Pluralism

democratic procedures and what are the conditions that such procedures must satisfy? In the first section, we consider descriptive theories of democracy; in the second, we focus on theories that are explicitly normative, in particular those associated with the deliberative model of democracy. This discussion, in turn, draws attention to the negative effect of the contemporary understanding of pluralism as purely moral or identity related, namely a reductive interpretation of political and social struggles as disputes over resource allocation, manageable through fair bargaining. In the third and last section, we explore a potential solution to this impasse through a discussion of Axel Honneth's recent attempt at reconstructing a 'moral grammar' of social conflicts, in particular redistributive conflicts. In spite of its weaknesses, this theory gives us tools to better grasp the conditions of their just treatment.

Dominique Terré, *Pluralism and Law* 69

This paper focuses on pluralism, which is connected with empiricism, pragmatism, realism, democracy, social forces. France of the Middle Age and the Roman Empire have experimented some kind of pluralism. Pluralism contrasts with the monism of the State involved in the theories of Carré de Malberg and Kelsen. Pluralism can be found in history more often than could be thought. Monism underrates the complexity of social life. Pluralism upholds that the law stems from the most vivid social forces, as George Gurvitch thinks who carved the formula of the "normative fact". However, pluralism is difficult to apprehend. Is a pluralism other than a mere façade possible ? Is there not always a reference to the State behind the most intense and unbridled legal forms? Pluralism today is rather to be found in phenomena such as alternative modes of conflict regulation or independent authorities.

Richard Bellamy, Justus Schönlau, *The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights* 85

Constitutional politics is often contrasted with normal politics on the grounds that the former involves deliberation on matters of principle and leads to a normative consensus, whereas the latter is characterized by self-interested bargaining and produces a compromise. We challenge this account in two respects. First, we argue that what Rawls called the 'burdens of judgment' mean that even on issues of principle there can be a plurality of reasonable views not all of which will be fully compatible with each other. Second, we contend that the bargaining and compromises typical of normal politics have many normative attractions and can be well suited to resolving disagreements of principle. We illustrate our argument via a detailed examination of the convention that drew up the EU Charter of Fundamental European Rights.

Elisabeth Zoller, *Pluralism as Foundation of the American Sense for the State* 109

The present article argues that pluralism is the best conceptual tool to get an idea of the American sense of the State. The historical roots of the pluralistic State are to be found in Letter 10 of the Federalist Papers dealing with fac-

tions and interests in the modern society and in Letter 51 addressing the means to keep both of them under control.

Some pluralist political philosophers assume that an acceptance of the thesis of value pluralism entails a rejection of autonomy-liberalism in favor of a form of liberalism based on the ideal of toleration. This assumption is mistaken. First, value-pluralism shares with relativism the difficulty inherent in any attempt at deriving a normative conclusion from a descriptive thesis. An attempt at filling in the argument with missing bridging premises shows that value pluralism is more naturally connected with autonomy-liberalism than it is with a toleration-based liberalism. This is because individuals must possess a capacity for autonomous choice in order for pluralism to have any relevance for them.

The contemporary discussion about pluralism is mainly focused on the opposition between two kinds of liberty: negative liberty, as absence of external constraint, and positive liberty as self-accomplishment. This paper propounds an intermediary meaning of liberty, which is also more commonplace: the appreciative liberty, which concerns the possibility for everyone to act towards one's best aims in non-ideal psychological and social conditions. The paper describes several sorts of moral and politic pluralism and emphasizes the example of agreed dependences upon communities, sexual partners or addictive substances, in order to develop a "meta-liberal" perspective, promoting a public contribution to individual autonomy, which would be respectful of all the appreciative liberties.

This paper presents and discusses the works of Canadian philosopher Will Kymlicka and his theses regarding the protection and promotion of minorities. Kymlicka draws a strong link between culture and autonomy, and claims that principles of justice in liberal democracies demand that special rights and privileges, including self-determination, be granted to national minorities. After a critical evaluation of the epistemological presuppositions structuring that scheme, the paper shows that the two main analytical dichotomies on which it rests, between national minorities and immigrant communities, and between internal and external restrictions, are either empirically unjustified or logically flawed. While the claims presented by minorities may not be illegitimate, they are not matters of justice but of preferences, and should thus be governed by political arguments, rather than by ethical ones. Then, the paper analyzes the possible consequences of transferring high levels of self-government to national minorities. That transfer overlooks the power relations within groups, and seems to duplicate the framework of international relations among sovereign states. As such, it can hardly be defended in the name of liberalism, and constitutes a renouncement of political theory to actively embrace pluralism. What is more, the administrative inscription of identities it maps out can be the source of serious infringements on autonomy.

The paper concludes with a presentation of some alternative understandings of identities and pluralism, which bypass those limits and that renouncement to politics.

Michel Germain, *Pluralism and Economic Law* 235
Pluralism is difficult to define. Economic law is forever growing. Thus, the meeting of legal pluralism and economic law is a particularly delicate matter. Legal pluralism asks the question if a law can develop outside State law and of the constraints organized by the State. Such a situation of true pluralism is very seldom, maybe non-existent: the new formula of business ethics might belong to this realm. However, one comes more often across a relative pluralism, allowing a group, such as a commercial company, to live an apparently autonomous life, but in fact in close symbiosis with state law.

Daniel Gutmann, *Pluralism and Tax Law* 243
This paper goes into the relationships between tax law and the many facets of pluralism. It focuses in particular on the role tax law is playing to maintain and develop social and moral pluralism, as well as on the issue of the future of pluralism in tax patterns.

Luc Wintgens, *Légisprudence: Study for a new theory of legislation* 251
Irrational theories of legislation may exist. There is no theory of rational legislation. The theory of rational legislation which is christened "légisprudence" contributes to the rationalization of the process of legislation by linking it to principles. This choice for a theory of principles, as well as their mutual relation, calls for an in depth argumentation, which tends to question the old positioning of case law, legal dogmatic, legal theory and philosophy et above all the relationships between these various fields. I this analysis were to bear fruit, légisprudence as a new theory of legislation could take root and contribute to a bettering not only of legislation as such but also of our way to envision it.

Didier Boden, *Legal Pluralism in Private International Law* 275
The expression "legal pluralism" designates, among many other meanings, a general theory of law (that permits for instance to describe law, to apply it, or to advocate its change or its preservation), as opposed to monism and dualism. As general theories of law, monism and dualism, unlike pluralism, are identically unable to describe relations between legal orders; in that sense and to that extent, dualism is but a manner of monism, so it does not necessitate separate reflections. In private international law, monism and pluralism are surprisingly named of bilateralism and unilateralism. It is essentially since the end of the 19th century that the contrast between monism-bilateralism and pluralism-unilateralism is perceived. Some legislators chose on purpose to follow the one or the other one of these two theories. They guide the organs of application of the law, giving them its directions for use. For a half-century, authors have been measuring the extent in which each of these two theories respectively corresponds to positive law, the recent evolution of which gives an increasing pertinence to pluralism-unilateralism. The many paradoxes, vicious circles, *petitiones principii*, and others problems that the private international

law has experienced since 1837 were recently identified as so many results of the entanglement of these two theories, which are in the main incompatible with each other. To many respects, moral and ethical theories of placing oneself in the service of someone else's will (active tolerance, active obedience, active complicity) would gain by being collated with theories of private international law, traditionally presented by its specialists as the law of tolerance.

TRIBUTE

J.-L. Gardies's legal philosophy has formed gradually, thanks to a set of works written over a period of more than twenty years, which focused on the study of moral and legal rationality. Its constant concern was to always establish a relation of reciprocal confirmation/rectification between the contents of phenomenological intuition and logical constructions. At the same time, he endeavored to improve the tool allowing an analysis of the contents of legal concepts, by moving from a structuralist conception influenced by Reinach, to a logical writing stemming from the works of Hintikka and Kripke. He finally had the merit to insert these analyses in a more general study of natural speech grammar, which gave prominence to the rational properties common to juridical, logical and mathematical speeches.

MISCELLANEOUS STUDIES

Among the reasonings building court orders, one appears regularly: the authority reasoning. Even if it is nurtured with classical reasonings such as the inductive reasoning or the deductive reasoning, the authority reasoning is, once one accepts to presume it, likely to disrupt civil proceedings as well as the general theory of law.

This article hopes to begin a debate on the nature and origins of crosscurrents in contemporary Franco-American legal philosophy. As such, no claim is made to an exhaustive treatment of the subject. The central thesis of this article is that although each country has its own distinct philosophical traditions, French philosophical thought has had a distinct influence on American legal philosophy in the latter half of the twentieth century. To demonstrate this, the article summarizes the seminal thought of certain twentieth century French philosophers such as Jean-Paul Sartre, Michel Foucault, Jacques Derrida and Jean-Francois. It then traces their influence on their contemporary American counterparts such as Jack Balkin, Pierre Schlag, Duncan Kennedy, Peter Gabel, Mark Kelman, Drucilla Cornell, Richard Rorty and Stanley Fish.

Reinach has not yet found his place within the Pantheon of legal theoricists. Husserl, Kantorowicz, Radbruch, Villey... have yet commented on his works, and his ideas have recently been reevaluated in philosophy of knowledge. The understanding of the theoretical impasse and the slight practical interest of his intuitionist approach had only suggested to direct phenomenological research in law theory towards the late works of Husserl. Putting aside this familiar issue, we propose here to read *de novo* Reinach through his earliest work, his 1905 *Dissertation* on the *Concept of Causation in Criminal Law*. Reinach appears not only to exemplify the contradictions of the *fin de siècle* positivism, but to greatly help conceptualizing causation in law. Reinach is certainly a precursor for the speech act theory. To read him as a precursor for causation, however, gives his work more depth and relevance in the field of legal theory.

The author shows that, in Radbruch legal philosophy, the idea of law answers three parameters which interfere with everyday legal practice: the need for justice, the demand of guarantee, the concern for ends. Respecting these parameters is essential in a democratic society.