IVR CONGRESS 2022 BUCHAREST

31 Special Workshop:

Construction of Emerging Rights.

Debates for the Basis of New Constitutional Standards

Convenor: Jose M. Sauca

PARTICIPANTS

1. Delia Budeanu

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Title: Construction of the emerging «right to understand» the rights.

Abstract: Inaccessible language and legal institutions compromise the knowledge and appropriation of law and rights. The guarantee of access to justice, due process, effective judicial protection, among others, requires that the formulation of legal discourse meets standards of clarity and comprehension. The development of modern, open, and inclusive societies today requires us to further explore the legal basis and conceptual drafting of a new emerging right such as "the right to understand" or endorse the classic right to know with the "possibility of understanding". The justification and development of this emerging right accompanies the expectation of increasing the levels of protection of fundamental rights, of improving political participation and strengthening the mechanisms of control to public activity.
With this contribution, we explore the proposals and claims of two movements: "Plain Language Movement" and "Law and Literature Movement". Both collective projects demand the intelligibility of legal texts that recognize rights; and they do so based on linguistic and literary considerations. On the one hand, we analyze the constitutional and legislative framework for accommodating these demands and claims. And for the other hand, we propose bases of conceptualization of the "right to understand" as a right under construction grounded on "legal legible narrative".

2. Rubén García Higuera

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Title: Positive Freedom of Expression and the Challenges Digital Public Sphere.

Abstract: At the outset of the XXI century, a wave of optimism regarding the emergence of the Internet invited to foresee the advent of a truly democratic public sphere. Our societies moved from a top-down model, dominated by mass media during the XX century, to a more horizontal one, where different actors can produce content at a low cost and broadcast it on the Internet to a global audience. Nonetheless, these rapid changes are having a serious effect on our societies, not all of them as ideal as once thought. The excess of information, thanks to the

widespread of new formats and the lack of mediation, are creating problems that the democratic societies need to address. In this context, the presentation plan to frame the current debates and theoretical reformulations of the right to freedom of expression in order to face the challenges of the digital public sphere.

3. Daniel Cardoso Gerhard

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Title: The construction of the capital of the Brazilian Amazon and the consequent production of inequalities in the space of the city.

Abstract: The present work aims to demonstrate that the social inequalities verified in the city of Manaus, Amazonas (recognized as the capital of the Brazilian Amazon) are the result of a historical process that merges with the emergence of the city of the city itself to serve foreign capital, aligned with the interests of the State - instead of serve its inhabitants. The social inequalities that will be exposed refer both to an urban project of the city and to the application of law by the justice system – both excluding. The retraction of these spaces formed since the foundation of the city of Manaus, in 1669, through the cycles of rubber exploration to the commercial and industrial free trade zone, nowadays: the city is home to an industrial hub fed by tax incentives, which generates wealth for the State and the industries, but not for the population: according to the Brazilian Institute of Geography and Statistics - IBGE (2020), Manaus has the sixth economy in the country, representing 20, 18 of the Gross Domestic Product of the entire northern region of Brazil. However, the rich city also occupies the sixth position in another index that evaluated, also in 2020, the ten worst cities in the country in terms of basic sanitation – only 12.43% of its population benefits. According to IBGE data for the year 2020, 47.4% of the population of the State of Amazonas lives below the poverty line, that is, out of a total of 4.1 million people, 1.9 million lived in this condition in 2019. Such discrepancies should not be tolerated or normalized, since the city itself is a right of its inhabitants, insofar as in its configuration spaces for experiences are forged that must be a condition of possibility for the citizen to exist, develop and participate, which consists, finally, in the protection and promotion of the rigid core of fundamental rights.

4. Triantafyllos Gkouvas
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Title: The Social Minimum as a Right and as a Requirement of Distributive Justice.

Abstract: The theme I will be discussing in this paper regards the metaphysical and consequently normative premises that inform the understanding of a social minimum as a right and as a requirement of distributive justice. The most representative case of the rights-theoretic approach is by any measure the left-libertarian advocacy of a natural right to an equal, per capita share of this planet's initially unowned external resources. The most representative case of distributive dimension of the social minimum is John Rawls' proceduralist understanding of a pre-distributive scenery populated by broad, macroeconomic classes of economic agents. I will argue that the rights-theoretic approach is vulnerable to needs-based counterarguments and that Rawls' proceduralist approach prematurely replaces the justice of distributive outcomes with the justice of societal design. I will conclude my presentation with some neglected desiderata for constructing theories of the social minimum.

5. Róisín Hennessy

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Title: Conceptual Perspectives on the Right to Social Protection – Analysing the Discourse and Challenges for Key International Organisations

Abstract: In the wake of the financial crisis and, more recently, during the course of the COVID-19 epidemic, social protection interventions of diverse forms were foregrounded as part of the development co-operation agenda, and as key elements of the COVID-19 response. However, the conceptual definition and contours of social protection are highly contested in a number of key ways by international organisations such as the World Bank, and the International Labour Organisation, who act as thought-leaders in shaping legal and policy frameworks at national levels. This paper will clarify the conceptual underpinnings of the policy spectrum for social protection that ranges from minimalist "safety-net and market-centred" approaches, traditionally associated with the World Bank, to more fulsome "human rights-based" interventions to social protection, traditionally associated with organisations such as the International Labour Organisation and UNICEF. With reference to a number of recurring dilemmas that beset Governments in their design of social protection systems, the paper will argue in favour of the conceptual underpinnings of a "human rights-based" approach to social protection, and aims to illustrate why that model is preferable to the residual neo-liberal State model in this current phase of the evolution of the social state.

6. Sebastián Ibarra González

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Title: The Right to Privacy in the Global Information Society**.**

Abstract: The conception of Privacy of the Ancients was understood as the protection of a space reserved exclusively for the individual against deliberate interference and without the consent of its owner, this claim is based on the personal aspiration to exclude others from access to a space that only concerns the individual. Privacy as a legal category takes the form of a fundamental right and freedom with the purpose of protecting the most exclusive space of the individual against any unwanted public or private interference. The paradigm shift that triggered the conceptual evolution of privacy is the product of a revolutionary milestone in computer technology, that is, the invention and convergence of computer microprocessors in 1971 and the Internet in 1983. Moderns understanding of Privacy consists of in the control of information or informative self-determination. Being free today means deciding what information others may or may not know. Privacy is a whole made up of two legal dimensions, one negative of non-interference and the other positive of control, whose protected legal right par excellence is the human personality or individual autonomy.

7. Gema Marcilla Córdoba

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Title: Euthanasia, Dignified Life and Fundamental Rights

Abstract: Due to current biomedical advances, which allow unexpectedly extending life, important moral dilemmas emerge in euthanasia contexts. Indeed, it is necessary to reflect on the possible modulation of the right to life when it conflicts with physical and moral integrity, privacy, the free development of the personality, or human dignity. Thus, several alternatives are possible when a person's existence entails suffering due to an irreversible disease or intolerable illness. First of all, it is thinkable that the State should protect life by the State at all costs; but also, that, under certain circumstances, it is possible to decriminalize assisted suicide; or that a legal regime must accompany this decriminalization with all the guarantees of truly free euthanasia; or, finally, that the public authorities are obliged to guarantee assistance in dying. The debate, far from being settled, is entirely in force and confronts us with multiple paradoxes of free consent. For example, do lucid suicides have room? What value should we give to the consent of a vulnerable person subjected to severe physical or emotional ailments? Is the will of the disabled person respected if previously this person, fully capable, has expressed her living will? Is there a fundamental right to receive help to die? In this text, we will address these and other questions**.**

8. Rodrigo Merayo Fernández

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Title: Recent Legal Treatment of Poverty in the Inter-American Court of Human Rights: Reformulation of the Principle of Equality in the light of the Theories of Justice?

Abstract: The end of poverty is ranked number one in the Sustainable Development Goals (SDGs) set by the United Nations in 2015, which is formulated from a multidimensional point of view and with a series of goals to be achieved by 2030. From 2016 onwards, the legal treatment of poverty in the Inter-American Human Rights System, more specifically from the work of the Inter-American Court of Human Rights, has taken on a new and pioneering reformulation within the human rights organizational chart. The principle of equality occupies a prominent and pre-eminent place within this new form of treatment of poverty because it is articulated both as a value, as a right and as a goal to be pursued, which makes the content of this and the recent interpretation of it to address poverty situations/conditions have much to do with some of the theories of contemporary egalitarian justice. The main objective of this Work is to try to verify what is the principle of equality in this new interpretative framework of poverty and the possible influence on its articulation of egalitarian justice theories. In the same way, this work seeks to analyse and reflect on the possible consequences of such treatment and the impact of the right to address the phenomenon of poverty, to which historically has not paid too much attention from the legal discipline.

9. **Digno Montalván Zambrano**

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Title: The emerging paradigm of the Rights of Nature: a non-anthropocentric framework for environmental governance.

Abstract: The Rights of Nature constitute the emerging framework through which the new claims of the ecological movement are being translated into law. This new proposal seeks to give an ecocentric interpretation to law and, through that, to discuss who should exercise the representation of Nature. Under the traditional anthropocentric model of environmental justice the State has the exclusive power to represent Nature. This is shown in the regulation of the environmental issue as administrative law (environmental law) or criminal law (environmental crimes). On the contrary, the granting of rights to Nature requires that a human being, human collective or human entity exercise its representation in the courts. The question of who should represent Nature in these scenarios allows us to discuss the exclusivity that has been attributed to the State in this matter. However, despite of the ecological civilizing potential that this new proposal has, if the philosophy and theory of law are not prepared to produce the corresponding analysis of the concepts and arguments that justify and problematize the rights of Nature, a vacuum may arise between the social and political discourse and the legal and moral philosophy. This vacuum could not only affects its emancipatory potential, but also, turns it into a new tool of domination under which false ecological answers formulated by the hegemonic power delay, once again, the civilizational change demanded by the ecological crisis. This paper seeks to contribute to the task of building such theoretical support, proposing to see ecological law just as a tool to make visible the epistemic pluralism in the governance of ecological systems. In this framework, the Rights of Nature, rather than a closed catalog of universal intrinsic values, constitute an instrument for ecological, local and adaptive governance.

10. Francisco Javier Pardo Tornero

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Title: Beyond social rights: on the transforming function attributed to the constitutional clause of the social State

Abstract: In recent times, the debate on the social State has focused almost exclusively on the investigation of the nature, structure and extension of the so-called social rights. However, the adjective social refers in the first place to the value of equality, and imposes on the State, by mandate of this precept, a positive intervention to promote the material equality of the individual and of the groups in which he is integrated, which, far from allowing a self-congratulatory reading of the Constitution as a reflection of a perfect socio-political reality -which is the purpose of classical liberal constitutionalism-, incorporates its self-criticism, and configures a constitutional system in continuous transition toward a more just and egalitarian society. With all this, a third is added to the traditional political and legal dimensions of the Constitution, which is that of transformation or social remodelling, whose spearhead is given by the social State clause. Based on this approach, this paper aims to provide some reflections for the construction of a theory on the expansive function of the social State, that allows to justify the incorporation of new fundamental rights or the extension of some already recognized.

11. Aurelio de Prada García

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Title: The Right to Facts

Abstract: To defend a "right to facts", as we will do here, may seem a *contradictio in terminis*, given that our current conception of Law is based on the distinction between Law and facts, between *quaestio iuris* and *quaestio facti*. However, the deconstruction of facts made, sometimes, by the judges when applying the Law, along with contemporary problems like the "fake news" or the "post-truth", make necessary to postulate a right to facts, even as a fundamental right.

12. José María Sauca Cano

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Title: On Right to Decide. Debates and Features for an Emerging Right.

Abstract: For the last 25 years, Spanish legal and political philosophical thinking, as well as its public law theory, has aroused a huge intensive debate on the validity or eventual convenience of the acknowledgement of a new basic claim: the Right to Decide.
This debate has provisionally concluded in a dead end dialogue without a minimum conceptual clarification of its possible characteristics reached.
This right is intensively connected to the defence of the self-determination right in non-colonial contexts; theories that propose to deepen democracy and the social movements given to the recognition of the collective identity of a national minority. However, this right could present some specific characteristics, which is the main object of this reflexion.
Characteristics and eventually conditions for the recognition of the right to decide, specially in the context of Western democracies, constitute a good example of an emerging right either as an object to express acknowledgment or as a derivative right of some principles such as the democratic one or the integrity of a cultural identity.

13. José Antonio Sendin Mateos

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Ttitle: Restrictions on the right to information in the Spanish Transparency Act.

Abstract: In Spain, the effective recognition of the right of access to public information has been late, occurring in the Transparency Act that was approved in 2013. Despite everything, this Law provides for important restrictions on the exercise of this right, which are difficult to reconcile with the requirements of the principles of publicity and transparency. These restrictions are intended, fundamentally, to safeguard the economic and commercial interests of the State, as well as other vital interests that, such as national security and defence, are protected by the Official Secrets Act of 1968. Incomprehensibly, the Transparency Act does not mention the Official Secrets Act, which regulates the Spanish regime of State secrets. After more than fifty years since its approval, this Act urgently demands a reform. For this reason, the Basque Parliamentary Group in the Spanish Congress of Deputies has put forward, for the fourth time,

a Bill to reform the Act on Official Secrets, which, at the moment, does not seem to be going to be approved.

14. Isabel Turégano Mansilla

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Title: Right to nationality as a limit to the sovereignty of the State

Abstract: The content and meaning of moral values and principles are not static nor are they absolutely defined and closed. Among the normative requirements that compel us to reformulate and deepen the foundation and content of rights, participation in public affairs occupies a central place. The way in which this participation has traditionally been translated has been by way of forms of involvement, representation and control framed within national borders. The territorial and personal delimitation of these has been considered an exclusive competence of States.
To the extent that nationality determines the rights and duties that are assigned and guaranteed to a person and define their position in a political community, its acquisition and protection can be considered a legitimate claim of any individual. The right to nationality assumes that States do not have an absolute and unlimited power to decide who their nationals are and what rights they have as such. This conceptualization is reinforced from the perspective of a theory of global justice from which liberties and rights cannot be subordinated to the arbitrariness of state border policies. This paper considers what is the basis and content of a right to nationality, how it can be translated into a legal methodology aimed at a favourable interpretation the regulatory structure and the adequacy of the constitutional and legislative Spanish framework to make such normative requirements effective.