

***Atlantic transfers: responses to totalitarianism in legal thought
and the dilemma of liberty in the post-War Atlantic***

(New York, 4th November 2016)

1. On November 4th 2016, a conference on the topic of ‘Atlantic transfers: responses to totalitarianism in legal thought and the dilemma of liberty in the post-War Atlantic’ was held at Furman Hall of New York University. The conference was co-hosted by Prof. William Nelson of the Legal history department of NYU Law School and Kaius Tuori, PI of the ERC-project ‘Reinventing the foundations of European legal culture 1934-1964’ (foundlaw.org, code 313100) at the Network of European Studies of the University of Helsinki. Tuori and Nelson opened the colloquium together. The keynote speaker was Prof. James Whitman of Yale University, who introduced his newly published book on *Hitler’s America*, linking the Nazi deliberations prior to primarily the Nuremberg Race Laws (1935) to various American models employed by sympathizers of the fascist regime, such as previously existing US regulations concerning race and segregation. These laws were mostly (but by no means exclusively) limited to the Southern states of the US, however, the Nazis also proved to be interested in Roosevelt’s New Deal as well as generally the American ‘conquest of the West’, the latter of which is mentioned by Hitler in *Mein Kampf* as a direct source of inspiration. Finally, Whitman presented Nazi lawyers, legal professionals and legal scholars as ‘vocal Legal realists’, taking their cues from the pre-existing American scholarly tradition. Following Whitman, Douglas Morris, a legal practitioner in New York who has however published extensively on several wartime jurists, spoke about the democratic turn in the post-War works of Gustav Radbruch (1878-1949). After the War, Radbruch abandons his positivist legal theory, and moves towards a prescriptive conception of natural law. Morris argued this was the result of Radbruch’s wartime experiences, when he was ousted but still stayed in Germany. Questions to Whitman and Morris concerned the role of the German *Grundgesetz*, the technicalities of the American race laws and the New Deal, Nazi jurists as Legal realists and Radbruch as an academic figure.

2. In the second session, Ville Erkkilä of the University of Helsinki treated the so-called ‘Kieler Schule’, a part of his upcoming dissertation on the prominent German legal historian Franz Wieacker (1908-1994). The Kieler Schule designates a specific group of Nazi sympathizing academics working there between 1933 and 1937, attempting to reform the university into a Nazi ‘storm trooper faculty’, a scientific weapon of war. Erkkilä linked the development of the School to the thought of Carl Schmitt, and showed how specific legal notions, such as *Berufstand* and *Rechtswusstsein*, were formulated and used by this group. Prof. Warren Breckman of the University of Pennsylvania then focused on Claude Lefort (1924-2010), a recently deceased thinker on democracy, political theology and totalitarianism. In a 1985 essay, Lefort questioned the meaning of modernity as expounded by Hannah Arendt (1906-1975), who had been all but ignored in France before, in the context of the problem of ‘cultural immortal-

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ity'. Where Arendt identified modernity primarily with capitalism, Lefort argued this also entailed an unfounded criticism on democracy and representation: in developing these, modern times has however done away with 'cultural immortality', leading to the deification of tyrants. Questions to Erkkilä and Breckman concerned the breakdown of community in post-War America, Arendt's theory of action and the division between the social and the political, the Marxist idea of community, the employment of empirical social sciences in the *Kieler Schule*, and the origin of the word totalitarianism.

3. The third session opened with Jacob Giltaij of the University of Helsinki and a Global fellow at NYU. He spoke about the German professor of Roman law Fritz Schulz (1879-1957), who was ousted from his post at the University of Berlin in 1934. In 1936, Schulz then travels to United States, giving lectures at the Catholic University at Washington, DC and at Roscoe Pound's seminar at Harvard University. The latter visit is noteworthy, since Harvard in general and Pound in particular had a seemingly positive attitude towards the political developments in Germany. From Pound's personal papers, Giltaij presented various new documents surrounding Schulz's visit to Pound's seminar. Noah Rosenblum of Yale Law School and Columbia University then addressed the US Executive Reorganization Act of 1937, connecting it to Interwar legal and political thought. The Act was developed by the President's Committee on Administrative Management, the members of which were progressive reformists. The Committee accepted and even promoted a strict separation of powers, despite the emphasis on a strong executive branch. Rosenblum argued the contemporary encounter with fascism and totalitarianism had been crucial for this stance, in part based on the resolutions of the 6th International Congress of Administrative Sciences in 1936. Questions for Giltaij and Rosenblum concerned democracy as window dressing in the debates surrounding the Executive Reorganization Act, the problem of Pound as a serious thinker specifically as late as 1936, and the measure in which the role of the executive was inspired by the role of the judiciary before.

4. In the fourth and final session, Prof. Samuel Moyn of Harvard University treated the 'spirit of social rights' through the perspective of Georges Gurvitch (1894-1965), a Russian-French sociologist and jurist, who composed a 'Bill of social rights' in the 1940s. This bill, according to Moyn, is the first scholarly analysis of social rights, despite earlier forays into essays on social law and social right, such as his 1932 'L'idee du droit social'. Gurvitch's thoughts were never influential in the US, but found their way into the debates surrounding the creation of the post-War European welfare state. Social rights were only later transformed into universal rights, after the 1970s. The final speaker, then, was Kaius Tuori of the University of Helsinki, discussing the wartime and post-War change in the idea of freedom and equality as a transatlantic problem. In this, Tuori focused on Franz Neumann (1900-1954) and Leo Strauss (1899-1973), who were opposites in a number of ways, specifically with regard to their respective thinking on the rule of law. Both, however, could be seen as exiles, with Neumann moving to the US, and Strauss ending up in the UK first and later in the US. Neumann composed his 'Behemoth' on the Nazi political order already in 1942. Questions to Moyn and Tu-

ori regarded the role of the separation between citizenship and social rights in Moyn's larger work, *émigrés like* Neumann transcending boundaries to make their scholarship available to the new audience, Roman law supporting totalitarianism, Strauss rejecting natural law, and the role of democratic popular support of fascist regimes in Neumann.

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