PRN Subject Matter eJournals:
PHILOSOPHY OF LAW eJOURNAL
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Announcement:

At present, all Philosophy Research Network (PRN) journals are managed by the network's co-directors, Lawrence Becker and Brie Gertler.

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The University of Sydney Law School

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Hebrew University of Jerusalem - Faculty of Law

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5. Hinduism and Law
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7. Using Litigation to Defend Women Prosecuted for Abortion in Mexico: Challenging State Laws and the Implications of Recent Court Judgments
Jennifer Paine
Grupo de Informacion en Reproduccion Elegida (GIRE), Mexico
Regina Tames Noriega
GIRE, Mexico
Alma Beltran y Puga
Unaffiliated Authors - Independent

Philosophy of Law

Brian Leiter
University of Chicago
Michael Sevel
The University of Sydney Law School

ENCYCLOPAEDIA BRITANNICA, 2015
Sydney Law School Research Paper No. 15/18

Abstract:
A brief and general introduction to the philosophy of law. The article includes a history of the philosophy of law from Ancient Greece to the present, and a discussion of the primary questions and arguments of the field.
View on SSRN

Contract Theory and the Limits of Reason

Efi Zemach
Hebrew University of Jerusalem - Faculty of Law
Omri Ben-Zvi
Hebrew University of Jerusalem - Faculty of Law

Tulsa Law Review, Vol. 52, 2017

Abstract:
It is widely agreed that no theory of contract is fully adequate – all theories face formidable descriptive, normative and conceptual difficulties. Why has contract scholarship failed to produce an acceptable theory of contract law, even after several decades of nuanced and sophisticated theoretical efforts? This Article answers this puzzle by offering a novel meta-theory of contract scholarship that focuses on the aesthetics of various contract theories. An aesthetic commitment, under this understanding, is a pre-theoretical presupposition regarding the form (as opposed to the substance) of legal discourse. The Article argues that jurists harbor several different aesthetics and often employ them interchangeably and without noticing. The continuing struggle between different contract theories is isomorphous to the battle of aesthetics that rages in the legal community as a whole. Since there is no meta-aesthetic way to determine which aesthetic construction is correct, contract theories, which are based on different aesthetics, are destined to continue struggling indefinitely. The Article explores four leading contract theories – promissory, reliance, economic and pluralistic conceptions of contract – and illustrates the manner each theory's substantive insights are interwoven with aesthetics commitments, animating and giving the theories their unique character. In so doing, the Article shows how the aesthetic point of view can better explain these theories' specific strengths, weaknesses and disagreements, and grounds its prediction that contract scholarship is not likely to produce a widely accepted theory any time soon.
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Protecting Rights and Their Impact on NCI Reporting – A Property Rights Based View on Accounting

Helfried Labrenz
University of Leipzig - Faculty of Economics and Management Science

Abstract:
The article examines a property rights perspective concerning NCI-recognition. The suggested accounting approach is based on the assumption that shareholder lawsuits, equipped with temporary blocking abilities, might increase the value of the corresponding NCI by restricting the parent company's property rights. The examination is embedded in the context of information analysis.
View on SSRN

Labor Judiciary Access to Achieve the Substantive Justice

Asri Wijayanti
University Muhammadiyah Surabaya

Abstract:
The existence of means to maintain or regain lost rights to be one of the law state requirements. This study aims to analyze the absolute competence of the Industrial Relation Court in handling all the problems of labor rights violation. This study is a normative legal research with the statute approach and socio-legal studies. The results shows that the competence of the Industrial Relation Court has not been able to handle all the problems of labor rights violations, especially those that are public. The resulted

recommendations are the revision of provisions related to the absolute competence of the industrial relation court and district court.
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Hinduism and Law

Timothy Lubin
Washington and Lee University; Washington and Lee University - School of Law

Hinduism in India: Modern and Contemporary Movements, edited by Will Sweetman and Aditya Malik (Sage Publications, 2016), pp. 41–68.

Abstract:
Beginning with a review of the interaction between religion and law in premodern periods, this essay presents in more detail the complex developments since the seventeenth century up to the present day. This includes the creation of 'Anglo-Hindu' law, colonial administration of justice (including the legal treatment of disapproved Hindu practices), and the gradual restriction of Hindu law to matters of family law; legal treatment of Hindus and Hindu institutions under secular law in modern India and Nepal; and Hindu religion under modern secular law outside of South Asia. Throughout, the emphasis is on the fruits of research in the last thirty years or so, especially current developments.
View on SSRN

Mimesis, Imagination and Law

Marcelo Galuppo
PUC Minas; Universidade Federal de Minas Gerais; University of Baltimore - School of Law

Abstract:
This paper assumes that a judicial sentence consists of a narrative that encompasses other narratives held in a suit. As such, we should know whether it is possible to transpose events into discourse, i.e., if it is possible to represent mimetically the reality in the judicial discourse. In order to this narrative process to be legitimate, it needs to present narrative coherence so that it makes possible that other narratives (plaintiff's, defendant's, and witnesses' ones) be understood as dialectically overcame in sentence's narrative. Imagination plays a key role in narratives, and it is not different in judicial narratives, since it links the events, disconnected and isolated in themselves, into a coherent, meaningful whole. This paper assumes that not only the phenomenology of trials can be better understood if one takes them at as a narrative, but also that the Judge's (and Jury's) imagination plays a major role in building the meaning of this narrative. This perspective also rejects the traditional positivistic view that court decision may be an objective description (neutral) of the facts involved in the case.
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Using Litigation to Defend Women Prosecuted for Abortion in Mexico: Challenging State Laws and the Implications of Recent Court Judgments

Jennifer Paine
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Regina Tames Noriega
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Reproductive Health Matters, Vol. 22, No. 44, November, 2014, pp. 61-69

Abstract:
While women in Mexico City can access free, safe and legal abortion during the first trimester, women in other Mexican states face many barriers. To complicate matters, between 2008 and 2009, 16 state constitutions were amended to protect life from conception. While these reforms do not annul existing legal abortion indications, they have created additional obstacles for women. Health providers increasingly report women who seek life-saving care for complications such as haemorrhage to the police, and some cases eventually end up in court. The Grupo de Información en Reproducción Elegida (GIRE) has successfully litigated such cases in state courts, with positive outcomes. However, state courts have mainly focused on procedural issues. The Mexican Supreme Court ruling recognising Mexico City's law has had a positive effect, but a stronger stance is needed. This paper discusses the constitutional framework and jurisprudence regarding abortion in Mexico, and the recent Costa Rica decision of the Inter-American Court of Human Rights. We assert that Mexican states must guarantee women's access to abortion on the legal grounds established in law. We continue to support litigation at the state level to oblige courts to exonerate women prosecuted for illegal abortion. Advocacy should, of course, also address the legislative and executive branches, while working simultaneously to set legal precedents on abortion.
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LABOR JUDICIARY ACCESS TO ACHIVE THE SUBSTANTIVE JUSTICE[1]

Dr. Asri Wijayanti, S.H.,MH. (University Muhammadiyah of Surabaya)

Abstract

The existence of means to maintain or regain lost rights to be one of the law state requirements. This study aims to analyze the absolute competence of the Industrial Relation Court in handling all the problems of labor rights violation. This study is a normative legal research with the statute approach and socio- legal studies. The results shows that the competence of the Industrial Relation Court has not been able to handle all the problems of labor rights violations, especially those that are public. The resulted recommendations are the revision of provisions related to the absolute competence of the industrial relation court and district court.

Keywords : labor judiciary, absolute competence and substantive justice .

Introduction

Judiciary is one of the means to maintain or regain lost rights. The existence of judiciary which guarantees the basic rights of labors is one of the requirements of law state. Access to get the fair legal process becomes the basic needs of each labor. Unfortunately until now access to a fair judiciary has not been perceived by labors. Industrial Relations Court (IRC = Pengadilan Hubungan Industrial/PHI) replaced the position of the Committee for Settlement of Labour Disputes at Regional Level (P4D)/Central Level (P4P). The existence of Law No. 2 of 2004, regarding the settlement of industrial relation disputes (LNRI/Official Gazette of The Republic of

[1] Be presented in The 3rd ACIKITA International Conference on Science & Technology (AICST), ACIKITA Foundation 25-27 Agustus 2013, Jakarta

Indonesia No. 6 , TLNRI/Additional of Official Gazette No. 4356) is still causing debate in community. Among those are about competencies, procedures, and access to the court to achieve justice. There are several interests of labors or employers which have not been resolved by the IRC. From the above description, it appears a problem that is whether the competency of IRC intended as a labor courts refers to Law 2/2004, has been able to accommodate all of the problems of labor rights violation to achieve substantive justice ?

Materials and methods

This study is a normative legal research by statute approach and socio- legal studies. Materials used in the study of law is legislation to regulate labor judiciary and the case of labor rights violation along with the court's judgement.

Result and Discussions

Judiciary access for the labors should be able to guarantee the basic rights of labors.

Access means the way to enter[2]. Judiciary access for labors in this paper means the way for the labors to maintain the guarantee of basic rights in the work. The goal of judiciary for labors is to ensure labors' rights.

[2] http://artikata.com/arti-318231-akses.html

There are three basic questions in this paper. The first question is what the basic rights of labors are. The second question is how the regulation of the basic rights of labors in Indonesia is. The third question is if the basic labor rights regulation has already provided judiciary access for the labors.

A. Basic rights of labors

Let us talk about the first question namely what the basic rights of labors are. Rights derived from the word "right", it means *something (as a power or privilege) to which one has a just or lawful claim*.[3] Paton said that the right contains three elements, namely *protection, will,* and *interest*.[4] The essence of rights is the existence of a claim.[5] Claim is a legal action that can be done, if there are rights that have been abused.

The right is a freedom to do or not to do something related to something or against a particular legal subject or all legal subjects without any hindrance or interference from any party and the freedom has a legal base and therefore it is protected. Basic labor rights are a part of human rights. *Everyone has the right to life, liberty and security of person*. The three rights are a series that should be possessed by every human being and embodied in the two groups of rights. The first group are civil and political rights.[6] The second group are the social, economic and cultural rights.[7] The

[3] The Merriam Webster Dictionary, op.cit., h. 626
[4] G. W. Paton, *op.cit.*, h. 286
[5] Philipus M. Hadjon, **Perlindungan Hukum Bagi Rakyat Indonesia (Suatu Studi Tentang Prinsip-Prinsipnya, Penanganannya Oleh Pengadilan Dalam Lingkungan Peradilan Umum Dan Pembentukan Peradilan Administrasi)**, Peradaban, 2007, h. 34. (Philipus M. Hadjon I).
[6] Political and civil rights are guaranteed in Article 4 – Article 21 UN Charter
[7] social, economic and cultural rights are guaranteed in Article 22 – Article 27 UN Charter

fair labor judiciary access is the implementation of the right to get a fair trial and an open judiciary by an independent and impartial court (Article 10 of the UN Charter).

Labors as human beings must also have three basic rights. In 1998, *the International Labor Organization (ILO*) has released *the ILO Declaration on Fundamental Principles and Rights at Work*.[8] The declaration aims to maintain the relationship between social progress and economic growth, the guarantee of basic principles and rights at work. It states that all members including those that have not ratified these conventions, have an obligation arising from the fact of membership in the Organization to respect, to promote and to realize, in good faith, the principles concerning the basic rights which are the subject of the *core convention*, namely :

1. *freedom of association and the effective recognition of the right to negotiate(C.87 ,C.98);*
2. *elimination of all forms of forced or compulsory labor (C.29 , C.105);*
3. *effective abolition of child labor (C.138) , and*
4. *elimination of discrimination in respect of employment and occupation (C.100 , C.131)*

B. The regulation of the basic rights of labors in Indonesia

The second discussion is to answer the question of how the regulation of the labor basic rights in Indonesia is. This paper is based on the normative legal research

[8] It is the result of General Conference of ILO in the 86th conference in Jenewa on June 19, 1998 in http://www.ilocarib.org.tt/projects/cariblex/conventions_12.shtml

using the statute approach. The approach is first based on the 1945 Indonesian constitution. Constitutionally, the fair judiciary access for labors is guaranteed by Article 27 paragraph (1) and (2) of the 1945 Constitution in conjunction with Article 28 paragraph (1) and (2) 1945 Constitution, namely :

- Article 27 1945 Constitution: (1) All citizens shall have an equal position in law and government and shall be obligated to uphold such law and government without exception. (2) Every citizen shall have the right to work and to living befitting human beings.
- Article 28D of the 1945 Constitution : (1) Every person shall have the right to recognition, guarantee, protection, and legal certainty of just laws as well as equal treatment before the law. (2) Every person shall have the right to work and to receive fair and proper remuneration and treatment work relationships.

That constitutionally assurance was further elaborated in the Law No. 13 Year 2013 concerning Manpower (manpower law). Manpower law distinguishes rights and labor rights.

Labor rights , namely :

1. Every labor has an equal opportunity to obtain employment without discrimination. (Article 5)
2. Every labor has the rights to acquire and/or enhance and/or develop job competence according to their talents, interests, and abilities through job training (Article 11).

3. Every labor has the rights to acquire the recognition of competence after training work that is held in government job training institute, private vocational training institutions, or training at work (Article 18 paragraph (1)).
4. Every labor has the same rights and opportunities to choose, obtain, or change jobs and earn a decent income on the inside or outside of the country (Article 31).

Worker rights include :

1. Every worker/labor has the right to acquire equal treatment without discrimination from employers (Article 6).
2. Every worker/labor has the right to acquire the protection of: occupational safety and health; morals and decency, and treatment in accordance with human dignity and religious values. (Article 86).
3. Every worker/labor has the right to earn a decent livelihood that meets for humanity (Article 88 paragraph (1)).
4. Every worker/labor and his family has the right to acquire the labors social insurance (Article 99 paragraph (1)).
5. Every worker/labor has the right to form and join trade unions / labor unions (Article 104 paragraph (1)).
6. Strike as a basic right of workers/labor and trade unions/labor unions is performed legally, orderly, and peacefully as a result of a breakdown in negotiations. (Article 137).

There is a difference between the regulation of the labor basic rights of the ILO and of the Law 13/2003. This difference results in lost of labor basic rights. For example, restrictions on the rule of law appears in Act 21/2000. Terms of Trade Unions was formed when the amount of at least 10 (ten) workers/labors (Article 5 paragraph (2)). If the requirements are not fulfilled during registration, then the Trade Unions will never get the number of records. The legal consequence is the establishment of Trade Unions will be illegal. If Trade Unions are illegal, then the rights (paragraph 25 (1)) and obligations (Article 27) of the Trade Unions won't be owned. The result of this rule has limited the PT JC Feed Jombang labors to form trade unions.

C. Judiciary access for labor

The third discussion is about if the regulation of basic labor rights has already provided judiciary access for the labor. The discussion is about the absolute competence of IRC that should be able to accommodate all the problems of the labors for the purposes of substantial justice.

There are four absolute competences of IRC. IRC is on duty and authority to examine and decide :

a. the first level of dispute concerning rights;
b. the first and last of the conflicts of interest;
c. the first level of dispute regarding the dismissal;
d. the first and the last level of the trade unions/labor unions in one company. (Article 56 of Law no. 2 of 2004)

IRC is a part of the general judiciary access which is subject to the laws of civil procedure. Industrial Relations Court as a special court set up in the district court that is authorized to investigate, prosecute and give the verdict against industrial disputes (Article 1 paragraph 17 of Law 2/2004), namely the rights disputes, conflicts of interest, termination of employment relationship disputes, disputes between Trade Unions/Labour Unions only within one company. Procedural law based on civil law (Article 57). Free of charge if the value of the claim is under $ 150,000,000.00 (one hundred and fifty million rupiah) (Article 58). This provision greatly weakened the principle of Trade Unions negotiate. Often cases of industrial relations do not only include the *presence of default* but demands for changing the terms and conditions of employment that may not exist in the CBA.[9] This involves a conflict of interest which is wisdom *(doelmatigheid issues)*, outside of the law aspects.[10]

Labor disputes (=industrial relationship) are the disputes among the legal subjects about the legal object of industrial relationship. Industrial relationship in a broadest sense is a working relationship. Indonesia does not distinguish the setting of individual and collective employment relationship. employment relationship set in Burgerlijk Wetboek (BW) is never repealed with the enactment of labor law (Law no. 13 in 2013). The regulation of dualism employment law happens. This law dualism resulted in obscurity of legal remedy which can be done by labors or employers if they want to fight for the rights that have been abused. For example, labors getting the termination of

[9] H.M. Laica Marzuki, " ***Mengenal Karakteristik Kasus-Kasus Perburuhan*** ", Varia Peradilan No. 133, IKAHI, Jakarta, Oktober 1996, hal. 151.
[10] Wijayanto Setiawan, ***Pengadilan Perburuhan Di Indonesia***, Disertasi, Universitas Airlangga, 2006, h. 19.

employment relationship unilaterally by the employer, and unfair, have rights to file a lawsuit to the District Court or IRC.

Labor disputes is known as the industrial relationship dispute. Labor disputes is the subject of dispute among the objects of employment relationships. Based on legal theory, there are two labor disputes: disputes over rights and interests disputes. Iman Supomo, labor disputes enumerated types are distinguished between disputes over rights (rechtsgeshil) and conflicts of interest (belangengeschil). According H.M. Laica Marzuki, there are two kinds of disputes that indicate the characteristics of labor cases, namely :

1. Cases of disputes over rights (rechtsgeschil, conflict right) which interlock with the approval, stressed the legal aspects (rechtsmatigheid) of the problem, especially regarding appointments brekdown (default) with the employment agreement, labor law abuses.
2. Cases of conflict of interest (belangeschillen, conflict of interest) that interlock with the absence of understanding conformity concerning the rules of employment and/or conditions of employment, particularly regarding the improvement of economy and the lives of workers accommodation, emphasize aspects such disputes doelmatigheid.

Understanding the different labor disputes is formulated in the form of industrial disputes in Indonesia. There are two critics of systematic interpretation of the rule of law. First, from the standpoint of person. There is a horizontal inconsistency in Article 1 paragraph 1 of Law 2/2004 and Article 1 paragraph 16 Law 13/2003. This

formulation is more appropriate as a definition of labor dispute, because the state was not included as a subject of industrial relationship that can be prosecuted by countries to establish a mechanism in the legislation so that the basic rights of labors in the core conventions can be protected. Minimum salary regulation in Governor's Decree is a form of decision that should be sued if it is deemed unfair. Governor is a state official. State may be sued, as a manifestation of Indonesia that is a law state.

Second, from the point of view of the legal object. Dismissal disputes, must be part of the right dispute, as in disputes over rights, the law has been violated, not to be implemented or interpreted differently. Dismissal disputes are disputes arising from the employment relationship, either because of congenital agreement, or violation of labor laws. So it is part of a rights dispute. Article 56 letter c of Law 2/2004 is too excessive in formulating the type of industrial disputes. Legal consequences of specialization in employment termination dispute, is the transfer case of the object of the labor dispute concerning the validity of the basic rights of labors laid off course can eliminating the state's responsibility to ensure the protection of the implementation of basic labor rights. Trade union/labor union in the company, should be tried in district court. The analogy is the disputes among employers regarding the trading business are settled in court. The dispute among the labors does not meet the minimum criteria for the two legal subjects in a employment relationship that is labors and employers.

There are shifts in the basic of labor law regulation. In the reign of the Dutch East Indies it used the basic of private law. Early independence it was based on administrative law and now it is conceptualized as a private law again. According to Philip M Hadjon, Labour Law is a functional discipline because it has a mixed character

of public law and private law. A good measure of law rules is formulated by Fuller into eight principles of the so-called of *principles of legality*, namely:

1. *a failure to Achieve rules at all, so that every issue must be decided on an ad hoc basis.*
2. *a failure to Publicize, or at least to the make avaiable to the affected party, the rules he is expected to observe*
3. *the abuse of retoactive legislation, the which not only can not itself guide action , but under cuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change*
4. *a failure to the make rules understandable*
5. *the enactment of contradictory rules*
6. *rules that require conduct beyond the powers of the affected party*
7. *introducing such frequent changes in the rules that the subject can not orient his action by them*
8. *a failure of congruence between the rules and their actual Announced as adminisration.*[11]

Those eight criteria referred by Hilaire Mc Coubrey and Nigel D White are the criteria of lawmaking.[12] IRC competence obscurity has an impact on the practice of law.

[11] Lon L. Fuller, The Morality of Law, Yale University Press, 1975, h. 39.

[12] Those eight criteria referred by Hilaire Mc Courbey and Nigel D. White are the criteria of lawmaking, that consist of *failure to establish rules at all, leading to absolute uncertainty; failure to make rules public to those requred to observe them improrer use of retroactive lawmaking; failure to make comprehensible rules; making rules which contradict each other; making rules which impose requirements with which complieance in impossible; canging rules so frequently that the required conduct becomes wholly unclear; discontinuity between the stated content of rules and their administration in practice*. (Look up Hilaire Mc Coubrey *and* Nigel D White, ***Textbook On Jurisprudence,*** Second edition, Blackstone Press Limited, 1993, h. 90.

Dispute case against the minimu wage, people still think that the authority of the court administration. For example, the judgement court ruling PTUN Sekupang Tanjung Pinang, Batam (01/G/2013/PTUN-TPI) and Tangerang were dismissed according to the minimum wage because it does not fulfil the criteria for the concrete,indvidual,and fnal administrative decisions. Many people still choose the District Court as a civil court case to settle the working relationship. For example, Surakarta District Court adjudicate the criminal case of wages below the minimum wage in the city with a criminal on parole. This situation resulted the emergence of shopping forum to choose the settlement of labor disputes.

Conclusion

Competence of the labor court has not been able to deal with all the issues of labor rights violation, especially those that are public, for example, the case of the minimum wage. Recommendation is revision of provisions relating to the competence of the industrial relations court and district court.

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