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Edelnet E-Library News

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**Erasmus+**

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Editorial



We present today the model number 2 of our academic collaboration program's (EDELNet) Newsletter. This time we will remark the Phds Reading of some of our students and associates. In OU Netherlands as well as in UNED interesting Phd thesis have been presented. EDELNet appeared with a doctoral vocation and for that it is a satisfaction to know that Phd Works are being finished.

PhD theses

Last December nine students, three of each institution (FER-NUni, OU, UNED) made a previous presentation in the locals of the Law Faculty of the UNED, in Madrid of some of their PhD activities. Always in presence of the Doctor Professors and other Phd students each one of the nine exposed their projects and their situations. The academic aspect did not

finish the convience of the group of teachers and students since on Thursday the 10th of December an animated confraternity dinner of teachers, Phd students and other researchers of UNED, OU and FernUNI was organised.

Ordinary meeting of the Executive Board

The Executive Board of EDELNet has had an ordinary meeting at the locals of the FernUNI in Bonn (Germany) last 27th of April. They analysed present and future activities with the attendance of the members of this Board of the three Law Faculties.

Summer School

In a month now, from the 4th to the 16th of July we will celebrate the ninth edition of our Summer School, the first under the Erasmus Plus scheme (most of the last ones had Erasmus support of the program corresponding to the 2007-2014 period. Madrid, Maastricht, Berlin, Madrid, Maastricht, Cologne, Madrid and Las Palmas de Gran Canaria hosted the last eight editions).

In 2016 it will be Berlin again, in the FernUni's local center of the capital, the city that will host our Summer School. This time there will be two different activities. The first week, from 4th to 8th of July, postgraduates and Master students of the three institutions will colive with professors of the three institutions with the support of lecturers of other Universities (Salamanca, among them).

Between the 11th and the 15th of July Undergraduate students will do the same. They will discuss several Comparative Law topics emphasizing Economic Law aspects (in Master Level) and various issues of Political Science in Constitutional Law topics (always in a practical way) related to democratic maturity (Grade level).

We hope that in our next number we will be able to give a more detailed description of that activity.

Now let's enjoy this E-News number.

Happy year-ending and happy Summer to everyone!

Prof. Dr. Pablo de Diego

Deputy to Dean in UNED Faculty of Law.

Faculty of Law



Legal Aspects of the Dutch Financial Services Complaints Institute



On November 27, 2015, Mr. Donald Hellegers LL.M. defended his PhD thesis, titled 'The Legal Aspects of the Dutch Financial Services Complaints Institute (Kifid) in 2015' at the Open Universiteit in Heerlen, The Netherlands. Mr. Hellegers is working as an assistant professor in private and corporate Law at the Open Universiteit.

His dissertation focuses on Kifid, the Dutch Financial Services Complaints Institute. Kifid, which stands for Klachteninstituut Financiële Dienstverlening, mediates in the event of disputes between consumers and banks, insurers, intermediaries and other providers of financial services with a view to reach a settlement. From the moment of its establishment in 2006, its functioning has been at the centre of attention, not only because of a perceived lack of independence and neutrality. For this reason, and because there have been the necessary modifications to its structure from the very begin-

ning – in some cases as a result of a change in the statutory preconditions which Kifid has to meet – this study investigates its current functioning in the light of the most important legal preconditions as set in legislation and formulated by the courts and by scholars.

Chapter 1 therefore contains more detailed research questions and sets out the working method for answering these questions.

In Chapter 2 the history of the formation of Kifid and its organisation are discussed in greater detail. The realization of Kifid is connected in particular with two developments that occurred at about the same time. The first development concerns the preliminaries to the Dutch Financial Supervision Act (Wet op het financieel toezicht) and the introduction of the Act. The second is the coming into effect of Directive



2002/65/EC concerning the distance marketing of consumer financial services, Directive 2002/92/EC on insurance mediation and Directive 2004/39/EC on markets in financial instruments. In similar wording, each of these directives obliges the member states within the scope of the respective directives to encourage the introduction of appropriate and effective complaints and appeal procedures for the out-of-court settlement of consumer disputes.

In Chapter 3 attention is paid to the overall structure and organization of Kifid from an historical perspective. Although the identity and structure of Kifid were to a large degree determined at the time of its establishment, since then the necessary modifications have been made regarding its form. Its Articles of Association were amended four times in the course of eight years to, among other things, better safeguard the independent character of the dispute settlement and to adapt its organisational structure in order to meet the requirements under two European initiatives, i.e. the 'Directive on Consumer ADR' and the 'Regulation on Consumer ODR', and the Dutch Consumer Out-of-Court Dispute Settlement Implementation Act (Implementatiewet buitengerechtelijke geschillenbeslechting consumenten), which aims to implement the Directive on Consumer ADR. In order to find an answer to the question as to whether Kifid was set up and is functioning in conformity with the current most relevant legal preconditions.

Chapter 4 examines the question as to which legal standards are of most relevance to Kifid. The standards discussed are

those laid down in Recommendation 98/257/EC, Recommendation 2001/310/EC, the Directive on Consumer ADR and the Regulation on Consumer ODR, articles 45 through 48f of the Dutch Administrative Order governing the conduct-of-business supervision of financial undertakings (Besluit Gedragstoezicht financiële ondernemingen, BGfo), the Dutch Consumer Out-of-Court Settlement Implementation Act and various provisions from Books 6 and 7 of the Dutch Civil Code (BW).

Chapter 5, the final chapter, provides an answer to the question as to whether the current Articles of Association and Bylaws of Kifid meet the standards set in the Dutch Implementation Act and the Administrative Order governing the conduct-of-business supervision of financial undertakings (BGfo). In Chapters 4 and 5 it is made clear that in essence, but not in all instances, Kifid's structure and functioning are in conformity with the most relevant legal preconditions. At some points in the text a number of recommendations are found.

EU regulations and the margin of appreciation by the Dutch criminal court



On March 4, 2016, Mrs. Mandy de Bruijn LL.M. defended her PhD thesis, titled 'Effects of EU regulations for the margin of appreciation by the Dutch criminal court ('Armslag voor de strafrechter')' at the Open Universiteit in Heerlen, The Netherlands. Mrs. De Bruijn is working as an assistant professor in Criminal Law at the Open Universiteit.

Her dissertation focuses on the research question whether the involvement of the European Union with criminal procedure rules either contributes to a trend in the Netherlands in which these rules are being broadened, or rather the opposite, by strengthening these rules, and thus decreasing the margin of appreciation by the Dutch court. The (regularly raised) assumption is that the European Union does not support the national trend, but, on the contrary, leads to a decrease of the discretion of the national court.

Since there are, up to now, only few Council decisions or directives concerning the national criminal procedure, the

main question is answered on the basis of a specific field of criminal procedure: the international judicial assistance in criminal matters. This field of law is part of criminal procedure in a broad sense. As such this analysis compares the traditional international judicial assistance with the implementation of mutual recognition in this field and cautiously quantifies this comparison.

The main finding is that the assumption, almost always unsubstantiated in terms of quantification, cannot be supported by this study. Whether tightening is the case, or not, depends mostly on choices of the national legislator.

Freedom of expression, hate speech and direct incitement

On January 1, 2016, Mr. Martín Herrera D. defended his PhD thesis, titled 'Freedom of expression, hate speech and direct incitement. Clear and imminent danger from the perspective of the Supreme Court of the United States and the European Court of Human Rights' at the UNED of Spain.

The aim of this thesis is to analyze the importance of the right to freedom of expression and information for democratic societies, their way of contributing to the free exchange of ideas that have enabled human and technological development of modern societies, and the need to make the voice of minorities heard thanks to its free exercise. Although its essence is recognized in the main international treaties, since the time of ancient Greece it has been a right subject to many controversies, and is perhaps the most feared by enemies of the establishment. Its exercise has allowed the transfer of linguistic, cultural, religious and technological heritage of humanity, but has also fostered the coming of abject periods during which the reason succumbed to ignorance, destruction and violence, the decline of differential human reasoning and the empowerment of intolerance as a result of the fear of speaking out against the abject.

In this sense, freedom of expression is a right that makes it possible to spread ideologies when the amplifier of the intolerant speaker is louder than the voices of the weak, or on the contrary, if the message comes from a source that holds a dominant position such that it can silence the oppressed in order to make its purposes effective. It's at this stage where we enter into the realm of discourse called hate speech, which is able to incite directly to discrimination, violence or war, and is unprotected by a large number of international treaties.

These facets were one of the major anxieties of our immortal brother, Martin Luther King, who said: "I am not worried about the corruption, the violence, the dishonesty, the people without ethics, but what worries me the most is the silence of the good". And we will certainly try to keep this in mind during this study; this intangible consideration, with the aim to avoid falling into sensationalism that distorts the essence of freedom of expression, which for us is none other than the ideal transmission medium for brotherhood between cultures and civilizations.

That said, we are moving into the structure of the work: In the first chapter, we will discuss the treatment of freedom of expression and of the risks of its exercise, based on those Athenian democratic pioneers. That way we will try to outline the importance of this law for the development of democratic societies and the risks posed by its exercise from a universal perspective.

In the second chapter, we will show the importance given to freedom of expression by the US constitutional law and the long controversy that its recognition has brought to the interests of the State. For this purpose, we will base our analysis on the abundant and substantial case-law that the Supreme Court (USSC) developed in the last century, and which we certainly believe deserves to be recognized.

The third chapter aims to identify the value of freedom of expression in Europe, confused with a historical traditionalism that constantly stumbles over the recognition of cultural, ideological, political, and religious diversity in a forced attempt to make Europe a militant system influenced by the tragedy of its continuing wars. As a consequence, the



European Court of Human Rights (ECHR) has had repeated setbacks, and therefore developed a slow and diffuse jurisprudence that appropriately establishes some acceptable standards, but which in some occasions are not applied case by case, or are declared inadmissible based on the abuse of rights clause. These standards, along with the margin of appreciation of national courts, will accompany us all along the remaining chapters of the thesis.

In the fourth chapter, we will analyze the delicate conflict between freedom of expression and religion in which we will see the merge of freedom of satirical and religious information with incitement to intolerance.

The fifth chapter identifies the –for fear of a repetition– forced establishment of a part of the widely recognized and verified history, and which has unfairly made of its slanderers criminally persecuted enemies.

Finally, the sixth chapter will try to identify the real and imminent danger of racial and ethnic discourse and the consequences of its restriction. Conscious of the relevance of the extreme speech exercise in the media and in the political discourse, we have considered appropriate to leave this vibrant material for the end, with the clear aim that the importance of its free exercise and the risks it represents, shall be the subject of future studies which could help to determine the admissible limits to this speech.

As for the extension, this is our unfinished business, because to be honest we would have liked to write a modern thesis with half the content that is presented here. However, the vibrant subject has made it difficult to marginalize other parts of speech we do not refer to.

During this long search, it has not been easy just being a spectator of some of the analyzed tragedies, and there have

not been few occasions in which our despair has increased under the relentless shadow of affliction; to see how far human beings are able to go up against other members of the human community is not complacent nor advisable work for those of us who put more passion than intellect into it, because as Mark Sherry says, there is the risk that your own soul ends up burning by all the pain produced by the tragedy of others.

What we will try to show in these pages, is another extract of the history of mankind, an extract that will not stop to repeat itself in an analogical and continued way. It is not easy either to establish a priori a position that can restrict rights that have been achieved thanks to the efforts and suffering of many generations, and as we shall see, are the essence of our present imperfect democracies.

“I swear or affirm by my conscience and honour”

The defense of the doctoral thesis entitled “I Swear or Affirm by my Conscience and Honour: Sense and Effectiveness of the Oath or Affirmation”, presented by Mrs. Carmen Castañón-Jiménez, took place on 15th April 2016, at the Lecture Hall of the Faculty of Law of UNED in Madrid.

“I Swear or Affirm by my Conscience and Honour: Sense and Effectiveness of the Oath or Affirmation” deals with the meaning of the oath or its alternative affirmation nowadays. Despite an almost instinctive tendency to discard it as a mere relic of the past, the periodical interest shown by the media during certain oath of office ceremonies, as well as the continuous legislation reforms touching different aspects of the oath’s regulation, are proof of the opposite.

The research object is tackled from two points of view. Firstly, a theoretical-analytical framework is presented in order to answer the “what, who, what for, how, when, why, which consequences”- or, in other words, focus is put on the object, subjects, contents, functions, form, nature, grounds, validity and effectiveness. The answers to these questions are extracted from the common or recurring elements present in the different types of oath.

Secondly, the spread of normative references suggested an attempt at systematization of the oaths and affirmations present in the Spanish legal system. This was done through an

in-depth study of the regulation and use of the oath or affirmation within the Legislative, Executive and Judiciary branches of the State, as well as the King’s Oath, oaths in other constitutional bodies, and citizen oaths with public effects.

Research on this topic is scarce in Spain, so both the theoretical-analytical framework and the systematization and analysis of the existing types of oaths and affirmations are original contributions.

The last part of the thesis identifies contemporary trends of use and thought on the oath or affirmation, such as its evolution in democratic Spain, its employment as an instrument of Public Service Motivation and its recent vindication in private commercial spheres such as the well-known case of the bankers’ oath in The Netherlands.



Texts and speeches in the formation of colombian law 1777-1820

On April 19, 2016, Mrs. Mónica Patricia Navarro. defended his PhD thesis, titled 'Texts and speeches in the formation of colombian law 1777-1820. Royal library of Santa Fe and its contributions to the legal 'culture' at the Lecture Hall of the faculty of Law of UNED, in Madrid, Spain.

The study on the 'corpus' of texts and essential speeches (that they were) set for legal education is a field of study and research which is yet to be addressed consistently and systematically. The experience of countries like Spain, Mexico and Peru, and even (in) Argentina has allowed show that it is possible from the reconstruction of documentary heritage of the early stages of formation of the Hispanic culture to offer professionals from various fields of human sciences the ability to draw new routes in the conceptual map of studies on the culture and identity of the peoples of Latin America.

The issue begins with the question about books, readings and readers in the New World and passes through the formation of a native literature and a critical canon on its importance in the newly formed Spanish colonies, to continue

reviewing the contribution that book culture (especially the legal book) was in the construction of Colombian law in the studied period (1777-1820).

It recovers quantitatively and qualitatively the importance of the bibliography that reached the Spanish colonies in America, and the process of creation of texts and speeches that were consolidated in the New World, it is essential to understand the nature and identity of law arising in Colombia in the colony-republic transition. Under the conceptual budget of what we have called 'book culture', a new approach to the process of building a Latin American identity that from the cultural, religious and even political, became the basis of their own culture is intended to (would) permeate the construction of nations and independent republican states



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