

2013

Law Abstracts

Tenth Annual International
Conference on Law
8-11 July 2013, Athens, Greece

Edited by Gregory T. Papanikos

THE ATHENS INSTITUTE FOR EDUCATION AND RESEARCH



Law Abstracts
10th Annual International
Conference on Law
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Greece

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TABLE OF CONTENTS

(In Alphabetical Order by Author's Family name)

	Preface	9
	Conference Program	10
1	Uncovering Unobserved Economy: A General Equilibrium Characterization <i>Amedeo Argentiero & Carlo Andrea Bollino</i>	16
2	Technology and Communicative Action Theory - Paths to an Effective Democracy <i>Miriam Azevedo Hernandez Perez</i>	17
3	Outline of the Adoption American Legal System in the South Korea - Translate US 13 States Law into Korean <i>Jihyun Baek</i>	18
4	The Parthenon Marbles Revisited - a New Strategy for Greece? <i>Nadia Banteka</i>	19
5	The Judges of the European Court of Human Rights as a Specific Socioprofessional Group of International Legal Influence <i>Anatoli Bayashou</i>	20
6	Optimality Condition of Place of Injury Rule in Cross-Border Internet Torts and Implications for Turkey <i>Erman Benli</i>	21
7	Answer to the Questions? A Critical Analysis of the South African Labour Relations Amendment Bill of 2012 with Regard to Labour Brokes <i>Anri Botes</i>	22
8	The Taxation of Customer Loyalty Award Programmes in South Africa <i>Pieter Brits</i>	23
9	Transport Documents: The New Terminology and Categorisation under the Rotterdam Rules <i>Belma Bulut</i>	24
10	“Unwritten Lawyers”: A Comparative Approach on Representations of Women Lawyers in the Anglo-American and European Literature <i>Anna Chronopoulou</i>	25
11	Has Social Media Become the Proverbial “Elephant in the Room” in Modern Labour Relations? <i>Quintin Cilliers</i>	26
12	Money Laundering and Terrorist Financing - Perspectives of Further Development of the Risk Based Approach in Assessment of Suspicious Transactions <i>Sonja Cindori</i>	27
13	Uniform International Legal Regime for Multimodal Transport: Blatant need but no General Acceptance <i>Ramandeep Chhina</i>	29

14	Property and Fundamental Rights, between Courts Judgements and Constitutional Norms <i>Maria Luisa Chiarella</i>	30
15	Social Security for Immigrants and New Perspectives of Citizenship <i>Paola Chiarella</i>	31
16	A Critical Analysis of the Right to Fair Labour Practices <i>Maralize Conradie</i>	32
17	Contracts of Employment: A Preliminary Study of the Interaction between Relational Norms and Formal Agreements <i>Penny-Anne Cullen</i>	35
18	The Public-Private Divide in Prosecutions and Obtaining of Evidence: Towards a Code? <i>Claire de Than & Jesse Elvin</i>	37
19	Protection of Persons during Disaster Response <i>Gerda du Toit</i>	38
20	The Audience and the Judge <i>Julen Etxabe</i>	39
21	A Labour Law Perspective on Employees with Depression <i>Laetitia Fourie & Adv Denine Smit</i>	40
22	A New ECN Model. Extraterritorial Jurisdiction and the Rule of Law <i>Dorota Galeza</i>	41
23	A Monitoring Mechanism for Constitutional Decisions: A Study of the Costa Rican Supreme Court <i>Varun Gauri</i>	42
24	Health Tourism in Incredible India: Are Overseas Patients Good for the Health of India's Poor? <i>Swati Gola</i>	43
25	If Promoting Fair Play is the Basis of the World Anti-Doping Code then is it not Ironic that the Code is so Unfair? <i>Thomas Hickie</i>	44
26	'Beyond the Prize': Amateurism, Athletics and International Human Rights Law <i>David Holmes</i>	45
27	Qualifications and Competencies of Business Rescue Practitioners in South Africa <i>Lezelle Jacobs</i>	46
28	Extraterritorial Criminal Jurisdiction and the Rule of Law <i>Danielle Ireland-Piper</i>	47
29	Analyzing the Concept of Mercy in Shakespeare's "Measure for Measure" <i>Rinat Kitai-Sangero</i>	48
30	Foreign Influences and Law Reviews Rankings in Israel Legal Scholarship <i>Pablo Lerner</i>	49
31	Aesthetics of Violence: The Battle between Memory and Oblivion <i>Monica Lopez Lerma</i>	51

32	Core Principles for Effective Banking Supervision: New Concepts and Challenges <i>Michael Malloy</i>	52
33	New Framework in the Law of War: Combatting Transnational Organized Crime <i>Regina Menachery Paulose</i>	53
34	How Different is the Relevant Market Definition in Tramp Shipping Services? <i>Stefanos Merikas</i>	54
35	A Critical Appraisal on the Effectiveness of the International Monetary Fund and the International Bank for Reconstruction and Development Regarding Sustainable Development in Specific African Developing Countries <i>Glancina Mokone</i>	55
36	The Decriminalization of South African Company Law <i>Hermanus Molman</i>	56
37	International Efforts to Regulate Foreign Investment and to Provide a more Consistent Legal Framework of Foreign Directed Investment <i>Mukhles Murad</i>	57
38	Human Rights and Intellectual Property: The Case of Pharmaceutical Patents <i>Linda Muswaka</i>	58
39	Curbing Thin Capitalisation: A Comparative Overview with Specific Reference to South Africa's Approach - Challenges Posed by the Amended Section 31 of the Income Tax <i>Annet Oguttu</i>	59
40	Nonlinear Incentive Schemes and Corruption in Public Procurement <i>Jan Palguta</i>	60
41	Financial Transaction Tax Versus Pigouvian Tax? <i>Dorota Pasinska</i>	61
42	Stokvel as a Means of Poverty Alleviation in Black Communities around Mangaung (South Africa) <i>Bella Rametse</i>	62
43	Changing Property Rights in Fresh Water in South Africa <i>Dalita Ramwell</i>	63
44	The Rights and Obligations of Primary and Excess Layer Insurers <i>Kristi Riedel</i>	64
45	Scarlett Fever <i>Andrew Ross</i>	65
46	Public Participation in Environmental Decision-Making: the Implementation of the Aarhus Convention in the case-law of the Compliance Committee <i>Andrea Saba</i>	66
47	The Adhesion of Croatia to the European Union <i>Miriam Salholz</i>	67

48	The Importance of Competition Policy Harmonisation for ASEAN Economic Integration <i>Cenuk Sayekti</i>	68
49	Global Taxation of Corporations <i>Elfriede Sangkuhl</i>	69
50	Are the New Filtering Measures of Applications by the European Court of Human Rights Effective? <i>Taixia Shen</i>	70
51	Caught in a State of Exception: Kafka's Man from the Country, Camus's Outsider, and Flannery O'Connor's Misfit <i>Ilana Shiloh</i>	71
52	Bullying in Cyberspace: How Do we Protect Our Learners on this New Playground? <i>Dina Maria Smit</i>	72
53	Defining Blood Diamonds: The Zimbabwe Problem <i>Elizabeth Snyman-Van Deventer</i>	73
54	South Africa's SRI-Reporting and Climate Change - Lessons for the Future? <i>Anel Strampe & Adri du Plessis</i>	74
55	Patents' Choice Problem in Pharmacy: Legal and Economic Aspects <i>Valeryia Stukina</i>	75
56	The Author and her Work: Charlotte Bronte's Shirley as a Therapeutic Experience <i>Aleksandra Tryniecka</i>	76
57	The Pros and Cons of a Technology Neutral Approach in the Regulation of Electronic Money <i>Maphuti David Tuba</i>	77
58	An Economic Analysis of the Legal Recognition of Cuba by the United States <i>Frank Vandall</i>	78
59	From an International Perspective, The American Criminal Justice System is Deplorable <i>Johan Van der Vyver</i>	79
60	Stipulatio Alteri V Donatio Mortis Causa - What is the Difference? <i>Rika Van Zyl</i>	80

Preface

This abstract book includes all the abstracts of the papers presented at the *10th Annual International Conference on Law, 8-11 July 2013*, organized by the Athens Institute for Education and Research. In total there were 60 papers and 65 presenters, coming from 20 different countries (Australia, Brazil, China, Croatia, Czech Republic, Finland, Greece, Israel, Italy, Kurdistan-Iraq, Poland, Russian Federation, South Africa, South Korea, Switzerland, the Netherlands, Turkey, UK, USA). The conference was organized into XII sessions that included areas such as Law e.t.c As it is the publication policy of the Institute, the papers presented in this conference will be considered for publication in one of the books of ATINER.

The Institute was established in 1995 as an independent academic organization with the mission to become a forum where academics and researchers from all over the world could meet in Athens and exchange ideas on their research and consider the future developments of their fields of study. Our mission is to make ATHENS a place where academics and researchers from all over the world meet to discuss the developments of their discipline and present their work. To serve this purpose, conferences are organized along the lines of well established and well defined scientific disciplines. In addition, interdisciplinary conferences are also organized because they serve the mission statement of the Institute. Since 1995, ATINER has organized more than 150 international conferences and has published over 100 books. Academically, the Institute is organized into four research divisions and nineteen research units. Each research unit organizes at least one annual conference and undertakes various small and large research projects.

I would like to thank all the participants, the members of the organizing and academic committee and most importantly the administration staff of ATINER for putting this conference together.

Gregory T. Papanikos
President

FINAL CONFERENCE PROGRAM
10th Annual International Conference on Law
8-11 July 2012
PROGRAM

Conference Venue: Titania Hotel (52 Panepistimiou Avenue)

ORGANIZING AND SCIENTIFIC COMMITTEE

1. Dr. Gregory T. Papanikos, President, ATINER.
2. Dr. David A. Frenkel, Head, Law Research Unit, ATINER & Professor, Ben-Gurion University, Beer-Sheva, Israel.
3. Dr. George Poulos, Vice-President of Research, ATINER & Emeritus Professor, University of South Africa, South Africa.
4. Dr. Nicholas Georgakopoulos, The Harold R. Woodard Professor of Law, Indiana University, USA & Academic Member, ATINER.
5. Dr. Michael P. Malloy, Distinguished Professor & Scholar, University of the Pacific, USA & Academic Member, ATINER.
6. Dr. Chris Sakellariou, Vice President of Finance, ATINER & Associate Professor, Nanyang Technological University, Singapore.
7. Ms. Anna Chronopoulou, Academic Member, ATINER & Ph.D. Student, Birkbeck College, UK.
8. Dr. Robert Ashford, Professor, Syracuse University, U.S.A.
9. Dr. Iliana Christodoulou-Varotsi, Associate Professor, DERE - The American College of Greece, Greece.
10. Dr. J. Kirkland Grant, Distinguished Visiting Professor of Law, Charleston School of Law, USA.
11. Mr. Athanasios Mihalakas, Assistant Professor, The State University of New York, at Brockport, USA.
12. Dr. Angelos Tsaklanganos, Visiting Professor, University of Nicosia, Cyprus & Emeritus Professor, Aristotle University of Thessaloniki, Greece
13. Dr. Demetra Arsalidou, Lecturer, Cardiff University, U.K.
14. Ms. Lila Skountridaki, Researcher, ATINER & Ph.D. Student, University of Strathclyde, U.K.
15. Mr. Vasilis Charalampopoulos, Researcher, ATINER & Ph.D. Student, University of Stirling, U.K.

Administration

Fani Balaska, Stavroula Kiritsi, Eirini Lentzou, Konstantinos Manolidis,
Katerina Maraki & Celia Sakka

C O N F E R E N C E P R O G R A M

(The time for each session includes at least 10 minutes coffee break)

Monday 8 July 2013

08:45-09:30 Registration

09:30-09:40 Welcome and Opening Remarks

- Dr. Gregory T. Papanikos, President, ATINER.
- Dr. David A. Frenkel, Head, Law Research Unit, ATINER & Professor, Ben-Gurion University, Beer-Sheva, Israel.

09:40-11:00 Session I (Room A):

Chair: David A. Frenkel, Head, Law Research Unit, ATINER & Professor, Ben-Gurion University, Beer-Sheva, Israel.

1. Michael Malloy, Distinguished Professor and Scholar, University of the Pacific McGeorge, USA. Core Principles for Effective Banking Supervision: New Concepts and Challenges
2. Frank Vandall, Professor, Emory University, USA. An Economic Analysis of the Legal Recognition of Cuba by the United States.
3. Amedeo Argentiero, Assistant Professor, University of Perugia, Italy & Carlo Andrea Bollino, Professor, University of Perugia, Italy. Uncovering Unobserved Economy: A General Equilibrium Characterization.
4. Cenuk Sayekti, PhD Candidate, Macquarie University, Australia. The Importance of Competition Policy Harmonisation for ASEAN Economic Integration.

11:00-12:30 Session II (Room A):

Chair: Michael Malloy, Distinguished Professor and Scholar, University of the Pacific McGeorge, USA.

1. Anri Botes, Junior Lecturer, North-West University, South Africa. Answer to the Questions? A Critical Analysis of the South African Labour Relations Amendment Bill of 2012 with Regard to Labour Brokes.
2. Maria Luisa Chiarella, Researcher, Universita Magna Graecia di Catanzaro, Italy. Property and Fundamental Rights, between Courts Judgements and Constitutional Norms.
3. Laetitia Fourie, Lecturer, University of the Free State, South Africa & Adv Denine Smit, Lecturer, University of the Free State, South Africa. A Labour Law Perspective on Employees with Depression.
4. Maralize Conradie, Lecturer, University of the Free State, South Africa. A Critical Analysis of the Right to Fair Labour Practices.
5. Quintin Cilliers, Lecturer, University of the Free State, South Africa. Has Social Media Become the Proverbial "Elephant in the Room" in Modern Labour Relations?

12:30 -14:00 Session III (Room A):

Chair: Iliana Christodoulou-Varotsi, Associate Professor, DERE - The American College of Greece, Greece.

1. Ilana Shiloh, Head of English Studies, The Academic Center of Law and Business, Israel. Caught in a State of Exception: Kafka's Man from the Country, Camus's Outsider, and Flannery O'Connor's Misfit.
2. Aleksandra Tryniecka, PhD

12:30 -14:00 Session IV (Room B):

Chair: Anri Botes, Junior Lecturer, North-West University, South Africa.

1. *Pablo Lerner, Professor, Academic Center of Law and Business, Israel. Foreign Influences and Law Reviews Rankings in Israel Legal Scholarship.
2. Rika Van Zyl, Lecturer, University of the Free State, South Africa. Stipulatio Alteri V Donatio Mortis Causa - What is the Difference?

<p>Student, Maria Curie-Skłodowska University, Poland. The Author and her Work: Charlotte Brontë's <i>Shirley</i> as a Therapeutic Experience.</p> <p>3. Andrew Ross, Ph.D Student, University of California Santa Barbara, USA. Scarlett Fever.</p> <p>4. Nadia Banteka, Lecturer, The Hague University, The Netherlands. The Parthenon Marbles Revisited – a New Strategy for Greece?</p> <p>5. <u>Claire de Than</u>, Lecturer, City University London, UK & <u>Jesse Elvin</u>, Lecturer, City University London, UK. The Public-Private Divide in Prosecutions and Obtaining of Evidence: Towards a Code?</p> <p>6. Dorota Pasinska, PhD Student, University of Zurich, Switzerland. Financial Transaction Tax Versus Pigouvian Tax?</p>	<p>3. Erman Benli, Lawyer, Turk Telekom, Turkey. Optimality Condition of Place of Injury Rule in Cross-Border Internet Torts and Implications for Turkey.</p> <p>4. Hermanus Molman, Lecturer, University of the Free State, South Africa. The Decriminalization of South African Company Law.</p> <p>5. Mukhles Murad, Lecturer, Salahaddin University-Erbil, Kurdistan, Iraq. International Efforts to Regulate Foreign Investment and to Provide a more Consistent Legal Framework of Foreign Directed Investment.</p>
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14:00-15:00 Lunch

15:00-16:30 Session V (Room A):

Chair: Pablo Lerner, Professor, Academic Center of Law and Business, Israel

1. Annet Oguttu, Professor, University of South Africa, South Africa. Curbing Thin Capitalisation: A Comparative Overview with Specific Reference to South Africa's Approach - Challenges Posed by the Amended Section 31 of the Income Tax.
2. Elfriede Sangkuhl, Lecturer, University of Western Sydney, Australia. Global Taxation of Corporations.
3. Pieter Brits, Lecturer, University of the Free State, South Africa. The Taxation of Customer Loyalty Award Programmes in South Africa.
4. Maphuti David Tuba, Lecturer, University of South Africa, South Africa. The Pros and Cons of a Technology Neutral Approach in the Regulation of Electronic Money.
5. Bella Rametse, Lecturer, University of the Free State, South Africa. Stokvel as a Means of Poverty Alleviation in Black Communities around Mangaung (South Africa)

16:30-18:00 Session VI (Room A):

Chair: Miriam Azevedo Hernandez Perez, Lawyer, Public Law and New Rights Master degree Student at Estacio de Sa University in Rio De Janeiro, Brazil.

1. David Holmes, Lecturer, University of New South Wales, Australia. 'Beyond the Prize': Amateurism, Athletics and International Human Rights Law.
2. Linda Muswaka, Lecturer, North West University, South Africa. Human Rights and Intellectual Property: The Case of Pharmaceutical Patents.
3. Taixia Shen, Lecturer, Jinan University, China. Are the New Filtering Measures of Applications by the European Court of Human Rights Effective?
4. Anatoli Bayashou, Student, St. Petersburg State University, Russian Federation. The Judges of the European Court of Human Rights as a Specific Socioprofessional Group of International Legal Influence.
5. Valeria Stukina, PhD Student, University of Veterinary and Pharmaceutical Sciences Brno, Czech Republic. Patents' Choice Problem in Pharmacy: Legal and Economic Aspects.

18:00-19:30 Session VII (Room A):

Chair: David Holmes, Lecturer, University of New South Wales, Australia.

1. Miriam Azevedo Hernandez Perez, Lawyer, Public Law and New Rights Master degree Student at Estacio de Sa University in Rio De Janeiro, Brazil. Technology and Communicative Action Theory - Paths to an Effective Democracy.
2. Sonja Cindori, Assistant Professor, University of Zagreb, Croatia. Money Laundering and Terrorist Financing - Perspectives of Further Development of the Risk Based Approach in Assessment of Suspicious Transactions.
3. Ramandeep Chhina, Lecturer, Heriot-Watt University, UK. Uniform International Legal Regime for Multimodal Transport: Blatant need but no General Acceptance.
4. Belma Bulut, PhD Student, Southampton University, UK. Transport Documents: The New Terminology and Categorisation under the Rotterdam Rules.
5. Jihyun Baek, Student, Kangwon National University, South Korea. Outline of the Adoption American Legal System in the South Korea - Translate US first 13 States Law into Korean.

21:00-23:00 Greek Night and Dinner (Details during registration)

Tuesday 9 July 2013

08:00-10:00 Session VIII (Room A):

Chair: *Miriam Salholz, Associate Professor, St. Francis College, Adjunct Professor, Fordham University School of Law, USA.

1. *Dorota Galeza, PhD Student, Manchester University, UK. A New ECN Model.
2. *Regina Menachery Paulose, Attorney, USA. New Framework in the Law of War: Combatting Transnational Organized Crime.
3. Johan Van der Vyver, Professor, Emory University, USA. From an International Perspective, The American Criminal Justice System is Deplorable.
4. Andrea Saba, Graduate Student, University of Turin, Italy. Public Participation in Environmental Decision-Making: the Implementation of the Aarhus Convention in the case-law of the Compliance Committee.
5. Danielle Ireland-Piper, Senior Teaching Fellow, Bond University, Australia. Extraterritorial Criminal Jurisdiction and the Rule of Law.

<p>10:00-11:30 Session IX (Room A): Chair: *Regina Menachery Paulose, Attorney, USA.</p>	
<ol style="list-style-type: none"> 1. Thomas Hickie, Visiting Fellow and Sessional Lecturer, University of New South Wales, Australia. If Promoting Fair Play is the Basis of the World Anti-Doping Code then is it not Ironic that the Code is so Unfair? 2. Stefanos Merikas, PhD Candidate, University of Reading, UK. How Different is the Relevant Market Definition in Tramp Shipping Services? 3. Jan Palguta, Junior Researcher, Center for Economic Research & Graduate Education – Economics Institute, Czech Republic. Nonlinear Incentive Schemes and Corruption in Public Procurement. 4. Lezelle Jacobs, Lecturer, University of the Free State, South Africa. Qualifications and Competencies of Business Rescue Practitioners in South Africa. 5. Dina Maria Smit, Lecturer, University of the Free State, South Africa. Bullying in Cyberspace: How Do we Protect Our Learners on this New Playground? 	
<p>11:30-13:00 Session X (Room A): Chair: Thomas Hickie, Visiting Fellow and Sessional Lecturer, University of New South Wales, Australia.</p>	<p>11:30-13:00 Session XI (Room B): Chair: Lezelle Jacobs, Lecturer, University of the Free State, South Africa.</p>
<ol style="list-style-type: none"> 1. Paola Chiarella, Research Grant, Universita Magna Graecia di Catanzaro, Italy. Social Security for Immigrants and New Perspectives of Citizenship. 2. Elizabeth Snyman-Van Deventer, Professor, University of the Free State, South Africa. Defining Blood Diamonds: The Zimbabwe Problem. 3. Glancina Mokone, Lecturer, University of the Free State, South Africa. A Critical Appraisal on the Effectiveness of the International Monetary Fund and the International Bank for Reconstruction and Development Regarding Sustainable Development in Specific African Developing Countries. 4. Dalita Ramwell, Senior Lecturer, University of South Africa, South Africa. Changing Property Rights in Fresh Water in South Africa. 5. Varun Gauri, Senior Economist, the World Bank, USA. A Monitoring Mechanism for Constitutional Decisions: A Study of the Costa Rican Supreme Court. 	<ol style="list-style-type: none"> 1. *Miriam Salholz, Associate Professor, St. Francis College, Adjunct Professor, Fordham University School of Law, USA. The Accession of Croatia to the European Union. 2. Anna Chronopoulou, PhD Candidate, Birkbeck College University of London, UK. "Unwritten Lawyers": A Comparative Approach on Representations of Women Lawyers in the Anglo-American and European Literature. 3. Julen Etxabe, Postdoctoral Researcher, University of Helsinki, Finland. The Audience and the Judge. 4. <u>Rinat Kitai-Sangero</u>, Professor, Academic Center of Law and Business, Israel & Ronit Kedar. Analyzing the Concept of Mercy in Shakespeare's "Measure for Measure". 5. Monica Lopez Lerma, Researcher, University of Helsinki, Finland. Aesthetics of Violence: The Battle between Memory and Oblivion.

13:00-14:00 Lunch

14:00-16:00 Session XII (Room A):

Chair: Anna Chronopoulou, PhD Candidate, Birkbeck College University of London, UK.

1. Penny-Anne Cullen, Professor, Coventry University, England. Contracts of Employment: A Preliminary Study of the Interaction between Relational Norms and Formal Agreements. (Tuesday 9 July 2013)
2. Kristi Riedel, Associate, Cooper Grace Ward Lawyers, Australia. The Rights and Obligations of Primary and Excess Layer Insurers. (Tuesday 9 July 2013)
3. Gerda du Toit, Lecturer, University of the Free State, South Africa. Protection of Persons during Disaster Response.
4. Anel Strampe, Lecturer, University of the Free State, South Africa & Adri du Plessis, Professor, University of the Free State, South Africa. South Africa's SRI-Reporting and Climate Change – Lessons for the Future?
5. Swati Gola, PhD student, University of Manchester, UK. Health Tourism in Incredible India: Are Overseas Patients Good for the Health of India's Poor?

17:30-20:30 Urban Walk (Details during registration)

21:00- 22:00 Dinner (Details during registration)

Wednesday 10 July 2013

Cruise: (Details during registration)

Thursday 11 July 2013

Delphi Visit: (Details during registration)

Amedeo Argentiero

Assistant Professor, University of Perugia, Italy & Carlo Andrea Bollino,
Professor, University of Perugia, Italy

Uncovering Unobserved Economy: A General Equilibrium Characterization

This paper gives a theoretical contribution to modelize and dynamically analyze the two major components of hidden economy: underground and criminal economy. Both underground and criminal firms evade taxes, but criminal firm also produces an illegal good.

We build a DSGE model with two goods, the legal and the criminal good. The former can be produced either by the sunlight and the underground firm. The sunlight firm is risk-adverse and subject to distortionary taxation. The underground firm is risk-neutral and evades taxation. The criminal good is produced only by the criminal firm, that is risk-lover and evades any form of taxation.

All sectors are subject to stochastic incorrelated technology shocks on total factor productivity.

The demand side of the economy is populated by an infinite number of households with preferences defined over legal good consumption, criminal good consumption, public expenditure and labor services on a period-by-period basis.

The first order conditions together with an appropriate parametrization are able to characterize underground and criminal economy as a function of regular economy, whose data are known. Hence, the first result of the model is the construction of an high frequency estimated time series for underground and criminal economy.

We perform this analysis for Italy, the European Union and the US on quarterly data, over the sample 2000:01-2010:04.

We find that underground and criminal economy have a greater weight on GDP in Italy than in the European Union and the US.

The dynamic behavior of the model shows that: 1) underground production has a greater relative volatility than regular production; 2) criminal production has a greater relative volatility than underground production and regular production. Moreover, both underground and criminal production appear to be negatively correlated with GDP, showing that they conserve as a sort of buffer for the economy, whenever the business cycle is in downturn phases.

Miriam Azevedo Hernandez Perez

Lawyer, Public Law and New Rights Master degree Student at Estacio de Sa
University in Rio De Janeiro, Brazil

Technology and Communicative Action Theory - Paths to an Effective Democracy

This article main objective is to analyze the utilization of technology as an instrument to the democracy implementation and its improvement, by applying Jurgen Habermas' communicative theory. Firstly we analyze general aspects of the requirements of contemporary democracy - main characteristics, definitions - and the potential of technology to spread and develop it, bringing examples of practices that have been made through the world. Then, we focus our study in how communicative theory can enhance democracy using technology as a tool in this direction. We start it by presenting the conceptions and ideas developed by the German philosopher Jurgen Habermas related to the mentioned theory, how it empowers citizens, develops a legitimate law, enhances democracy and so on. Finally, the studies are focused on how his theory can be used together with technology to an effective democracy.

Jihyun Baek

Student, Kangwon National University, South Korea

Outline of the Adoption American Legal System in the South Korea - Translate US 13 States Law into Korean

South Korea, 2009 years officially started American style legal education system-3year graduate law school. We first finally adopted American law school system in the world. So South Korea, now we have to do legal reformation because South Korea is classified with European continental civil law system, so inappropriate for three year graduate law school system.

Law school is the only suitable for American style legal system- multi constitution system and common law system because the lifeforce of 3year graduate law school system can do raise up various lawyer, and do educate various lawyer contrary four year undergraduate law college.

The most distinctive features of American legal system is completely different plural legal society in the one country. In the case of USA, about 200 schools make 50 colors lawyer.

For Korean law school can do the same function of the American law school' s function in the USA , We have to make several constitutional law. We have to divide our country and than we have to construct several legal society in one country just like American style. First America was made by east 13 states

So we translate US east 13 states law into Korean language, and than, South Korea not only adopt American's colorful legal society But also Korean law school also work do well at least 25 law schools do make 13 style lawyer Instead of making a type of lawyer under the civil law system

Nadia Banteka

Lecturer, The Hague University, The Netherlands

The Parthenon Marbles Revisited – a New Strategy for Greece?

Cultural property disputes develop unique characteristics raising questions of ownership, possession, alleged destruction and looting, while simultaneously enveloping in legal vacuums and idiosyncratic statutes of limitations. Should objects of cultural heritage of a specific nation that have been removed in the past under ambiguous legal authorization, be returned to their source nation? This question has prompted an endless discussion among academics and scholars. Such is the case for the claim of Greece and its contention to the British Museum for the return of the Parthenon Marbles to their place of origin.

This paper attempts firstly to shed light into possible issues with the British ownership of the Marbles, namely (1) the problem of the language and form of the authority given by the Ottoman Empire to Lord Elgin, as well as a potential issue retroactive ratification, (2) issues of British law by virtue of legislation and binding case precedent, (3) the constitutive nature of the Marbles over the Greek nation *vis-a-vis* the idea of cultural property inalienability. With that covered, this paper moves to critically examine the debate between cultural nationalism and cultural internationalism in an attempt to propose a new standard advocating for an international managed market in cultural property exchange. Finally, this paper examines successful return strategies and proposes a new integrated approach between cultural nationalism and cultural internationalism under a new negotiation process.

This paper essentially seeks to identify a trajectory towards a more effective outlook on cultural property transcending the traditional ownership versus value debate as reflected so far in the scholarship. It attempts to do so by providing a shift in the context of the discussion from one of legal title and ownership to one of negotiation, cooperation, and advancement of both nationalist and internationalist ideals.

Anatoli Bayashou

Student, St. Petersburg State University, Russian Federation

The Judges of the European Court of Human Rights as a Specific Socioprofessional Group of International Legal Influence

In this paper the European Court of Human rights as a judicial organ of the Council of Europe is considered as an association of people with their personal, social and professional characteristics. The aim of the paper is to analyze the judges of the ECHR as a community of people ensuring the functioning of the Court in Strasbourg. The urgent need for this analysis is provided by the inevitability of judges representing the national legal systems and by the influence of their decisions and judgments on the national legal systems and the national perception of the principles of international law. The budget of the ECHR has become 50 times higher in 2013 than in 2000. The group is consolidated by their cooperation in real time, hence establishing a common identity. Earlier, the reforms of the Court have been concerning the human rights provided by the Convention of 1950. However, nowadays the reforms refer mostly to the structural reorganizing of the Court and procedures of judges' activity. The research question to be studied in the paper remains the following: to what extent is the role of judges in international law system to be changed? The inherent logic of the paper provides arguments to support its main thesis: the influence of judges is concentrating on advisory opinions within the Grand Chamber. The arguments are enforced with the interdisciplinary approach combining the sociological approach towards international relations, organizational sociology, law of international organizations.

Erman Benli
Lawyer, Turk Telekom, Turkey

Optimality Condition of Place of Injury Rule in Cross-Border Internet Torts and Implications for Turkey

Economic perspective is an instrumental way to deter tortfeasor so as to take efficient due level of care that reduces the probability of internet torts. We develop an extended new model that departs from the efficient condition of choice of law rule by O'Hara and Ribstein (1999). The first part of our model proposes the optimal amount of precaution in cross-border internet torts under strict liability. The second part of the model indicates the optimality condition of the place of injury rule. Then, we study the results of the model and its implications for Turkish Code of Concerning Private International Law and International Civil Procedure (2007) No.5718 article 34/II. In section 4, we conclude by discussing the interest and limits of our model with regard to cross-border internet torts.

Anri Botes

Junior Lecturer, North-West University, South Africa

Answers to the Questions? A Critical Analysis of the South African Labour Relations Amendment Bill of 2012 with Regard to Labour Brokers

Various obstacles experienced with labour brokers in South Africa made it clear that current South African labour legislation is inadequate with regard to the regulation of the triangular employment relationship (consisting of the labour broker, client and employee) and the protection of the rights of the employees involved. Labour broker employees are entitled to all general employee rights, but due to the atypical nature of their employment these rights are not always upheld. They rarely receive an adequate living wage and they suffer from job insecurity as the labour broker might be able to terminate their employment without an actual dismissal. The employees are not always able to bargain collectively and might even be excluded from labour legislation as labour brokers sometimes characterize them as independent contractors in order to avoid employer duties. The question regarding the labour broker's and the client's respective employer-status also raise issues.

Amendments to, among others, the *Labour Relations Act*, are proposed in order to attempt to resolve the problems. Within the *Labour Relations Amendment Bill* specific provision with regard to labour brokers is made for the allocation of organisational rights to trade unions, joint and several liabilities of the authority figures, rights of the employees and the identity of the true employer. When analysing the particular clauses in depth, one could however argue that the bill still does not address all the problems. Various clauses can be described as superficial and ambiguous and has the potential to create more questions than it provides answers.

It is therefore necessary to analyse the proposed bill in order to ascertain to what extent it could provide assistance in solving the problems experienced. It will be indicated which aspects within the *Amendment Bill* earn the most criticism. Suggestions will be made on how the bill can be improved.

Pieter Brits

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The Taxation of Customer Loyalty Award Programmes in South Africa

The development of customer loyalty award programmes by companies brings a novel form of interest to the fore in South Africa that needs to be investigated for purposes of taxation.

Individuals receive a rebate for interest earned on investments in South Africa. However, interest on income becomes taxable above a set threshold.

The accumulation of loyalty awards in a loyalty award programme poses certain problems from a tax perspective. It is the aim of this research article to investigate these problems.

Loyalty awards can be valued in monetary terms and they can therefore be included in the gross income of a taxpayer. The situation where loyalty awards are not used and accumulated needs further investigation in respect of the possible interest that could be earned by the customer on the capital amount of these awards held by the award giver vendor. The question needs to be addressed whether loyalty awards in this context can be regarded as a saving mechanism and whether interest, albeit on a notional basis, on the capital amount of the monetary value thereof should be included in the gross income of a taxpayer. In the event that a vendor pays interest on the capital amount of the monetary value to the customer, but at a reduced rate compared to the current rates paid by commercial banks, further questions of donations tax need to be addressed.

It is clear that various aspects of these loyalty award programmes need to be considered as far as the existence of interest in these loyalty award programmes could become taxable and treated as such.

Belma Bulut

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Transport Documents: The New Terminology and Categorisation under the Rotterdam Rules

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter the Rotterdam Rules) was adopted by the UN General Assembly in December 2008, and it was opened to signature in 2009. The Rotterdam Rules have not entered into force yet and, until now, only Spain and Togo have ratified it. The Convention aims to provide uniformity and satisfy the needs of the practice through the inclusion of some novel and comprehensive provisions. One of the significant novelties is introduced related to the carriage documents; since, in the current situation, there is complexity and ambiguity. The functions and legal character of the bills of lading vary from state to state; and while under common law, the documents are categorised as bill of lading, sea waybills etc. the same categorisation does not apply in other jurisdictions. However, in order to achieve a common understanding, the Rotterdam Rules introduce a generic term “transport document” and create a new categorisation for the transport documents. Furthermore, under the Convention, the carrier’s duty to issue transport document is restricted in some certain cases; and in such cases, the Convention allows undocumented transportation. Consequently, in respect of documents, the Rotterdam Rules do not follow the traditional terminology and regulation under the former sea conventions; and this new regulation might involve the pros and cons. In this study, it will be discussed that whether or not the new regulation is sufficient to satisfy the needs of the practice.

Anna Chronopoulou

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“Unwritten Lawyers”: A Comparative Approach on Representations of Women Lawyers in the Anglo-American and European Literature

The legal profession has witnessed changes in the number of women entrants not only in the Anglo-American but also in the European legal traditions. The growing number of women entrants in the legal professions worldwide resulted in the production and consumption of an exhaustive body of literature. This work examined women lawyers' experience in everyday legal practice. It also explored the problems that women lawyers face. It investigated further whether or not women lawyers could actually make a difference in legal practice. The growing presence of women lawyers in the legal profession attracted celluloid attention on both sides of the Atlantic. This, in turn, created enormous academic interest in the investigation of the portrayals of women lawyers on the big and small screens. A lot of academic ink has been spilt on the explanation of portrayals of women lawyers in the media; nevertheless, the position of women lawyers in literature has not become the object of extensive research yet. This paper seeks to address this absence. In doing so, it examines the reasons for this absence. It investigates portrayals of women lawyers in works of the Anglo-American literature. It also examines portrayals of women lawyers in the European literature. It draws parallels and exposes differences between the two strands of literature and realities of legal practice with the ultimate aim to provide insights into the positioning of women lawyers in literature on both sides of the Atlantic.

Quintin Cilliers

Lecturer, University of the Free State, South Africa

Has Social Media Become the Proverbial “Elephant in the Room” in Modern Labour Relations?

Although social media may still be a relatively new concept in labour legislation, it has been at the centre of many workplace disputes, generally regarding unfair dismissals.¹ What has become clear is that social en electronic media could cause difficulties if left unregulated.² Currently, the existing labour legislation and codes of good practise omit any provisions regarding the use of electronic media, which clearly labels this concept as the “elephant in the room”.³ Apart from the risks that social media poses in the workplace; it can also influence employment and can be of considerable value to an organisation if implemented correctly.⁴

Social media has become a deciding consideration in employment and modern labour relations and employers have thus drafted workplace policies to attempt to avoid or resolve situations where misuse of the company’s systems occurs. Generally these policies do not encompass all the applicable aspects and safeguards necessary to create clarity on a set of enforceable rules or to ensure that employees comply with the provisions thereof.⁵

This study will thus aim to critically analyse the effect and value of social media in the modern workplace and attempt to suggest practical solutions that might address disputes concerning this ever-growing “elephant” by comparing the situation in South Africa with international jurisdictions.

¹Woodman 2012: 1; *Sedick& another v Krisray (Pty) Ltd* [2011] 8 BALR 879 (CCMA); *Keeffe v Williams Muir’s Pty Limited T/A troy Williams The Good Guys* [2011] FWA 5311; *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544.

² Kelleher D 2009: 5 *Problems with social networking in the workplace*. Found at http://www.information-management.com/specialreports/2009_165/social_networking_media-10016208-1.html [21 September 2012].

³An expression that has its origin in the United States of America, possibly during the 1950’s. The expression means “An important and obvious topic, which everyone present is aware of, but which isn’t discussed, as such discussion is considered to be uncomfortable or superfluous.” Found at <http://www.phrases.org.uk/meanings/elephant-in-the-room.html> [06 December 2012].

⁴ A survey of approximately 2800 university students and young professionals held in 2011 found that at least 56% of these individuals would not accept an employment offer from a business which restricts or bans the use of social media in the workplace, or they would accept an offer and find a way to bypass the restriction or ban – see Benedict 2012: 5; see also <http://www.shrm.org/TemplatesTools/hrqa/Pages/socialnetworkingsitespolicy.aspx> [06 December 2012].

⁵McBrayeret al 2011: *Around the Virtual Water Cooler: Assessing, Implementing and Enforcing Company Social Media Policies in Light of Recent National Labor Relations Board Trends*. Found at <http://www.mmlk.com/Site-Map.shtml> [28 September 2012].

Sonja Cindori

Assistant Professor, University of Zagreb, Croatia

Money Laundering and Terrorist Financing - Perspectives of Further Development of the Risk Based Approach in Assessment of Suspicious Transactions

Although social media may still be a relatively new concept in labour legislation, it has been at the centre of many workplace disputes, generally regarding unfair dismissals.¹ What has become clear is that social and electronic media could cause difficulties if left unregulated.² Currently, the existing labour legislation and codes of good practice omit any provisions regarding the use of electronic media, which clearly labels this concept as the “elephant in the room”.³ Apart from the risks that social media poses in the workplace; it can also influence employment and can be of considerable value to an organisation if implemented correctly.⁴

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that might address disputes concerning this ever-growing “elephant” by comparing the situation in South Africa with international jurisdictions.

Ramandeep Chhina
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Uniform International Legal Regime for Multimodal Transport: Blatant need but no General Acceptance

Currently there is no set of uniform rules for multimodal transport that have received general acceptance and thus came into force internationally. Following the growth of containerized transportation in 1960s and the declared support for the enactment of a multimodal transport regime, attempts have been by several international organisations to establish a widely acceptable uniform international legal framework governing multimodal transport. Nonetheless, none of these attempts have been successful to bring about international uniformity; whether it be the UN Convention on International Multimodal Transport of Goods 1980 or the UNCTAD/ICC Rules for Multimodal Transport Documents 1992. In consequence, however, a variety of national, regional and sub-regional laws and regulations proliferated to deal with the various issues arising from multimodal transportation, which further resulted into uncertainty in multimodal transport law due to significant differences on key issues such as the liability basis and limitation of liability.

This paper provides a brief overview over the past international attempts to achieve harmonization in multimodal transport law and examines as to why it has become extremely difficult to provide a widely acceptable legal instrument in this field despite of its blatant need and demand by the industry. In particular, the paper examines the possible reasons for the failure of the UN Multimodal Transport Convention 1980 to attract sufficient support and compares and analyses the approach to multimodal transport under the recently drafted Rotterdam Rules 2009 with a attempt to establishing whether these Rules provide an adequate solution to achieve the objective of uniformity and efficiency in multimodal transport law or result into yet another set of rules contributing to further disunification in the field at international level. This analysis has become imperative considering the continuing growth of international multimodal transportation.

Maria Luisa Chiarella

Researcher, Università Magna Graecia di Catanzaro, Italy

Property and Fundamental Rights, between Courts Judgements and Constitutional Norms

This paper concerns the evolution (of the interpretation) of constitutional rights, considering the relevance of human dignity, solidarity and equality in private law debate and, in particular, the relationships between person and economic rights on the basis of international Conventions and Declarations of rights. Recent theories (Peces Barba, Ferrajoli) maintain that “fundamental” means “universal”, while rights which tend to exclude, such as property, are not fundamental, since, differently from liberty rights, they don’t have any universal application (they are not referred to everybody in general). On the contrary, social rights are universal rights since they can belong to each individual, without difference of any kind. This enquire has a particular significance in Italian law, considering that Italian Constitution regulates property and economic liberty in Part IV (“Rapporti economici”), rather than in Part I “Principi fondamentali”. This may mean a different importance of these rights in comparison to fundamental rights *tout court* (expressly protected by art. 2 of Italian Constitution). It’s also interesting to consider the “non pecuniary” damages that European Courts acknowledge to individuals in case of illegitimate expropriation of private property; evaluating these issues, it’s possible to investigate about the existence of a fundamental/human core in property rights. The research aims to analyse legal scholar and judicial debate concerning fundamental rights according to the concept of multi-level citizenship, considering the direct effect of constitutional norms in private law relationships.

Paola Chiarella

Research Grant, Università Magna Graecia di Catanzaro, Italy

Social Security for Immigrants and New Perspectives of Citizenship

The aim of the paper is to analyze the social protection and the political condition of immigrants in order to offer new models of legal safeguard and new forms of citizenship. Continuous migratory streams raise the problem of regulating the presence of immigrants in a different country that should be directed towards a progressive integration of them in the new community. On the contrary, reality shows deep forms of social exclusion and economic exploitation towards immigrants. Starting from these factual elements, this paper aims to control how the social protection of immigrants is still unsatisfactory and, furthermore, if it is possible to set up a "territorial citizenship" that recognizes civil and political rights to immigrants. The basic idea of the research is that the presence of foreigners in our country should not be seen as a threatening factor, but above all as an occasion of human and cultural enhancement and not only as an economic source. In this perspective, it is possible to obtain new theoretical and practical patterns of "advanced democracy" that, takes (beyond the *iussanguinis* and the *ius soli*) the *iusdomicilii* as a renewed paradigm for citizenship. The basic idea of this paradigm is the concept of *contiguity* founded on the importance of sharing a common space. In this perspective, the debate about citizenship concerns the requirements for a change as such.

Maralize Conradie

Lecturer, University of the Free State, South Africa

A Critical Analysis of the Right to Fair Labour Practices

Section 23 of the Constitution is an embodiment of fundamental labour rights. Section 23(1) reads as follows:

'(1) Everyone has the right to fair labour practices.'

The 'fair labour practice concept' is a rather recent development in South African labour law and is it therefore still required to attempt to provide meaning to this concept. It further becomes essential to provide meaning to the concept if it is acknowledged that when this concept was introduced in 1979, the unfairness of the concept was regulated by labour legislation and the Industrial Court's equity jurisprudence; currently, not only the unfairness of this concept is legislatively regulated but is the fairness of this concept embedded as a constitutional guarantee in the Constitution of South Africa. It has therefore become necessary to determine the exact scope of this constitutional right in order to determine the relation between the legislative concept and the constitutional right and to investigate whether there is any room for an extended view of this right and to which limitations (if any) it should be subjected to.

Prior to analysing the constitutional right to fair labour practices, a comprehensive investigation was led into the historical position preceding the introduction of this right. It was found that the history of 'fair labour practices' played an immensely important role in the analysis of this constitutional right. The events, motivations and circumstances which consequently led to the introduction of this right, without any doubt, provided a useful guideline as to the interpretation of the right. The disregard for the human element present in the employment relationship, not only while slavery was in existence but also in the continued policies and mindsets of policy-makers thereafter, could be described as the first element contributing to the unfairness of labour practices. It was also found that, although the common law still being relevant, the common law contract of employment should no longer serve as the yardstick for establishing the existence of an employment relationship (for purposes of provision of protection and ensuring fair labour practices). Regards must rather be having to all the circumstances surrounding the relationship between a person rendering services and the person paying for the services in order to establish the true nature of the relationship. In the end, protection for either of these parties is not solely dependent on a contract of employment anymore, but rather on the fact whether an employment relationship was proven or not. Before the enactment of the Constitution, protection in an employment context was literally limited to legislation providing protection. It is suggested that legislation should be interpreted according to the Constitution and common law should be developed in terms of the Constitution. Based on this premise everyone can currently enjoy the

right to fair labour practices based on sect 23(1), even if excluded by legislation or common law and even in the absence of regulation by legislation or common law.

When analysing the word 'everyone', it is submitted that our law has moved beyond the realms of contract to broad constitutionality in determining who is an 'employee'. A claim to be recognised as an employee in terms of the 1995-LRA is not contractual in nature but rather a claim to enforce constitutional rights. Although a contract of employment (or being regarded as an employee) is required to claim labour rights in terms of the 1995-LRA and other labour laws, sect 23(1) of the Constitution provides broader protection than labour laws where a person is in a work relationship 'akin to an employment relationship'. 'Everyone' should be determined with reference to 'being involved in an employment relationship'. The following persons will therefore in general enjoy protection in terms of this right: natural persons, juristic persons, employers, workers (including employees employed in a contract of employment and employees *in utero*), independent - and dependent contractors, citizens, aliens, children, job applicants, illegal workers (to a certain extent), temporary workers, casual workers, acting workers, probationary workers and managerial employees. It is also suggested that the protection afforded by sect 23(1) is not limited to an individual relationship but extends to collective relationships as well.

Fairness is a concept that has drawn attention not only since the unfairness of labour practices in South Africa has been realised but since the beginning of time. In attempting to comprehend the meaning of this concept attention should therefore be divided to the unfairness complained of, the views of ancient philosophers, the recommendations of the Wiehahn Commission, the previous Industrial Court's perception and decisions on fairness, contemporary views and future predicaments (last mentioned form an important part of defining this concept due to the fact that much of the meaning of the concept of fairness is contained in its idealistic nature). Determining the 'fairness' of a labour practice should not be done according to a value judgment made by a court as this would lead to much uncertainty. Therefore a statutory definition of an unfair labour practice must be interpreted and applied in accordance with the spirit, purport and objects of the fundamental rights guaranteed by the Constitution. It is not certain what type of value judgement will ensure fairness and it is also uncertain how it should be done. Furthermore, the content and standard of such a value judgment is uncertain. Brassey's determination of fairness ensures much more certainty: A labour practice will only be regarded as fair if it bears both an economic rationale and also proves to be legitimate. It is suggested that fairness is determined by balancing the respective interests of parties in any given situation.

If the other factors, *i.e.* the concept of 'everyone' and the meaning of fairness', influencing the application of sect 23(1), the history of unfair labour practice regulation and the values of the Constitution are taken into consideration, it seems justified to conclude on the concept of 'labour practices' in the following fashion: the Constitution envisaged to prevent and prohibit the repetition of a system that was representative of unfairness in the employment relationship. Both individual - and collective employment

relations have bearing on the perceived fairness of the employment relationship. All practices concerned with the employment relationship (before, during and after such a relationship) should therefore be subject to the scrutiny of the constitutional right to fair labour practices.

Penny-Anne Cullen
Professor, Coventry University, England

Contracts of Employment: A Preliminary Study of the Interaction between Relational Norms and Formal Agreements

This paper presents a scoping study regarding the written contract of employment and other informal factors that encompass the suite of obligations that parties establish *ex ante* and evolve *ex post* the employment relationship.

The research is intended to develop the programmes EPSRC/ industry funded team at the University of Warwick (LoTISS 2000-2003; ECLOS 1998-2000) in extending Macneil's original concept of relational contracting (Macneil, 1974-2001) to the employment relationship.

This assessment of employment contracts primarily focuses on branches of socio-legal and institutional economic research regarding the combination of human traits and formal contracts on the employment relationship. The review of the informal and formal factors that bind the employment relationship presents a perspective of transaction cost economics (Williamson, 1973-96; Battu, McMaster and White, 2002) that Campbell and Picciotto differentiate from the classical "old institutional economics" (Campbell and Picciotto, 1998; 273) and the relational contracting school (Macaulay, 1963; Macneil, 1974a, 1974b; Beale and Dugdale, 1975; Lyons, 1995; Campbell, 2001). The analysis then refers to empirical data that was gathered to initiate the groundwork for future research regarding the influence of relational contracting in employment contracts.

The main focus of existing contributions from the relational contracting and transaction cost economics schools analyse contractual relations from a commercial, rather than an employment context. Therefore the methodology of the paper is based on this commercial grounding. Nevertheless, the legal focus of both these branches of research is that of the Common Law of contract. As this classical, *laissez-faire* (Macneil, 1974a) perspective is the universal foundation of both commercial and employment contracting, it is proposed to be an appropriate basis to found the methodology of this paper and for the future work that the authors are developing in a workplace context.

In principle, the employment contract focus of the paper concurs with the original legal realist (Llewellyn, 1931) and relational contracting (Macaulay, 1963; Macneil, 1974-2001; Beale and Dugdale, 1975) schools that analysed commercial contracting in its real world phenomena.

Future research will develop the contractual aspects of seconding employees into extended enterprises (Cullen, 2000; Hickman, 2009) and network forms (Adams and Brownsword, 1990) of inter-firm relations. This examination of employment contracting will continue the analysis of relational norms in terms of their nexus with the nature and role of trust in employment contracts. Significantly this direction will follow the

recommendations of and Campbell and Picciotto (1998) and Lyons and Mehta (1997) that trust should be evaluated as a relational text between the lines and how it acts as a bond between contracting parties.

Claire de Than

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Jesse Elvin

Lecturer, City University London, UK

**The Public-Private Divide in Prosecutions and
Obtaining of Evidence: Towards a Code?**

Gerda du Toit

Lecturer, University of the Free State, South Africa

Protection of Persons during Disaster Response

This paper focuses on three aspects relating to the protection of persons during disaster response: firstly, the development of current laws and legal issues in international disaster response; secondly, the need to extend the application of International Humanitarian Law, International Human Rights and Refugee law to natural and industrial disasters and; thirdly the protection of persons during disaster response under Article 13(a) of the Charter of the United Nations.

Natural and industrial disasters include earthquakes, tsunamis, floods, droughts, major oil spills, industrial releases, etc and lately seem to increase in magnitude. Un-expectant countries are becoming more susceptible to such disasters and their consequences and yet governments remain ignorant and ill prepared to respond to such disasters in solitude.

In order to support countries in need, the international disaster response community has shown a great increase in responders. This necessitates the need to develop instruments in international disaster response to effect measures of control over responders and aid organisations to ensure immediate, quality, sufficient and effective assistance, especially when dealing with cross border aid. In order to address these issues of support the International Disaster Response Laws, Rules and Principles (IDRL) commits itself to the development of aid facilitation and regulation of international disaster response.

Primarily International Humanitarian Law (IHL), International Human Rights and Refugee Laws apply to situations of armed conflict. It is suggested, however, to extend this application to situations of natural and industrial disasters since hazards creating these are directly linked to human vulnerability which vulnerability necessitates the protection of humans and evidently human rights as provided for under these instruments.

In conclusion this paper seeks to highlight only a few of the numerous important aspects relating to effective disaster response in order to create a sustainable and disaster resilient environment.

Julen Etxabe

Postdoctoral Researcher, University of Helsinki, Finland

The Audience and the Judge

Against those who would maintain that the interpretation of literature and law are two radically different activities that could (and should) not be compared, in this presentation I will try to compare the task of the judge with the theatrical audience, assessing one in terms of the other. The heart of my position is that the audience's engagement with the dramatic performance elicits certain faculties that are central to the activity of judging hard legal conflicts, and vice versa, the legal judge must construct his or her position as does the audience in the theatre. Accordingly, the skills and dispositions required for judging both drama and law are actually the same, even though the implications of the two contexts may differ. Both activities require, fundamentally, not impartial disinterestedness as in the Kantian moral tradition, but affective and engaged concern, in order to assess not just the issues the case presents, but the complex interactions that both judge and audience should be establishing with them.

Laetitia Fourie

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Lecturer, University of the Free State, South Africa

A Labour Law Perspective on Employees with Depression

The World Health Organization (WHO) defines depression as follows: "Depression is a common mental disorder that presents with depressed mood, loss of interest or pleasure, feelings of guilt or low self-worth, disturbed sleep or appetite, low energy, and poor concentration. These problems can become chronic or recurrent and lead to substantial impairments in an individual's ability to take care of his or her everyday responsibilities. At its worst, depression can lead to suicide."

Depression has become a major common epidemic affecting over 121 million people worldwide and will be the second most common by the year 2020.

The WHO's definition of depression meet all the requirements of "disability" in terms of the Code of Good Practice on the employment of people with disabilities in South Africa. This Code, issued by the Employment Equity Act, No. 55 of 1998 (which protects people with disabilities against unfair discrimination and entitles them to affirmative action measures) is a useful guide for employers and employees on key aspects of promoting equal opportunities and fair treatment for people with disabilities as required by the Employment Equity Act.

South Africa is still a developing country and therefore disability has not been fully adressed by it's legislation. The Code of Good practice on Employment of people with disabilities considers "People with Disabilities" as those who satisfy all the criteria in the definition:

- having a physical or mental impairment;
- which is long term or recurring, and;
- which substantially limits their prospects of entry into or advancement in employment.

Disabled people constitute a historically disadvantaged and marginalized group that experiences discrimination in the workplace. This paper emphasizes the current position of employees with disabilities and more specifically employees with depression in the South African labour market.

Dorota Galeza

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A New ECN Model. Extraterritorial Jurisdiction and the Rule of Law

A new ECN model – incorporation of judicial cooperation, dispute resolution procedure, new procedural standards and RIAs. I will make certain comparisons to the US.

The EU model's characteristic is technocratic decision making. In my opinion, the adoption of wider political standing, such as in the US's AG is not necessary, but the view of public interest groups, civil society organizations, and citizens should be incorporated somehow. In general the model of regulatory state provides a direct participatory role to these groups by measures such as RIA and peer overview, which give actors the ability to pursue the wider community interest. I will try to design a new RIA for ECN basing on literature that comes from the US.

How judicial cooperation could be compatible with judicial independence and procedural autonomy and does it really achieve consistent application of the rule of law? I will argue in a similar vein as Wright, that greater transparency would boost legitimacy and legal certainty and in this way promote convergent application of EU anti-trust among national judges. Current proposals to enhance these aspects are misplaced and could be better achieved by publications of opinions and possibly national judgments. I will also argue whether duty of loyal cooperation under Article 4(3) TEU could be extended to national courts.

I will also argue that lack of a strong dispute resolution mechanism can result in possible conflict of case allocation and consequently the NCAs would be deemed to assume jurisdictions for parochial reasons in cases with political dimensions. Under the current model decisions of the NCAs may also be taken to the Advisory Committee on Restrictive Practices and Dominant Positions, without leading to a formal written opinion. I will make a comparison to the US model to strengthen my argument. I will also consider wider accountability considerations.

Varun Gauri

Senior Economist, the World Bank, USA

A Monitoring Mechanism for Constitutional Decisions: A Study of the Costa Rican Supreme Court

Most theories and most empirical studies of government compliance with judicial review orders focus on high profile cases, and do not address the high-volume, quotidian claims against the state for basic services that constitute the largest share of court dockets in many jurisdictions. We use a unique dataset on compliance with orders from the Constitutional Chamber of the Supreme Court of Costa Rica to examine the determinants of compliance in low salience cases. We find that orders issued just after the Court announced, in a press conference, that it was monitoring compliance were implemented roughly two months sooner than orders issued just prior to the press conference. These findings suggest that publicity can motivate compliance even in low salience cases. We develop an account of how it affects the decision making of senior policy makers, bureaucrats, and courts.

Swati Gola

PhD student, University of Manchester, UK

Health Tourism in Incredible India: Are Overseas Patients Good for the Health of India's Poor?

Since the 1990s, international trade in health services emerged as the fastest growing sector in the world economy facilitated by domestic structural adjustment programmes resulting in restricted public-health systems and increased private sector participation. It changed the nature of health services from providing a necessary service to a premium commodity. Endorsing the inclusion of services in the trade agreement, the WTO secretariat posited that service liberalisation can assist Member States in promoting economic welfare by providing them with the means to capitalise on competitive strength. The benefits of economic growth will trickle down either directly through increased income or indirectly as the increased government revenues are spent on infrastructural development and supporting public-health services. In 2005 India opened its health sector for foreign patients and facilitated health tourism by introducing a medical visa category. From this starting point, this paper will examine if there exist any direct, probable or potential links between the increased influx of foreign patients and the affordability, accessibility, and quality of hospital services for socio-economically disadvantaged populations. It forms part of my doctoral research and my conclusions are based on the documentary analysis of administrative data collected through fieldwork in India. The paper evaluates the extent to which liberalisation policies achieved the desired result of increased economic welfare through capitalising on competitive strength, and further investigates its impact on equity and health. I will argue that there are already structural problems in the Indian hospital sector that will be aggravated by greater corporate presence and unregulated service trade liberalisation. Therefore, in order to ensure that economic benefits trickle down to the poor, India should first strengthen its public-health system and devise appropriate regulations, monitoring and grievance redress mechanisms.

Thomas Hickie

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Australia

If Promoting Fair Play is the Basis of the World Anti-Doping Code then is it not Ironic that the Code is so Unfair?

The logo of the World Anti-Doping Code contains the slogan “play true”. The preamble to the Code states that the ‘fundamental rationale for the World Anti-Doping Code’ is ‘to preserve what is intrinsically valuable about sport ... it is the essence of Olympism; it is how we play true’. This is further defined in the preamble by the statement that ‘the spirit of sport ... is characterized’ by such values as ‘ethics, fair play and honesty’, and ‘respect for rules and laws’. If promoting fair play is the basis of the World Anti-Doping Code then is it not ironic that the Code is so unfair? The draconian nature of the World Anti-Doping Code means that fault does not have to be proved. Explanations only go to the penalty to be imposed. Not content, however, with undermining of the rule of law in many countries by implementing a code where absolute liability prevails, and thus at odds with domestic laws where fault must be proved, the Code may soon be heading in an even more questionable direction. A recent example will be analysed where the Australian Sports Anti-Doping Authority (ASADA) has lobbied the national government to draft legislation proposing to give the CEO of ASADA criminal coercive powers. That is, to make it a federal “civil” offence for a player to refuse to be interviewed by ASADA. There is also a vicious sting in the tail. Although there is to be a statutory protection so that what an athlete says in any ASADA interview cannot be used against them in any subsequent legal proceedings, the protection is limited. It will not apply to any charges laid under the national *Criminal Code* for providing false and misleading information or false or misleading documents, each of which carries a penalty of 12 months imprisonment. Australia has been at the forefront of supporting the IOC and WADA. Indeed, WADA’s current president is an Australian. What is now proposed in Australia many other countries may soon be lobbied to follow suit. Once governments allow national anti-doping bodies to undertake investigations with threats of financial penalties and ultimately criminal sanctions, sport will have crossed the Rubicon from which there will be no return.

David Holmes

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'Beyond the Prize': Amateurism, Athletics and International Human Rights Law

Amateurism dominated the landscape of international sport for the greater part of the twentieth century. This ideology constituted the *sine qua non* of international sporting federations, affecting the lives of millions of athletes worldwide.¹ Whether or not it was amateurism's very appeal that has foiled scholars' attempts to understand the essential nature of this ideology, one can only guess at. Nevertheless, scholars have failed to recognise that amateurism was, at heart, a pernicious (rather than wholesome) ideology. Further, and in contraposition to the scholarship, I argue that amateurism was far more injurious to the athletes who participated in the system than it was towards those it excluded. Rather, it favoured those who administered the system insofar as disempowering others empowered themselves. By way of case study, this paper sets out to illustrate how the modus operandi of amateurism was chiefly concerned with restricting an athlete's liberty and freedom of movement. Because amateurism has not, until now, been understood in such terms, this paper further contends that amateurism has been overlooked as a human rights issue, violating central tenets of international human rights law.² The title of this paper, 'Beyond the Prize', encapsulates both the rhetoric of amateurism and its darker reality—a reality in which the basic rights of athletes was also 'beyond'. The findings of this paper have significant implications for both the law and administration of sport.

¹ On the dominance of amateurism in international sport see, as a starting point: A. Guttmann, *From Ritual to Record: the Nature of Modern Sports*, Columbia University Press, New York, 1978, pp. 20-39.

² Further to this, it is a basic principle of common law 'that every act which restricts or interferes with a person's freedom is unlawful.' For a concise overview of this principle see E. Campbell and H. Whitmore, *Freedom in Australia*, Sydney University Press, Halstead Press, Sydney, 1977, pp. 13-14.

Lezelle Jacobs

Lecturer, University of the Free State, South Africa

Qualifications and Competencies of Business Rescue Practitioners in South Africa

In 2011 a new Companies Act 71 of 2008 came into effect in South Africa. The new Act brought about several important changes with regards to corporate law in South Africa. One of the most important changes brought about in the new Act were the inclusion of a whole new corporate rescue system.

In the current economic climate, where more and more companies find themselves under financial strain, an effective business rescue system is essential. A system is needed which affords the company an opportunity to once again become a successful concern and carry on business on solvent grounds. The key role player in the business rescue procedure is the person in who the duty to rescue the company vests, namely the business rescue practitioner. The practitioner's main functions are to manage the affairs of the company under supervision and help the company to rehabilitate itself by drafting and implementing a business rescue plan.

This paper will focus on the possible development of a competency and qualification framework for business rescue practitioners in South Africa. The fact that the Companies Act only came into effect on 1 May 2011 makes research on this topic relevant for the disastrous economic climate we find ourselves in and even more so in a developing economy .

A possible solution for the South African problem of inadequate regulatory provisions regarding Rescue Practitioners needs to be addressed.

The paper will therefore focus on determining which qualifications are needed to effectively act as rescue practitioner and also to investigate the feasibility of a business rescue regulatory board to regulate the rescue profession.

Danielle Ireland-Piper
Senior Teaching Fellow, Bond University, Australia

Extraterritorial Criminal Jurisdiction and the Rule of Law

Nations states are demonstrating an increased willingness to assert jurisdiction over conduct occurring extraterritorially. This paper considers why that may be the case, and seeks to examine the extent to which assertions of extraterritorial criminal jurisdiction are consistent with the rule of law. Case studies of assertions of extraterritorial jurisdiction are presented and analysed using five principles as benchmarks. To that end, the rule of law is taken to refer to the following five principles: 1) The law must be both readily known and available, and certain and clear; 2) The law should be applied to all people equally, and operate uniformly in circumstances which are not materially different; 3) All people are entitled to a fair trial; 4) There must be some capacity for judicial review of administrative action; and 5) The Executive arm of government should be subject to the law and any action undertaken by the Executive should be authorised by law. The paper will suggest that there are currently inadequate legal frameworks for the regulation of extraterritorial jurisdiction.

Rinat Kitai-Sangero

Professor, Academic Center of Law and Business, Israel & Ronit Kedar

Analyzing the Concept of Mercy in Shakespeare's "Measure for Measure". (Law & Literature)

The questions of whether justice in criminal punishment includes mercy (defined as an imposition of less than the deserved punishment out of benevolence), and when the exercise of mercy is appropriate, are controversial issues.

Shakespeare's play "Measure for Measure" explores the proper balance between justice and mercy in the legal system. The sweeping pardons granted by the Duke raise the question of whether every offender received his just desert, as the title of the play suggests.

The paper would analyze the questions of whether the arguments presented in the play in favor of mercy (mercy as a virtue, perhaps disconnected from the nature of the offense and the offender; the individual's potential for rehabilitation), and whether the pardons granted, morally make sense. The paper would especially focus on the legal and philosophical argument for mercy according to which judges themselves and every ordinary person could fail in the same sin for which the judge has sentenced the defendant. Although the potential of all of us to sin cannot of itself justify impunity, human frailties should be taken into account in both enacting criminal offenses and meting out punishment.

Pablo Lerner

Professor, Academic Center of Law and Business, Israel

Foreign Influences and Law Reviews Rankings in Israel Legal Scholarship

Recently the Hebrew University, Law Faculty released a ranking of legal journals that embraces more than 500 law reviews. The purported aim of this ranking is to "guide" Israeli (or perhaps only Hebrew University) law researchers toward publication in the law reviews, considered by the editors to be most prestigious. Rather than analyzing this ranking (the first international ranking created by an Israeli law school), the purpose of my presentation is to offer insight into the relationship between this ranking and trends in Israeli scholarship.

The ranking divides law reviews into four categories (A-B-C-D) according to their perceived quality and importance. Short of Israeli law reviews (I refer to this point below), most of the law reviews, in all of the categories, are American. The fact that this ranking is clearly American biased is seen at odds with the history of Israeli legal education. It is important to remember that the Hebrew University, Faculty of Law was created by European professors having a clear-cut continental approach to legal theory. These "founding fathers" tried to establish the scholarship and legal education based upon a continental-oriented approach. However, they fell short of succeeding. The new generation of scholars is even less knowledgeable of continental legal culture than those before it. One reason for this—and is indicative of the English language reviews in the ranking—is that short of English, most Israeli scholars (and students) cannot speak any foreign language..

No less noteworthy is the fact that Israeli law journals are not found in the first, prestigious category and only begin to be present in the second, "B" category (or even lower—however, the distinction between the grade given to the different Israeli law reviews is beyond the scope of this paper). According to the editors, while the standard of Israeli legal journal is quite high, acceptance to publication in an Israeli journal is "easier" than to one of the top American journals. I do not intend to challenge this assumption, but do question whether it does not also hide the fact that for a considerable number of Israeli law scholars, publishing in America is more important than publishing in Israel—for instance for reasons of tenure.

Assuming that the ranking reflects the scholarship approach in Israel, the outcome is that law professors teach in Israel "Israeli law," but research theoretical analysis that is relevant for the American fora and according to American scholastic patterns. Consequently, it is not astonishing that this ranking received harsh response from Israeli scholars who reject this American linkage, arguing that Israeli law should be constructed within a "nationalistic" academic framework.

Israel is defined as a mixed jurisdiction since, although based on common law, it also bears elements of civil or continental law. Moreover, religious law (principally in questions of personal status) is present in Israeli law. Assuming

that a mixed jurisdiction gives expression to, at least, two different legal cultures, it is difficult to see that the approach of the Israeli scholarship (or at least the approach adopted by the ranking's editors) as a balanced one, since by and large most of Israeli scholars has largely jettisoned the continental approach which was one the pillars of this mixed approach, and prefer to relied on a common law and more particularly on American sources.

I believe that there is not just one option for researching or teaching law – i.e., an American oriented approach (and certainly I do not obviate or underestimate the importance of American scholarship) or a local approach. The true option lies between a broad, pluralistic, and comparative approach which understands different insights, grapples with the differences between legal systems that import or export legal ideas and concepts. Thus, I believe that law reviews ranking should be taken with a grain of salt.

Monica Lopez Lerma
Researcher, University of Helsinki, Finland

Aesthetics of Violence: The Battle between Memory and Oblivion

This paper addresses the recovery of the historical memory of the victims of Franco's dictatorship (1939-1975) in light of Guillermo del Toro's *El Laberinto del Fauno* (*Pan's Labyrinth*, 2006). The film combines the imagery of dark fairy tales with images of graphic violence (e.g., torture and murder) to look back at post-war Spain and, in particular, Franco's repressive dictatorship and the resistance of the Maquis, the anti-Francoist guerrilla fighters. Drawing on Eduardo Cadava's work on memory and Marc Augé's notion of oblivion, I trace via the multiple worlds pictured in the film a series of recurring representational practices (words, images, or figures) that, in their persistence, reveal that memory and oblivion are irrevocably intertwined in constructing the narrative of the Spanish past. In the second part of the paper, I use Alison Young's approach to the cinematic crime-image to explore how the film's representation of violence, as well as its affective dimension (the ways the viewer is implicated in the scenes of violence), invites viewers to challenge the authority, legitimacy, and judgment of past crimes.

Michael Malloy

Distinguished Professor and Scholar, University of the Pacific
McGeorge, USA

Core Principles for Effective Banking Supervision: New Concepts and Challenges

This paper examines certain fundamental issues raised by the existence and application of the newly revised *Core Principles for Effective Banking Supervision*. First, what expectations are imposed upon jurisdictions that adopt the *Core Principles*? Second, are the *Core Principles* an effective response to the international financial crisis? Third, what is the legal status of the *Core Principles*—mere guidelines, a significant new source of law in international practice, or something in between? The paper argues that the *Core Principles* represents a distinctive and highly effective approach to the coordination of legal norms across borders that, in the context of international banking practice, may operate as a set of functionally binding norms – and possibly a new source of law in international practice.

Regina Menachery Paulose
Attorney, USA

New Framework in the Law of War: Combatting Transnational Organized Crime

This paper will focus on how the current law of war paradigm will never accurately be able to accomplish conflicts all over the world. Nation states work under the continued assumption that they must choose one side and that wars are fought only between two parties. However, this paper will suggest through research, that transnational organized crime groups, need to be the main focus of any war. The paper will explore how transnational organized criminal groups are a) the source of conflict many times b) how they continually supply the means of warfare and c) how they benefit from regime changes and gain control at a later stage. The paper will focus on two or three international/non international conflicts as examples.

Stefanos Merikas

PhD Candidate, University of Reading, UK

How Different is the Relevant Market Definition in Tramp Shipping Services?

On the 26th of September 2013 the sector specific Guidelines on the application of Article 101 TFEU to tramp maritime transport (Maritime Guidelines) providing, *inter alia*, guidance for the delineation of the relevant market for EU competition law purposes will lapse and will be superseded by the general - non sector specific - guidelines. However, the delineation of the relevant market in the tramp shipping maritime services is a complex task not only because of the scarce legal precedence and the little attention paid by the literature, but more importantly due to particularities of the industry. This paper, after highlighting briefly the debate for the retention or not of the Maritime Guidelines, aims to address the issue how the relevant market doctrine should be applied when defining the relevant market in tramp shipping maritime services. This paper will focus on the definition of the relevant product and geographic market within tramp shipping sector both from the demand and supply side and will examine how the factual complexities and the specific features of the industry affect it. It will be argued that the specific criteria of the industry such as the nature of the cargo, 'the maritime cycles of prices', the notion of 'time' and the mobility of the ships play a central role in the delineation of the relevant market. The present paper argues that when defining relevant market in tramp shipping sector a subtle and pragmatic approach of qualitative or quantitative methods available is required closely linked to the specific features of the industry. In the new era for tramp shipping sector where compliance with EU competition laws is obligatory as in any other industry, identifying the relevant market in which each undertaking concerned operates is the starting point towards the self - assessment process mandated and required by Reg 1/2003.

Glancina Mokone

Lecturer, University of the Free State, South Africa

A Critical Appraisal on the Effectiveness of the International Monetary Fund and the International Bank for Reconstruction and Development Regarding Sustainable Development in Specific African Developing Countries

Sustainable development is founded on three dimensions or pillars those being: the economic pillar, social pillar and the environmental pillar.¹ For purposes of this paper, however, the social pillar will be divided into two pillars, those being: education and health. Thus, sustainable development, in this context, is founded on the following pillars: the economy, education and health.

The role or mandate that the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) are to fulfil is stated in their articles of agreement.

The objective of the paper is to investigate the effectiveness of the IMF and the IBRD in their mandate regarding the sustainable development of specific African developing countries, particularly in the areas of economic policy, education and health as these are, for the purposes of this study, considered the pillars of sustainable development.

The investigation will focus on the following areas: (1) the mandate set forth by these financial institutions; (2) the governance structure within the IMF and the IBRD; and (3) the relationship these institutions have with each other on the one hand and, on the other hand, the relationship they have and ought to have with the countries receiving aid from them within the context and meaning of sustainable development for purposes of this paper. The paper will endeavour to develop and recommend measuring instruments to determine the effectiveness of these financial institutions.

¹Cléménçon 2012:312.

Hermanus Molman
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The Decriminalization of South African Company Law

Numerous criminal offences run like a golden thread through South African company law. The Companies Act of 1973 was criticised for too readily invoking criminal sanctions when civil or administrative penalties would have sufficed. It placed an extreme burden on the criminal system, which consequently led to transgressions not being penalised effectively. The revision of the 1973 Act became imperative and the decriminalising of the company law was seen as a more credible and effective redress. The 2008 Act came into effect on 1 May 2011 and, instead of relying only on civil sanctions to decriminalise the South African law, also introduced administrative sanctions.

The decriminalisation of the South African company law led to the main research question of this study, namely: Does the 2008 Act, when compared to international best jurisdictions, provide for a predictable and effective environment for the enforcement of those acts or omissions that were decriminalised by the Act?

The criminal offences imposed by the 1973 Act were compared with those of the 2008 Act; and the acts or omissions that were substituted by civil and administrative sanctions identified. The civil and administrative sanctions created by the 2008 Act were then compared with those of international best practice jurisdictions to identify possible shortcomings and solutions.

The study has the potential to contribute toward the provision of a predictable and effective environment for the efficient regulation of companies and the promotion of investment in South Africa. The decriminalisation of the South African company law only took effect on 1 May 2011 and limited research has consequently been conducted on the research question. The study contributes towards the development of South African corporate law and jurisprudence in general, and the findings can be effectively incorporated in South African company law.

Mukhles Murad

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International Efforts to Regulate Foreign Investment and to Provide a more Consistent Legal Framework of Foreign Directed Investment

This paper analyses International efforts to regulate foreign investment and legal frame work of FDI have risen, such as those from the United Nations; World Bank(WB); Organization for Economic Co-Operation And Development (OECD); and World Trade Organization (WTO).

The efforts made by different international agencies so that they advance and regulate FDI. These agencies often promote foreign investment at varying measures and intent. They, nonetheless, focus on trade and investment liberalization; because they agree that regulating foreign investment can skew market efficiencies.

These policies are often interlinked with investment legislation, so that the attractiveness of one's country can be enhanced to foreigners. Economic interdependence through FDI is commonly linked with political interdependence, as nation-states align legislation that will be more favorable to FDI.

The United Nations, through UNCTAD, aims to manage foreign investments so that a balanced approach to FDI can be pursued by contracting parties. The WB has also exerted efforts in facilitating policies for FDI growth. The WB has provided a set of guidelines that aim for an advantageous overall framework which stands for fundamental principles meant to encourage FDI that promotes the interests of all members and that these guidelines have benefitted from a process of extensive consultation. The OECD Investment Committee, through the "Policy Framework for Investment," gives a non-prescriptive set of issues for consideration for governments that seek for domestic reform, regional co-operation or international policy dialogue that will generate an environment that is lucrative to domestic and foreign investors and that improves the benefits of investment to society. The WTO has a large role in investing foreign investment, since it aims to liberalise economies and improve investment flows for its member states. TRIMS and TRIPS have accelerated the liberalisation of world economies and the promotion of FDI.

Linda Muswaka

Lecturer, North West University, South Africa

Human Rights and Intellectual Property: The Case of Pharmaceutical Patents

In the case of *Cipla Medpro v Aventis Pharma* (139/12) *Aventis Pharma SA v Cipla Life Sciences* (138/12) [2012] ZASCA 108, the court stated that “Where the public is denied access to a generic during the lifetime of a patent that is the ordinary consequence of patent protection and it applies as much in all cases.” This remark brings into the arena the issue of the impact of patent protection and the lack of generic competition on the fundamental right to have access to medicines entrenched in the Constitution of the Republic of South Africa. The right to have access to medicines can be assured if a sustainable supply of affordable medicines can be guaranteed. However, when sustainability of supply can be guaranteed, new medicines are often too expensive for poor people and governments in the developing countries. This paper therefore, seeks to investigate the role of intellectual property law, specifically, patents, which human rights activists blame for creating monopolies that keep medicines inaccessible or unaffordable, and which pharmaceutical companies extol as necessary incentive for expensive research and development. The paper is based on the premise that while government is obliged to take reasonable steps to ensure access to health care services by *inter alia* making medicines accessible physically and economically, milestones can only be achieved if pharmaceutical companies join hands with government. It is in this regard that the paper makes a call for the government and pharmaceutical companies to work in tandem to ensure the realization of the right to have access to affordable medicines.

Annet Oguttu

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Curbing Thin Capitalisation: A Comparative Overview with Specific Reference to South Africa's Approach - Challenges Posed by the Amended Section 31 of the Income Tax

"Thin capitalisation" is a tax avoidance scheme employed by multinational companies whereby companies in the group are financed with smaller equity capital in comparison to its debt capital. To prevent thin capitalisation, the OECD recommends that the "arm's length principle" which is applied to curb "transfer pricing" should also be applied to curbing thin capitalisation. Although the OECD provides guidelines as to how the arm's length principle should apply with regard to "transfer pricing", it does not provide clear guidelines as to how this principle is to apply in the context of thin capitalisation. Consequently, internationally countries tend not to apply only the arm's length principle in curbing thin capitalisation but they often apply this principle alongside fixed debt/equity ratios (safe harbours) which set the parameters within which the arm's length principle applies. This has been the case also in South Africa since the thin capitalization rules were introduced in 1995. However in an endeavour to decrease the country's budget deficit in light of the global financial crisis and to ensure that the legislation is more effective in curbing tax avoidance, amendments were introduced in 2010 and 2011 which resulted in the merging of transfer pricing and thin capitalization legislation to the effect that only the arm's length principle is applied to curbing thin capitalization and the previous fixed debt/equity ratios have been dropped.

This paper critically analyses the challenges of using the arm's length approach to curbing thin capitalisation. It discusses the OECD's recommendations in this regard and also provides an overview of how thin capitalization rules apply in some of South Africa's trading partners. Based on this discussion, the challenges of the new approach to curbing thin capitalisation in South Africa are analysed and recommendations are provided as to how these can be resolved.

Jan Palguta

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Nonlinear Incentive Schemes and Corruption in Public Procurement

In this article I use data on Czech public procurement contracts from years 2005-2010 in order to uncover patterns suggestive of corrupt behaviour. Using nonparametric econometric methods I provide evidence that procuring officials manipulate with anticipated values of procurement contracts so that these contracts could be awarded through more restrictive and less transparent procedures. The incentives for manipulative behaviour derive from the nonlinear structure of procurement regulation: for example, below certain thresholds set out by the procurement law, procuring authorities have a sole discretion in inviting any five contractors of their choice into the procurement process. Using a policy experiment I document that this institutional structure has led to a sudden emergence of several sharp discontinuities in the procurements' anticipated value distribution. The discontinuities appear exactly at the points of thresholds and their first sudden appearance almost exactly coincides with new thresholds being established by procurement code re-codification. Discontinuities moreover appear only in procurement procedures restricted by procurement thresholds. Practice of bunching contracts below thresholds is concentrated only among a narrow group of procuring authorities, which is consistent with contract bunching being driven by corrupt behaviour of procuring officials.

Dorota Pasinska

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Financial Transaction Tax Versus Pigouvian Tax?

New tax levy on the financial sector, called Financial Transaction Tax (FTT) or the Tobin or Robin Hood tax, have been an ongoing subject of interest since the financial crisis of the past years.

Should we ask why do we really need this levy?

First of all, FTT was created to ensure that the under-taxed financial sector finally makes a fair contribution to the public purse. Second, this levy should help to deter the irresponsible financial trading. Finally, FTT offers substantial new revenues.

It is clear, also by the lawmakers, that a part of such above mentioned revenues should need to be used for international, collective responsibilities. From many purposes, the environmental aim of FTT seems to be appreciated and supported not only by European Union Commission but also by major international environmental organizations. What is more “many developed countries have very high commitments in terms of financing development and climate change”.

But not only FTT rise that issue.

Arthur C. Pigou, a renowned English economist from the early 20th century, invented a tax, called Pigouvian tax, which was designed to correct what economists call "market failures" or "negative externalities" that impose spillover costs on society, such as pollution. The Pigou's idea was to include the external costs of environment protection to the cost of production. As Pigou pointed out that this tax will “allow us to correct market failures without heavy-handed regulations”. Can we say the same about FTT? If yes, to which extent? Can FTT as a Pigovian tax be used to control behavior as a long established method of regulation? Moreover, do both taxes focus on negative externalities to correct for a market failure which are economically harmful? Can we both call Robin Hood taxes? What differences we can find between them? What similarities? I will try to answer on this question.

Bella Rametse

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Stokvel as a Means of Poverty Alleviation in Black Communities around Mangaung (South Africa)

The paper aims to investigate the benefits and challenges of the stokvel as well as the developments by government to formalise these well functioning informal institutions. Stokvels are self help groups which were established in the past when the formal sector couldn't transact with certain groups due to a combination of high risks such as unemployment or lack of sufficient assets to utilise as collateral when securing loans. Naturally when people are excluded from formal social security systems, they rely on informal social arrangements for survival. Stokvels became "informal saving schemes for blacks by black communities". As a rotating credit union or saving scheme members contribute money into a common pool weekly, fortnightly or monthly and take turns to withdraw from the pool. The essence of stokvel is mutual financial assistance for burial, education, investment and others. According to research conducted in Nov 2011 there are 811 830 stokvels in South Africa with investment of up to R44 billion rand per annum. This is influenced by the informal nature of stokvels as they have less rigid rules and regulations. They provide mutual support for each other in times of hardships and the main advantage is that they provide loans to members who would naturally not qualify for same in the formal sector. The qualitative study done with four different types of stokvels in the Mangaung Municipality in the Free State province, South Africa agrees with the aforementioned. Post 1994 government started taking keen interest in informal sector, creating initiatives aimed at poverty alleviation by making funds available through the Department of Trade and Industry for small, medium and micro enterprises (SMMEs) to form co-operatives. Although these are legal entities enjoying legal protection and government support, attempts to formalise stokvel had not been met with substantial success since they have been functioning well without being regulated. Study by the University of Cape Town also confirms that approach by formal sector is Eurocentric and not take cognisance of the role of group affinity and network marketing in the informal sector.

Dalita Ramwell

Senior Lecturer, University of South Africa, South Africa

Changing Property Rights in Fresh Water in South Africa

Since becoming a constitutional democracy in 1994, South African water law has been radically legislatively changed to vest the rights to all fresh water in the state. The motivation for the legislative change was to promote access to clean potable water, to protect the environment and to comply with international obligations. This aligns with international water law trends, but in South Africa the legislative changes have impacted on vested private property rights, which were historically based on Roman-Dutch law principles in that the owner of the land owned everything above and below the land, including, with some exceptions, the water. The delayed and phased implementation of the application of the law is now creating a constitutional tension which still has to be tested in the Constitutional Court. I will highlight and discuss these areas of tension and argue that a better and more legally cohesive result could have been achieved by revising the philosophy and parameters of the concept of ownership, particularly ownership of natural resources, to link such natural resource ownership to responsibilities, rather than transferring the ownership of natural resources to the state. The South African experience in this has international relevance because natural resources transcend national borders and protection, exploitation and regulation of natural resources is a growing international problem.

Kristi Riedel

Associate, Cooper Grace Ward Lawyers, Australia

The Rights and Obligations of Primary and Excess Layer Insurers

Excess layer insurance policies, and the legal principles surrounding their enlivenment, are not topics frequently considered by Australian courts. They are, nonetheless, important issues which Australian based insurance lawyers are grappling with on an ever increasing basis, and with little Australian jurisprudence. Some guidance about the relationships between excess and primary layer insurers can be gleaned, however, from the case law of the United States of America.

American courts have often had cause to consider the rights and obligations of primary and excess layer insurers. We examine a number of cases which have recognised at least 4 obligations stemming from the relationship between primary and excess insurers including:

1. A duty of good faith;
2. A duty upon the primary insurer to notify excess insurers of potential excess exposure;
3. A duty upon the primary insurer to settle a claim within policy limits; and
4. A duty upon the excess insurer to advise if it considers the primary insurer's conduct of the defence inadequate.

We also consider a recent and significant decision handed down by the Supreme Court of Mississippi concerning the role played by coverage counsel and the obligations which they owe to primary and excess layer insurers.

Andrew Ross

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Scarlett Fever

In her declaration offered in defense of the book *The Wind Done Gone*, in a copyright dispute with *Gone With The Wind*, Alice Randall claimed that “[the book]...uses characteristic elements of *Gone With The Wind* and imitates them in a way that appears ridiculous.” This case raises numerous questions regarding the treatment of the parody defense in federal courts: Are federal judges qualified to evaluate the “transformative” test created by Pierre Leval? How much weight do judges place on the testimony and declarations of expert witnesses? Do judges feel comfortable making decisions about the unique characteristics of certain literary genres?

One would assume that judges decide the law in copyright cases based on the criteria provided by the Copyright Act - however, when the parody defense is asserted, it appears that expert witnesses - as well as the testimony of the authors involved - exert a singularly powerful influence upon the decision of the judge. This paper argues that judges are heavily influenced by expert witnesses in cases involving the parody defense. The effect can be seen in more recent cases such as *The Wind Done Gone*, as well as earlier copyright cases in which the transformative test was first put to use, such as *Cambell v. Acuff-Rose*.

Andrea Saba

PhD Student, University of Turin, Italy

Public Participation in Environmental Decision-Making: the Implementation of the Aarhus Convention in the case-law of the Compliance Committee

Public participation ideally involves the activity of the members of the public in partnership with public authorities to ensure an optimal result in decision-making. In using the recent case-law from the Aarhus Compliance Committee as a reference, this article attempts to analyze the implementation of the pillar on public participation in the case-law of the Aarhus Compliance Committee.

Public participation provisions are divided into three parts in accordance with the kind of governmental processes covered. Although there is no set formula for public participation, at minimum the Convention requires proper procedures, adequate information, reasonable time-frames and appropriate taking into account of the outcome of the public participation. Early public participation should be ensured when all options are open and effective public participation can take place. Public participation procedures are required to include reasonable time-frames for the different phases, allowing sufficient time for informing the public and for participating effectively during the environmental decision-making. Reasonable time-frames require taking account of the nature, complexity and size of the proposed activity. The input of public participation should finally have a real impact on the decision.

Public participation is often identified with the procedure for environmental assessment. Against this understanding, the paper highlights the implied misinterpretation. While environmental assessment may play an important role in facilitating the effectiveness of public participation, the Convention neither makes an environmental assessment a mandatory part of public participation procedure nor regulates situations where the assessment is required.

In conclusion, the paper provides that public participation enhances the quality and the enforcement of environmental decisions. In this context, public participation cannot be effective without access to information nor without the possibility of enforcement through access to justice.

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The Adhesion of Croatia to the European Union

This paper will present my research on the anticipated adhesion of Croatia to the European Union ("EU"). Croatia applied for EU membership in 2003 and was in negotiations from 2005 until 2011. On December 9, 2011, leaders from the EU and Croatia signed the Accession Treaty. Croatia has ratified the Accession Treaty and, subject to its ratification by all EU countries, the country will become the 28th EU member country on July 1, 2013.

When an applicant nation seeks to enter into the EU, and as part of the adhesion process, it is given nation-specific steps established by the EU to prepare its economy and country for this entry. In the course of the negotiations, Croatia agreed to a number of country-specific commitments, which must be implemented by the date of accession, at the latest, unless specific transitional arrangements have been agreed.

These commitments normally include political requirements (parliamentary elections, independent judiciary, human rights and the fight against corruption, protection of minorities, war crimes and bilateral relations), economic criteria (freedom of movement for workers, company law, intellectual property law, financial services, information society and media, economic and monetary policy, competition policy and state aids) and the ability to take on EU membership. According to Article 36 of the Act of Accession, the Commission is required to closely monitor all commitments undertaken by Croatia in the accession negotiations, focusing in particular on competition policy, judiciary and fundamental rights, and freedom, security and justice.

My research and presentation will concentrate on the specific requirements imposed by the EU on Croatia, in light of the general procedure of EU enlargement, and on Croatian efforts made to date to comply with these requirements.

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The Importance of Competition Policy Harmonisation for ASEAN Economic Integration

Harmonization of competition policy contributes to effectiveness of incoming ASEAN Economic Community (AEC). Harmonization ought to be understood as a comprehensive concerted effort, which encompasses political and legal will of all states in a specific region. Harmonization is necessary to promote fairness in free trade. Experience has shown that economic integration without modernize a comprehensive and harmonized competition policy and the power to enforce compliance with regional competition regime, will be incapable of integrating the economies of the ASEAN member states. One of the ways through which meaningful economic integration can be achieved is through the harmonization. This paper is examines the importance of harmonization, the benefits of it, within which competition laws and policies are created and operated. Literature approach was used to collect data about harmonization between regional and domestic legal framework with special emphasis on competition policies of ASEAN members, and analysed by using qualitative method. The preliminary result of the research shows harmonization of competition policy is still debatable and almost impossible to implement in ASEAN. EU is the most keen and desirous of harmonization of competition policy. EU has succeeded to advocate the integration of the competition policies into international institutions. Following an in-depth comprehensive analysis of preliminary research results, some recommendations for harmonization of competition policies would also be presented.

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Global Taxation of Corporations

This paper suggests that there needs to be a global approach to the taxation of corporate profits.

National taxing authorities apply transfer pricing rules in an attempt to apportion corporate profits based on a notion of 'arms length' dealings. In 2010 the OECD updated its Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. As transnational corporations grow larger and control ever greater levels of world trade finding 'arms length' values for trade becomes more difficult.

There needs to be an alignment of corporate profits and taxation to the jurisdictions in which corporations actually earn the profits. The US formula apportionment method of allocating profits between jurisdictions is based on sales made, property owned and people employed in a particular jurisdiction. This apportionment recognises the physical impact of corporations in a jurisdiction and attempts to apportion profits recognising this impact. The apportionment is not perfect but at least it recognises some of the realities of the operation of a corporation. The formula could be improved by recognising the impact that corporations in jurisdictions have on the external environment, for example, the carbon emissions made by a corporation in each location.

Apportioning corporate profits grounded in a physical reality, even if not perfect, recognises the impact corporations, artificial people, have on real people where they physically live and work.

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Are the New Filtering Measures of Applications by the European Court of Human Rights Effective?

The European Court of Human Rights launched a new round reform these years to improve the filtering capacity of applications as the largest part of individual applications are declared inadmissible or struck out of the Court's list of cases. This article studies the contents and effects of new measures of this reform, including the new judicial formations of single-judge, the three-judges committee and their competences, the new criterion of admissibility, the flexible rules introduced by the Protocol No.14 and Protocol No.15, the priority policy and the filtering section. The statistics around the implementation of the measures show that the new judicial formations and the filtering section are effective in reducing the number of pending applications and in improving the filtering ability of applications by the Court; The priority policy and pilot-judgment procedure are useful for optimizing resources, for focusing energy on the most important applications that require a thorough review and for strengthening the long-term effectiveness of the control system established by the Convention; The new admissibility criterion has improved by the jurisprudences of the Court and its effect should be studied after its application by the single-judge and the three-judges committee. The conclusion is drawn that the new reform are effective for improving the filtering capacity of applications and for enhancing the control system established by the Convention, but the Court still faces the problems and needs to advance the reform.

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Caught in a State of Exception: Kafka's Man from the Country, Camus's Outsider, and Flannery O'Connor's Misfit

Giorgio Agamben famously described the state of exception as the legal form of what cannot have legal form. He was referring to Carl Schmitt's alignment of sovereignty with the power to initiate a state of emergency, that is, the power to establish laws which suspend the rule of law. I would like to borrow Agamben's fortuitous phrase and transpose it from the political to the metaphysical plane.

The present paper will explore three literary works whose protagonists are stranded in a liminal space outside the law: Kafka's parable "Before the Law," Camus's novel *The Outsider* and Flannery O'Connor's short story "A Good Man Is Hard to Find." In each one of the three works, the protagonist exists in a state of exception, in the sense that the law either ignores or excludes him. Kafka's man from the country spends his entire life waiting for permission to enter the law. He waits in vain, for the permission will never be granted. Camus's Meursault is tried and sentenced on the basis of laws from which he is alienated by nature, and which fail to acknowledge his different nature. And O'Connor's murderous Misfit sees himself as excluded from secular law, which decrees that the punishment fit the crime. He paradoxically believes that he's following the example of Jesus and fulfilling the Savior's mysterious economy of sacrifice.

The man from the country, the outsider and the Misfit live in an existential state of exception. The metaphysical implications of this state are the concern of the present paper.

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Bullying in Cyberspace: How Do we Protect Our Learners on this New Playground?

The term bullying conjures up visions of the strong traditional schoolyard bully and the lessersubordinate victim being called names, punched or lunch box money taken from the victim during school hours or at least on the said premises, but in our digital age, the latest playground is cyberspace.

The cyber domain gives rise to different types of cyber violence, mainly via text messaging, picture- or video clips, inclusive of "sexting", phone calls, e-mail, chat rooms, instant messaging, websites and blogs, social networking sites and internet gaming- activities participated in especially by young learners. Bullies in schools have become faceless, ageless, genderless and even the greatest nerd can turn into superman by the click of a button. Cyberbullying in schools is a leading cause for suicide, school shootings and depression amongst our learners and it is this phenomenon which needs to be addressed to protect our children on the modern playgrounds of cyberspace.

In a study conducted by the Centre for Justice and Crime Prevention in South Africa during 2009, it was found that 31% of young people interviewed in the four largest cities in South Africa, had experienced some form of cyber aggression while at school, whilst 42, 9% had experienced some form of cyber aggression outside of school. It is thus hardly surprising that the victims cannot flee from cyber-bullying. The US Centre for Disease Control indicated a 50% increase between 2000 and 2005 in young internet users reporting to have been victims of online violence. Lately 34 states in the United States of America passed specific cyberbullying laws or amended their anti-bullying statutes to include cyberbullying or electronic harassment scenarios¹ in an effort to curb bullying in cyberspace.

This article endeavours to discuss legal requirements of possible solutions, legislative or policy driven interventions, to prohibit or minimise cyber bullying in an educational environment through a legalistic comparative study done between South Africa and the USA.

¹Albin K 2012 :Bullies in a wired world: The impact of cyberspace victimisation on adolescent mental health and the need for cyberbullying legislation in Ohio:156

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Defining Blood Diamonds: The Zimbabwe Problem

Blood or conflict diamonds are rough diamonds that originate from areas of war. These areas are controlled by forces opposed to the legitimate and internationally recognized governments. The money made from the sales or transport of these diamonds are then used to fund military action of rebel movement or their allies in opposition to those governments, or in contravention of the decisions of the UN Security Council. The diamonds are sold by especially rebel forces to finance the purchases of arms and to finance their other illegal activities and human rights abuses. The Kimberley Process Certification Scheme section 1 defines blood diamonds as follows: "Conflict diamonds means rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described by relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in the United Nations General Assembly (UNGA) Resolution 55/56, or in similar UNGA resolutions which may be adopted in future". In terms of this definition, diamonds that originate in Zimbabwe do not comply with the requirements to be labeled "blood diamonds". However, there is an urgent call from various NGOs that in view of the human right abuses in Zimbabwe, especially pertaining to the mining industry itself and the military control over it, diamonds from Zimbabwe should be classified as blood diamonds. There are also questions on the Zimbabwe government's compliance of the Kimberley Process. It seems as if there is no government control over the diamond fields and it has been reported that very little, if any, of the profit from the sale of Zimbabwe diamonds ends up in the state coffers.

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South Africa's SRI-Reporting and Climate Change – Lessons for the Future?

The issue of sustainability has recently become increasingly relevant in the operational sphere of companies. Consequently, sustainability-reporting has gained importance. Sustainability is not always quantifiable¹ which makes it more difficult to report on than financial results. This article examines Socially Responsible Investment (SRI) in South Africa. The Johannesburg Stock Exchange (JSE) was the first to create a SRI-Index in an emerging market economy. SRI, although relatively new, is becoming increasingly important to companies. In light of climate change and other environmental issues investors are watching companies more closely and want to know how companies impact society, the environment and their employees. The JSE SRI Index is a sustainability index. It measures the standard of sustainability-reporting of a company against other participating companies. It also gives investors a transparent view of the company and the way business is conducted. The JSE SRI Index promotes the corporate governance regime envisaged by the most recent King Code of Corporate Governance. This paper will look at what integrated reporting is and how it relates to sustainability. A short historical overview and the development of the JSE SRI Index will be presented. The criteria for and the operation of the JSE SRI Index will also be analysed. Finally a conclusion regarding the possibility of the King III and the JSE SRI-Index making a meaningful contribution to the broader concept of sustainability will be made.

¹ Certain aspects of sustainability are more quantifiable, e.g. water use, work-related accidents, carbon credits, etc.

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Patents' Choice Problem in Pharmacy: Legal and Economic Aspects

Patents play a significant role in the high cost pharmacy business. Every time the pharmaceutical company must secure the exclusive rights to its invention and choose the appropriate and correct protection for its new active pharmaceutical ingredients or finished dosage forms among international, European or one/several national patent systems. Companies create so called "patent house".

The main treaties that encourage and protect the innovations and promote the economic development in the pharmaceutical sphere are:

1. On the international level:

- The Paris Convention for the Protection of Industrial Property (1883) - the first major international agreement relating to the protection of industrial property rights, including patents;
- The Patent Cooperation Treaty (1970) - the Treaty was amended in 1979, and modified in 1984 and 2001 with the WIPO participation,
- The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is administered by the WTO (1994),
- [The Patent Law Treaty](#) was signed in 2000 and came into force in 2012.

2. On the European level:

- The Convention on the Grant of European Patents (1973), or the European Patent Convention (EPC), is a multilateral treaty.

3. On the national level:

- Laws of different states - Collection of Laws for Electronic Access (CLEA) database.

The economic aspect to a large extent depends on balance among the payments for the laboratories, experienced specialists, patent costs and expected profit. At the same time the increased competition determine the demand for specialized kinds of patents which can block access to this market for other companies, and increase the commercial value of the invention. There can be used umbrella patent, scarecrow patent, nuisance patent, dead-wood patent, dormant patent etc. or its combination.

The company's patent choice depends on many factors of inner and external character but the most essential are legal and economic aspects of it.

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The Author and her Work: Charlotte Brontë's *Shirley* as a Therapeutic Experience

While it is common to analyse a literary work against the background of the reader-centred methodology, the approach which brings the author's role to the fore is considerably less common in contemporary literary studies. In particular, drawing on the author's experiences when interpreting a work of fiction is not believed to be a legitimate approach, especially in the post-"death of the author" era. However, there is no denying that works of fiction may draw, to a varying degree, on the author's life and experience. If this is the case, the role of the author can hardly be minimized in literary analysis. Writing should then be seen as an artistic and aesthetic endeavour whose aim is not only to please the potential reader, but also to structure the author's reality.

Charlotte Brontë's novel, *Shirley*, for example, provides the reader with a profound insight into the mind of the young female protagonist. Introduced from the perspective of figural narration, Caroline Helstone contemplates the "challenges of existence." The plot of *Shirley* is believed to be closely related to Brontë's life, in that it is held to unveil the author's identity and personality. By offering an insight into Caroline's emotional life and adopting a confessional mode of writing, Brontë lays bare her own feelings of restlessness and anxiety: "Charlotte's wish to preserve her incognito, and, above all, to prevent any reference to her personal sorrows (...) could not entirely be achieved," Winifred Gérin, Brontë's biographer, aptly observes, (402). Based on the biographies of Brontë by such authors as Elizabeth Gaskell, Winifred Gérin or Rebecca Fraser, this paper investigates the relationship between the authoress of *Shirley* and the protagonist in the novel itself. Particularly, I focus on the "interaction" between the writer and her novel and on the saving influence writing of *Shirley* had on Charlotte Brontë.

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The Pros and Cons of a Technology Neutral Approach in the Regulation of Electronic Money

The rapid developments of computer technologies since the evolution in the 1960s have introduced lots of challenges for the business and the regulating communities. While these developments have given rise to beneficially penetrations into commerce, they raise various regulatory questions in the law-making process. Amongst these questions are whether such technological developments fit neatly into existing laws and how to provide legal definitions to relevant technological concepts and to classify them effectively; taking into account the speed of their developments. These questions have gained much popularity in the development of some evolving technologies such as electronic payment systems, money remittances as well as electronic money products. They have also brought regulatory challenges for national, regional, international legislators and policy makers; rendering existing laws meaningless. With these challenges, technology neutrality – a regulatory approach which requires legal rules not to favour or discriminate against a particular technology and to ensure that the regulation of technology remains flexible and relevant in the case of technological change - has been espoused extensively as a regulatory approach to address these challenges. This paper discusses the pros and cons of adopting a technology neutral approach in the regulation of electronic money products. The paper discusses this approach as adopted by the European Union in its Electronic Money Directives. The paper uses the application of PayPal payment systems to illustrate the pros and cons of this approach. The aim of the paper is to highlight various challenges in the regulation of electronic money products and the supervision of institutions that issues these products.

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An Economic Analysis of the Legal Recognition of Cuba by the United States

Four critical considerations form the foundation of the argument for a full recognition of Cuba. First, economics. Because of the recession in the U.S.A., all new trade is a good thing. From our side, we could export automobiles, motorcycles, heavy equipment, food, and electronics to Cuba. From Cuba, they could export rum, sugar, cigars and music to the United States. Citizens of the U.S.A. would love to visit Cuba and vice-versa. Prior to the revolution, Cuba was a destination resort for many Americans.

Second, the three-hundred-pound gorilla at the table is the fact that Cuba is a communist government. But since President Nixon opened China to trade with the United States forty years ago, communism has become a nonissue. Today China is a huge trading partner and our largest creditor. The word communist is no longer used in a derogatory fashion. Indeed, Russia a formerly communist nation has adopted numerous democratic reforms, such as free elections. Quite simply, communism is no longer a threat to us—just the opposite. Clearly, the best way to further democracy is to trade with a country and encourage them to visit us in order to see how we live.

The rest of the world is travelling to Cuba: Germany, Spain, Canada and Austria, for example. Tourism is an important part of their trade.

Third, as neighbors only 100 miles apart, we should work together for mutual social and economic benefit. Since 1962, we have been “walled-off” from Cuba. In the main, U.S. citizens are not permitted to visit or purchase products made in Cuba. Cuban visits to the United States are severely restricted, as well.

Fourth, historically, a team of revolutionaries including Che Guevara and the Castro brothers, overthrew the Cuban dictator, Fulgencio Batista. Fidel Castro was elected President of Cuba in 1976. Castro has been Cuba’s unchallenged leader since 1959, however. One of his first accomplishments was to nationalize the private land and turn Cuba into a communist state. This nationalization of the land is the heart of the USA’s disagreement with Cuba today.

I will make clear the future economic value of the goods and services exported from Cuba to the USA and from the USA to Cuba. My goal will be to manifest that from an economic perspective, the USA should recognize Cuba and open the doors to tourists and trade.

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From an International Perspective, The American Criminal Justice System is Deplorable

The Rules of Procedure and Evidence of the International Criminal Court encapsulated rules of criminal justice that complies almost entirely with the dictates of propriety. The American legal system is not even remotely in conformity with those norms of criminal justice. The ICC Statute requires of the Prosecutor to prove the guilt of an accused above reasonable doubt and stipulates that there shall not be a reversal of the burden of proof; in the United States an accused must prove special defences on a balance of probabilities. The ICC State upholds the principle of *ne bis in idem* and prohibits a second trial based on the same conduct; in the United States, the rule against double jeopardy applies to multiple prosecutions for the same offence and regards different states (provinces), and also the federation, as different sovereignties and therefore does not preclude multiple trials for the same crime in a different states or in a state and federal court. International law prohibits cruel and inhuman punishments; the American Constitution prohibits cruel and unusual punishments, meaning unusual in the United States. Those punishments include the death penalty and life imprisonment without the option of parole, which are not competent sentences in the ICC. Sentences in the United States are almost exclusively based on the nature of the crime and the means of perpetration, while the ICC upholds the principle that sentencing must also be individualized and based on the personal circumstances of the convicted person. In the United States juveniles can be prosecuted as though they were adults and until recently, juvenile offenders could be sentenced to death and receive a life sentence without the option of parole.

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Stipulatio Alteri V Donatio Mortis Causa – What is the Difference?

The *stipulatioalteri* is a Roman-Dutch doctrine that finds its application in the law of contract in South Africa. It can be translated to mean a contract for the benefit of a third party. An example of this is when a beneficiary is named in a life policy set up by the life insured and insurer. At the death of the life insured, the policy will pay its proceeds to the named beneficiary instead of the life insured's estate.

The *donatio mortis causa* also finds its origin in the Roman –Duth law with the law of succession as its basis. The *donatio mortis causa* enables the donor to make a donation only upon the time that the donor dies. It is then treated as a donation and the donee receives the proceeds.

By defining these terms there seems to be many similarities in the construction of the two doctrines. The question then arises if one of these methods of providing something to a third party on your death has more advantages than the other. In order to do this, an investigation is necessary to find out what the differences and similarities are between these two doctrines.

One of the advantages that are considered is the different tax consequences of the two doctrines. Is one of these doctrines more tax friendly than the other? The donations tax and estate duty consequences are examined.

There is also South African legislation that arises and seeks to find answers on the *stipulatioalteri* and *donatio mortis causa*. One of the cases investigates a provision in an ante-nuptial contract where a property was excluded from the accrual. The court had to decide whether this exclusion was a testamentary clause and thereby a *donation mortis causa*. In another case the court had to answer whether a beneficiary nomination under a policy, a *stipulatioalteri*, can exist collateral to a *donatio mortis causa*.

These questions are relevant and necessary to provide certainty to the application of the *stipulatioalteri* and the *donatio mortis causa*.