**SW 100 Workshop: Human Rights and Personal Identity**

**Convenor: Professor Jill Marshall (Royal Holloway, University of London)**

This workshop seeks to draw together papers on the themes of personal identity and human rights, including law’s role in democracies in forming, sustaining and protecting our identities. Do ideas of personal identity rights constrain us or enable us to live free lives? How does identity relate to dignity and diversity? How does this translate into a world of threats to, and legal restrictions on, (aspects of) our identities?

Who and what we are – our identity - involves identification with, in the sense of finding something in common with, or being similar to, other human beings. It also entails un-identification from others, in the sense of being different and distinct from, those others. This universal belonging, yet difference from, forms a crucial tension in considering personal identity.

The juxtaposition of belonging through similarity and difference is evident in human rights law seeking to enshrine what it is to be a human being individually, as a member of certain groups or cultures – race, religion, gender, sex - and as a member of the human species to be accorded dignity, freedom and equality.

Identity is defined in and through law. The fact of personal existence has to be legally registered and some form of birth record produced. This consists of certain components of that person’s identity, often including their place of birth, sex, names and certain details of parentage. Many think that such a record is needed to comply with a person’s human rights to know who they are. This implies that who they are exists at birth. Yet, is personal identity fixed or fluid and how can that be accommodated in law?

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**4 Hour Workshop consisting of two consecutive sessions:**

**Session One 14.00-16.00 Two hours**

At the beginning of session one, all Participants will be introduced for both sessions by convenor, Prof Jill Marshall

1. **Anish Chakravarty, Doctoral Candidate in the Department of Philosophy, and Anasuya Agarwala, Assistant Professor in the Department of Philosophy, Gargli College, University of Delhi, India**

**Spinoza’s Determinism and the scope of Human Freedom**

Spinoza’s ‘hard determinism’ denies human agency and free will. On the other hand, it also admits the possibility of human freedom. This paper attempts to derive the notion of Human Being within the seeming opposition between Determinism (which precludes questions of moral responsibility) and Freedom (and Personal Identity). Drawing from Spinoza’s *Tractatus Theologico-Politicus* and *Ethics*, this investigation further investigates the concept of Personal Identity, Human Rights, and Law, given his concept of a Human Being. Spinoza, through the method of Rationalism, understands freedom to be liberation from ignorance and belief in false causes, thereby ascribing a political significance to the concept of Rights.

1. **Deirdre McGowan, Senior Lecturer and Head of Law, Technological University Dublin**

**Foucault on the limits of identity rights**

An enduring concern with the nature of human subjectivity unites the disparate threads of Foucault’s large body of work. His archaeological work demonstrates that the rational unified subject of humanism does not exist but was created by linguistic procedures and discursive formations. In his genealogical phase, he shows how power operates on individuals to shape their subjectivity and his late work focuses on active self-constitution. Foucault sees identity categories as normative and exclusionary, but at the same time does not reject identity as politically irrelevant, preferring instead to focus on the contingency of identities and how they are historically and culturally produced.

Law, and human rights law in particular, has played a significant role in providing weight and density to concepts of identity, both personal and social and has been ecognizes by feminists and queer theorists for its role in re-enforcing exclusionary social categories. Ben Golder (2015) has suggested, from a Foucaldian perspective, that rights claims can be made in a way that acts to neither re-enforce nor completely refuse existing networks of power, implying that it is possible to make claims of right that do not rely on normative categories nor produce exclusionary effects. This paper suggests an alternative Foucauldian approach to identity based rights claims, developing the critical traditions of queer theory and post-modern feminism. Reading Foucault’s genealogical work on the emergence of the neoliberal episteme with his late work on ethics, I point to some of the ways in which legal claims of right have operated, not only to create and sustain particular identities but also to flatten the concept of identity and empty it of historical meaning (Winnubst 2015). Legal categories ecognize social differences in pursuit of narrow understandings of equality. Identities become unhinged from ethical frameworks and people become neo-liberal subjects of interests, fungible resources for the value ecognizes market. This approach does not necessarily negate the value of identity based rights claims; rather it suggests a mechanism for reflection upon their risks and liberational potential. As pointed out by Osamudia (2017), some claims for group justice require the deployment of a concept of minoritized identity that ecognizes the lived experiences of the systematically excluded.

References:

Ben Golder, *Foucault and the Politics of Rights* (Stanford University Press, 2015).

James Osamudia, “Valuing Identity” (2017) 102 *Minnesota Law Review* 127.

Shannon Winnubst, *Way Too Cool: Selling Out Race and Ethics* (Columbia University Press, 2015).

1. **Tom Lewis, Professor of Law, Nottingham Trent University**

**What to do with the ‘Buried Giant’? - Collective Historical Memory and Identity, in the Freedom of Expression Case Law of European Court of Human Rights**

Artists and philosophers have long pondered the relative value of preserving collective historical memory as against the value of ‘forgetting’. For example in his fantasy novel *The Buried Giant*, set in an imagined 6th century Britain of the Dark Ages, the Nobel Laureate Kazuo Ishiguro imagines a land in which previously warring peoples are able to live together in peace and harmony because the conflicts of the past have been forgotten through the agency of the magical breath of a giant buried she-dragon. But this social harmony comes at a heavy cost: an all-pervading loss of people’s identities and senses of self. Taking this dilemma as its starting point, this paper will critically examine the role of historical memory as an aspect of identity in the adjudication of human rights cases, in particular through the prism of the Article 10 case law of the European Court of Human Rights in which, in several recent cases, the right to freedom of expression has been set in the balance against collective historical memory as an aspect of identity protected by the right to private and family life under Article 8 of European Convention on Human Rights.

**Q & A, Links, themes, connections with the title of the conference: Dignity, Democracy, Diversity**

COFFEE BREAK SET BY CONFERENCE ORGANISERS

**Session Two 16.30-18.30**

Continuing from previous session and linking into this one:

1. **Jill Marshall, Professor of Law, Co-director of the Centre for the Study of Emotion and Law, Royal Holloway, University of London**

**Love, Care and Belonging in Rights to Identity**

In this paper, the author develops aspects of her 2014 book *Human Rights Law and Personal Identity*. This paper will focus on how love, care and belonging relate to the formation of identity and its protection legally. Safety, comfort and the social conditions of freedom and identity development will be analysed in this connection. In part, the paper will focus on the situation of girls and women who seek confidentiality in pregnancy and childbirth to include analysis of baby boxes - hatches usually forming part of a hospital wall where babies can be anonymously deposited into incubators – which now exist in many European Union countries, and in all U.S. states which have some form of ‘safe haven’ legislation for discreet births.

References:

Jill Marshall *Personal Freedom Through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff Brill 2009)

Jill Marshall *Human Rights Law and Personal Identity* (Routledge 2014)

1. **Yussef Al Tamimi, PhD researcher, Department of Law, European University Institute and visiting researcher at New York University’s Law School.**

**Identity and Belonging at the European Court of Human Rights**

Identity has been studied by human rights scholars in relation to specific themes ranging from gender to religion, but a comprehensive discursive analysis of the conception of identity in case law is lacking from human rights literature. This study addresses this gap by analyzing all cases where the European Court of Human Rights (Court) uses the terms ‘identity’ or ‘identité’ until 1 September 2017 (n=2,939). This is the first study to conduct a comprehensive analysis of the conception of identity in the case law of the Court. A substantive analysis of the judgments shows that identity provides a strong instrument to demand greater responsibilities from states for its citizens, while it also reveals internal contradictions. The analysis brings to light *three dilemmas in the case law* concerning the notion of identity: (i) on the psychological substance of identity, (ii) the problem of essentialism, and (iii) the question of the subjective or objective character of identity.

The aim of this presentation is to analyze these dilemmas in light of existing social-theoretical debates on identity in order to define questions for further study. In particular, the presentation will grapple with the first dilemma, on the psychological substance of identity, and relate the legal findings of my research to emerging law and emotion scholarship.

1. **Amal Ali, Senior Lecturer in Law, University of Lincoln**

# **At the Intersect of Law, Gender and Religious Belief**

The right to manifest a religious belief is enshrined in the European Convention on Human Rights and has been under some attack lately in a number of Contracting Party States. In response to increasingly visible religious pluralism, a number of States have created legislation which limits this right in certain instances through the criminalisation of religious manifestations.

This paper considers the representation of Muslim women, their right to manifest their religious belief and inclusion in policy by the European Court of Human Rights (ECtHR). It will include extensive case law analysis of the jurisprudence of the ECtHR and examine the language, content and legal concepts integrated in the areas of religious manifestations and gender equality. It also draws on the quantitative and qualitative research that has been conducted by researchers across Europe who have evidenced that women are disproportionately affected by such bans and it documents the experiences and motives of the women affected. Using a thematic framework derived from feminist critiques of political, cultural and religious thought within intersectionality, this paper will identify if the ECtHR has integrated underlying assumptions and representations of Muslim women into their discourse in a way which undermines its current gender equality jurisprudence.

1. **Patricia Glym Silva C De Souza, Escritorio Thadeu de Jesus e Silva Advogados, Brazil**

**The Concept of Law, Feminist Legal Theory, Gender and Identity**

 The current feminist legal theory is mainly an account of the history of feminism and how law reacts to temporal-historical contexts. Legal theory point of view of what is law, what is moral, and what should be each one of these concepts, mainly is incomplete and need to be confronted with a feminist point of view. This is the aim of this paper.  The "different voice" strand of the feminist theory, associated most visibly with the work of Wittgenstein, asserts that there is a distinctly female way of approaching moral and legal dilemmas and that such way has been ignored or downplayed in legal doctrine and scholarship. Feminism can influence the idea one has about what is law and moral, however legal theory usually has been written by men, and does not confront the concepts and answers already existent with the feminist theory. Legal theory needs to connect its answers with the question ‘how men’s bias rule social relations?’, trying to care about how women “different voice” has expression in law definition, and how and why this happens.  No matter what is written on a paper, each society has different approaches to constitutional systems and democracy concepts, even when the same thing is ruled, depending on race, gender and class.  Therefore, the very idea of social constructionists’ feminist theory, which locates the source of gender difference in cultural attitudes, ideology, socialization or organizational structures has implied some meanings inside the concepts and issues on law definition. This way, this paper has the intention to emphasize the importance of a real feminist legal theory, which relates the concept of law with each gender, and explain the constructions happening inside the society and the importance of relating this with other legal theory concepts, also aiming to explain, using philosophy of language how heterosexism and constitutional authoritarianism are related.

**Final Discussion with all participants: Links, themes, connections with the title of the conference: Dignity, Democracy, Diversity**