably creates the latter.
How then to cultivate the virtue without which no rule of law can thrive? Above all, by example. We admire and emulate virtuous acts, just as corruption and vice can lead us astray. Being social creatures, we assimilate to those around us. To establish the rule of law, we must proclaim its virtue, and the virtues that make the rule of law possible. We must exhibit them in our own lives, and if we are lawyers, judges, or scholars, in our writings. Virtue and good faith have inherent ability to inspire and persuade. If you seek virtue and the rule of law, praise them! Neither can exist without the other.

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Title: **The legal virtue of reflexivity**

Abstract. Reflexivity is recommended in practicing law as an epistemological attitude to turn upon one's own personal and professional position, for evaluating the risks of stereotypes deriving from inevitable situated knowledge. It serves also to assess the scope of scholars' contribution to the practice of law in the field of international law. Historically, the idea according to which legal science does not only describe law, but it takes part in constructing it conveyed in the notion of *Juristenrecht*.
Reflexivity has also been defined as the ability of making explicit or implicit appeal to the rule of law in the practice of law (Nigel Simmonds, *Reflexivity and the Idea of Law*, Jurisprudence 1, 1,

2010: 1-23). Legislators, judges, lawyers, advisors, civic servants are called to reflect on the legal action at stake and to commensurate it with the rule of law as the core of a fair social ordering. In this sense, the rule of law can be identified as the mark of the legal mindset. Reflexivity is not only a key of the legal practitioners' ability to absorb and translate social inputs into legal terms, but it is the condition for the crafting of fair legal solutions for social issues. Reflexivity leads to a conception of legal science not as a theoretical or technical expertise, but rather as an art.
In the case of lay people, reflexivity aims also at eliminating exclusive external approaches to law. Without reflexivity it is hard to understand that the success of the practice depends on every actor's involvement. In their case, reflexivity leads not only to upholding the rules by respecting them as part of their contribution to the rule of law, but also to demanding accountability and transparency from those who wield power, as well as to participate in improving the system. The latter is the task of transformative justice which involves legal practitioners and citizens alike in the enhancement of rules and institutions, each of them according to their role and all of them as citizens engaged in social change. The distinction between participation as legal practitioners and citizens in improving rules and institutions could dispel temptations of some roles' activism, very often the result of hubris or arrogance: an important challenge for all legal practitioners.

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Van Domselaar's research addresses the question how best to account for ethics in legal practice. Drawing on neo-Aristotelian and neo-Wittgensteinian strands within practical and legal philosophy and on social-empirical research. She seeks to come to grips with ethics as 'lived experience' on the part of legal professionals and of citizens who are involved in legal procedures. She has published extensively on topics such as tragic dilemmas and moral remainders in legal practice, judicial virtues, the ethics of corporate lawyering, courage of legal professionals, and moral perception in legal practice. Currently, she collaborates in the nation-wide interdisciplinary consortium The Algorithmic Society with a project that focuses on digitization in the justice sector and the ramifications for the ethics of legal professionals.
Title: **Large-Scale Miscarriages of Justice: Lessons from and for Virtue Theory**

Abstract. A central feature of virtue-ethical approaches to law and legal practice is that they assign a central role to the virtues of legal professionals in their account of the ethical quality of legal practices and the legal order. The quality of these practices depends on the extent to which legal professionals are 'good', that is, possess the relevant professional virtues such as justice, practical wisdom, courage, temperance, and more specific legal role-dependent virtues such as loyalty, independence, and impartiality. Also, and relatedly, a virtue-ethical approach assigns a central role to the formative practices in which these virtues are to be developed.

It is noteworthy that these virtue-ethical approaches to law and legal practice largely focus on the positive dimension of legal practice. For example, by focusing on virtues rather than vices. However, recent large-scale miscarriages of justice in liberal democracies, such as the Child-Care Benefit scandal in the Netherlands, the Post Office scandal in the United Kingdom

and the Robodebt scandal in Australia, point to the need to also make sense of the 'darker side' of law and legal practice. An defining feature of these scandals is that they have caused enormous suffering to thousands of citizens, and that legal professionals have been largely involved in causing or facilitating devastating legal outcomes.

Starting from the premise that it is important to avoid similar miscarriages of justice in the future, the central question addressed in this paper is what lessons can be learned from virtue theory, and vice versa: what lessons do these miscarriages of justice have for virtue theory if it is to provide an account of law and legal practice that can help prevent similar miscarriages of justice from occurring in the future? In addressing these questions, this paper will take an interdisciplinary approach, also drawing on the insights of behavioral (legal) ethics and organizational ethics.

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Title: **The Relevance of Judicial Virtues for the Rule of Law**

Abstract: In this presentation I will argue for the usefulness of the notion of judicial virtue and its theoretical relevance for interpreting the requirement that judges should be of "impeccable character" and for other criteria of their appointment, such as intellectual capacities, skills, and social competencies. Judicial virtue is not a subjectively imposed view on judicial ethics. Instead, it is a context-relevant concept well-entrenched in legal culture that amounts to a personality aspect of the rule of law. In support of this claim, I will use a pluralist concept of judicial virtue. According to that account, judicial virtues are dispositions that allow the judge to respond in an excellent or good enough way to the challenges of the judicial role that arise in the respective virtue's field. This account can contribute to uncovering judicial virtues, such as those that respond to the challenges of judicial independence and are relevant to the rule of law. Judicial virtue theory may be a source of viable policy advice on modifying some judicial appointment criteria and procedures, which can, in turn, strengthen the rule of law.