

CHAIRE VILLEY 2019

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OUTLINE FOR THE FIRST SESSION

« The Rise and Fall of the Western Legal Tradition »

Jeudi 13 juin 2019, 16h-19h.

Institut Michel Villey.

**Outline :**

- I) Method and objectives
- II) The classical legal thought at the end of the 19<sup>th</sup> century: neutral private law and state neutrality
- III) The realist and CLS critique of private law in the 20<sup>th</sup> century: ideology, background rules and state action
- IV) Current usefulness of realist's and CLS' insights

## **I) METHOD AND OBJECTIVES.**

- **Method of analysis: selection of sources and the research method in law.**
- **The concept of legal consciousness and the problem of unity within the system.**

### **Bibliography:**

- 1) Duncan KENNEDY, *The Rise and Fall of Classical Legal Thought*, Beard Books, Cambridge, Washington DC (2006), Preface: Thirty Years Later.  
Source : [http://duncankennedy.net/documents/r&f\\_clt/Preface\\_Thirty%20Years%20Later.pdf](http://duncankennedy.net/documents/r&f_clt/Preface_Thirty%20Years%20Later.pdf)
- 2) Duncan KENNEDY, « Three Globalizations of Law and Legal Thought: 1850–2000 », in *The New Law and Economic Development: a Critical Appraisal* 63 (David TRUBEK & Alvaro SANTOS eds., 2006).  
Source : <http://duncankennedy.net/documents/Photo%20articles/Three%20Globalizations%20of%20Law%20and%20Legal%20Thought.pdf>

## **II) THE CLASSICAL LEGAL THOUGHT AT THE END OF THE 19<sup>TH</sup> CENTURY: NEUTRAL PRIVATE LAW AND STATE NEUTRALITY.**

- **Creating the public-private divide and defending the minimal state**
- **Expression of this ideology in contract law**

### **Bibliography:**

- 1) Duncan KENNEDY, « From the Will Theory to the Principle of Private Autonomy : Lon Fuller's "Consideration and Form" », 100 *Colum. L. Rev.* 94 (2000), p. 107 et s + p. 115 et s.  
Source : <http://duncankennedy.net/documents/From%20the%20Will%20Theory%20to%20the%20Principle%20of%20Private%20Autonomy.pdf>

## **III) THE REALIST AND CLS CRITIQUE OF PRIVATE LAW IN THE 20<sup>TH</sup> CENTURY: IDEOLOGY, BACKGROUND RULES AND STATE ACTION**

- **Questioning the public-private divide and state neutrality: conflicting considerations model, background rules of permission and how they directly structure economic struggle for resources**
- **A public law critique of contract law: redefining the freedom of contract**

## **Bibliography:**

- 1) Duncan KENNEDY, « The Stages of the Decline of the Public/Private Distinction », 130 *Univ. of Pennsylvania L. Rev.* 1349 (1982)  
Source : [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4675&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4675&context=penn_law_review)
- 2) Duncan KENNEDY, « The Stakes of Law, or Hale and Foucault ! », *Legal Studies Forum*, Volume XV, Number 4 (1991)  
Source : <http://duncankennedy.net/documents/The%20Stakes%20of%20Law%20or%20Hale%20and%20Foucault%20%20J%20Leg%20Stud.pdf>
- 3) Duncan KENNEDY, « From the Will Theory to the Principle of Private Autonomy : Lon Fuller's "Consideration and Form" », 100 *Colum. L. Rev.* 94 (2000), p. 117 et s. (the external and internal critiques of the will theory)  
Source : <http://duncankennedy.net/documents/From%20the%20Will%20Theory%20to%20the%20Principle%20of%20Private%20Autonomy.pdf>
- 4) Duncan KENNEDY and Marie-Claire BELLEAU, « La place de René Demogue dans la généalogie de la pensée juridique contemporaines », 56 *RIEJ* 153 (2006).  
Source : <http://duncankennedy.net/documents/Photo%20articles/Rene%20Demogue%20dans%20la%20genealogie%20de%20la%20pensee%20juridique%20contemporaine.pdf>

## **IV) WHAT TO DO NOW?**

- **What about Law and Economics?**

## **Bibliography:**

- 1) Duncan Kennedy, « Law and Economics from the Perspective of Critical Legal Studies »  
Source : <http://duncankennedy.net/documents/Law%20and%20Economics%20from%20the%20Perspective%20of%20cls.pdf>
- **CLS as a method for today's doctrine: feminism and race theory**

## OUTLINE FOR THE SECOND SESSION

« Legal Reasoning and Adjudication »

Vendredi 14 juin 2019, 16h-19h.

Institut Michel Villey.

### Outline :

- I) Terms of the debate
- II) Adjudication vs Legislation: The specificity of the judge's function
- III) The denial of ideology in adjudication and its consequences
- IV) The critique of rights

## I) TERMS OF THE DEBATE

- Ideology
- Liberalism/conservatism
- Legal elite/intelligentsia

## II) ADJUDICATION VS. LEGISLATION: THE SPECIFICITY OF THE JUDGE'S FUNCTION

- The distinction between legislation and adjudication from a CLS's perspective
- What are the specific constraints in adjudication? Questioning the CLS's theory of interpretation in comparison with the US and french realist approach

## III) THE DENIAL OF THE PRESENCE OF IDEOLOGY IN ADJUDICATION AND ITS CONSEQUENCES

- Meaning and scope of the myth of the presence of ideology in adjudication: Birth and survival of this collective denial
- Effects of adjudication in this context: moderation, empowerment, legitimation

## IV) THE CRITIQUE OF RIGHTS

- Use of rights in adjudication and the influence of partisanship
- Loss of faith in rights

### Bibliography:

- 1) Duncan KENNEDY, *A Critique of Adjudication (fin de siècle)*, Harvard University Press, 1998.
- 2) Duncan KENNEDY, « Une alternative phénoménologique de gauche à la théorie de l'interprétation juridique Hart/Kelsen », *Legal Reasoning*, Collected Essays, The Davies Book Publishers, Aurora CO, 2008 (trad. V. FORREY et A. GUIGUE).  
Source : <https://duncankennedy.net/documents/New/Une%20Alternative%20Phenom%20enologique%20de%20Gauche.pdf>

- 3) Duncan KENNEDY, « The Critique of Rights in Critical Legal Studies », in BROWN and HALLEY, eds., *Left Legalism/Left Critique*, Duke University Press, 2002.  
Source : <https://duncankennedy.net/documents/The%20Critique%20of%20Rights%20in%20cls.pdf>
- 4) Justin DESAUTEL-STEIN, « Structuralist Legal Histories », *Law and Contemporary Problems*, Vol. 78, No. 1, 2015.  
Source : [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2591956](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591956)
- 5) Michel TROPER, « Chapitre XIX : Le problème de l'interprétation et la théorie de la supralégalité constitutionnelle », in *Pour une théorie juridique de l'État*, Presses Universitaires de France, « Léviathan », 1994, p. 293-315.