Law and ontological politics

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Who knows what pain and suffering are? The legislator seems to know, at least if we choose to believe the Finnish *Government Bill on the Reform of the Tort Liability Act*. The Bill is explicit on what pain is: 'Unpleasant sensations and other symptoms caused by personal injury are compensable harm. Pain is the most typical of these sensations and symptoms' (HE 167/2003, 54). The Bill also lets us know what suffering is: 'Suffering refers to the psychological feeling of suffering caused by an injurious wrong. Such a wrong may typically cause the feelings of fright, humiliation, shame and displeasure (HE 167/2003, 54). The first of the cited passages – although not singlehandedly since there are other statements on the subject in the bill – gives us a description of pain. The second passage shapes the contours of suffering. As a result, two rather fundamental experiences have received an explicit authoritative legal description.

Should we take these definitions for real? Can law's renditions of pain and suffering have anything in common with the 'real' pain and suffering supposedly out there somewhere? Or should they have? Are these questions even relevant? In this article, I attempt to delve into the complex relationships between the law's rendition of the real – what is out there – and the real itself – be it the real matters of the physical or the social world or something else. The main focus is on *legal concepts* that turn *real phenomena* into *legal categories*.

The basic conventional approaches to the real in law reflect what could be characterized as the *inside* and *outside* positions. First, some scholars argue that e.g. pain and suffering in tort law – and other comparable notions elsewhere – are exclusively legal notions, nothing but mere legal definitions. As such, the definitions *per se* have nothing to do with real world phenomena. They might have, but the important point is that the definitions are mere conventions on how certain words are used in a highly specific setting. On a general level, this approach entails that legal concepts are internal to and meaningful only as parts of

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the legal discourse and practices. These scholars postulate a sharp divide between the legal and the real. The legal – even the real things within law's contours – is something other than the real. The *ought* of law must be separated from the *is* of the real world, i.e. a line has to be drawn between the norms and the facts. The law gives us a glimpse of its real but shys away from rendering its real real.

The other approach contests the absolute divide between the real and the law. Legal concepts reflect, imitate or are modelled on real phenomena. Whatever the detailed formulations, legal concepts are intimately connected with the real. This approach is epitomized by those who think that the best platform for criticism of a legal conceptualization is the real. If you assert that the conceptualization does not make sense in the "real world", the attack is a heavy one, they think. One could e.g. say that the phenomenon the legal concept identifies does not really exist or that it is given a skewed rendering. In pain and suffering, such an attack might comprise of pointing out the discrepancies of the legal understanding and the real pain and suffering embodied in e.g. medical knowledge. For the critic, the relationship between the law's concepts and the real's concepts is much more complex than it is for the divisionist. The critic claims – at least implicitly – that the real and the legal should correspond.

Concepts and the problem of the real

Professor Tuori has in two recent articles – the first in Finnish in *Lakimies* (Tuori 2004) and the second in English on the pages of this very journal (Tuori 2006) – and again in his major book *Oikeuden ratio ja voluntas* (Tuori 2007, 139-141) – described three distinct groups of legal concepts. The first group of concepts sums up the normative contents of the legal order. Such concepts, e.g. strict liability or negligence in tort law, are purely legal. They serve as shorthands that denote certain bundles of legal norms, thus enabling us to refer to those *legal* phenomena. Essentially, the concepts can be assembled by way of inductive reasoning, once the norms are analyzed. Sometimes the concepts also function as legal principles, professor Tuori argues. (Tuori 2004, 2007, 139).

Other concepts, secondly, are geared towards settling the relationship between the legal system and the environment that the legal system has the task of regulating. These concepts bridge the gap between the *is* and the *ought* by forming legal- instutional facts, such as a marriage, a contract, a state or a municipal authtority. It seems that for Tuori the legal-institutional facts are simultaneously both legal phenomena and real entities. (Tuori 2004, 2007, 139).

The third group consists of concepts that are closer to the real than the two prior groups. These concepts give a *legal* shape to *extra-legal*, real-world phenomena, i.e. as Tuori would say 'societal relations or chains of events'. E.g. the concepts of crime, intention, or incitement in criminal law, administrative act in administrative law and labour relation in labour law are vehicles that render the real accessible to law. When a labour relation is defined – an employee performs work for the employer under her guidance and control for remuneration – the *Tatbestand* simply refers to distinct real world phenomena and makes them amenable to legal signification. Once defined in the legal discourse, these legal phenomena come to exist in the legal realm as well. The concepts map the real-world phenomena and developments, and articulate *legally relevant* aspects of these phenomena. (Tuori 2004, 2007, 139-140; Tuori, 2006, 35.)

A tension builds up. The classification – especially at its extremities, the first and second group – implies that there might be something that could be described as *purely legal* and *purely non-legal* concepts, a notion that Tuori effectively rebuffs by maintaining that the characterizations are only ideal types.

Even with the safetyline attached the tension between the law and the real resurfaces elsewhere when one of professor Tuori's main ideas – the notion that every legal concept is laden with its own inbuilt tacit social theory – is introduced. If even the purest of the legal concepts have a tacit social theory inbuilt in them, how can they be purely legal? If e.g. negligence, one of the first group concepts, has a real side to it, i.e. it comprises non-legal matter in the form of a tacit social theory, can we say that legal concepts could be assembled within the legal realm only? The problem is that if we take Tuori's idea of tacit social theories for real, the categorization seems to implode. One of professor Tuori's own examples illustrates the problem. Professor Tuori namely takes up a new private law conceptual scheme offered by professor Juha Karhu (Pöyhönen, 2000). He assigns professor Karhu's four concepts, i.e. those of overall arrangement, environment, interested party, and risk position, to the third group and states:

> This set of concepts is not designed to compress the normative contents of private law. These concepts do not either refer to legal institutions as legal-institutional facts. Instead the concepts serve to structure the factual situations when a legal decision must be made. They help e.g. the judge to recognize relevant features of societal relations and series of events. (Tuori 2004, 1217-1218, translation MV.)

The line drawn between professor Karhu's concepts and the first group seems justified. However, allotting Karhu's concepts to the third group does not do

them justice. I cannot think of why professor Tuori thinks that Karhu's concepts could not 'refer to legal-insitutional facts'. If one takes the set of concepts professor Karhu proposes for real, it becomes obvious that the concepts at least aspire to gain a 'reality' of their own, a legal-institutional status. The concepts are designed to take the place of e.g. such second group legal-institutional facts as contract, property, debt, property, legal subject, debtor, and debtee. Now, if professor Karhu's novel conceptualizations are accepted, the notions would not only 'help to recognize relevant features of social relations and series of events' as professor Tuori suggests. Instead, the whole of the social – i.e. the real – could perhaps be reconfigured, transformed into something else than it used to be. One would no longer talk about contracts or debts, debtors and debtees, but of something else. The possibility of transformatory conceptualizations opens up a new avenue. And should one widen the perspective a little, the legal might be a tool in constructing the social.

Sidestepping the problem

There is another approach that sidesteps altogether the problematic relationship between the typical in-and-out approaches. The novel approach inverts the questions of the real and the legal by a paradox of sorts: it renders both the real and the legal real. Such a trick cannot be done with old methods. What is needed is a new theory of knowledge. Where I turn is *actor-network-theory* (e.g. Latour 2005). In actor-network theory the outlook is that the world is not one thing that would be susceptible to the old-fashioned empirical detection, but in fact a far more complex, multidimensional, and multiple entity than usually thought. There is not a single world out there, but rather parallel real worlds in which both the 'real' and legal renditions of what is out there might coexist peacefully, and be real. And what is most important, each of the parallel versions is real, because none of them is real in the old sense. They are all enacted.

I will here omit the detailed discussion of actor-network-theory (Latour 2005). However, I raise an example, a specific article that discusses the relationship of concepts and reality, in order to illustrate the idea. Marianne Mol discusses in a 1999 article (Mol 1999) a medical condition, i.e. *anemia*. Even though the reference point for Mol's ideas is medicine, her ideas are worth considering here.

Mol starts out by stating that medicine in fact enacts and performs anemia. In fact medicine performs three anemias, not just one. Each distinct conceptu-

alization of what anemia is enacts its own anemia. The first one is *clinical anemia*. In clinical anemia, anemia becomes a thing when certain symptoms emerge in the patient. She might be tired, feel dizzy, or the inner side of her eyelids might be only palely pink. A clinical anemia culminates in these symptoms. The second alternative is *laboratory anemia*. In this variety, anemia is performed when a blood sample is analyzed and the findings compared to statistical norms that ascertain treshold values for those to be diagnosed with anemia. The third option is *pathophysiological anemia*. In its pathophysiological version, anemia does not come into being in symptoms, nor on the computer screen as the blood sample test takes the shape of a number or in deviations from the established norms. Now anemia is conceptualized as a bodily condition. The haemoglobin levels are too low for the individual to transport oxygen in sufficient quantities in the body. (Mol 1999, 78.)

The novelty in Mol's approach consists of thinking that all three anemias exist parallel to each other. How? The answer is interesting. Mol asserts that all the anemias are performed and enacted in the practices that are connected to anemia. A doctor may even slide from one anemia to another, i.e. from one reality to another, as she tries to treat a patient. The different anemias are not merely different aspects of one and the same phenomenon. They do not form a succession of conceptualizations that replace one another in disciplinary sequence as science progresses. They exist and are performed all the time, simultaneously. None can be said to be superior or the best. Mol is actually saying that there are three distinct anemias.

The distance between anemia and – say – the concept of a right in law might seem long. However, at least the Finnish Supreme Court has tackled a comparable problem in two cases. The cases, KKO 1998:79 and KKO 1998:80, concern, not anemia, but hepatitis c. Two Finns were sent from Finland to Estonia for coronary bypass surgery. During surgery, both contracted the disease from transfusion blood contaminated with the virus. The Finns sued and claimed damages for e.g. pain and suffering caused by the infection. The point in moot was whether a hepatitis c infection constituted a personal injury, a precondition for the awarding of damages. The claimants presented the Supreme Court with a laboratory ontology of hepatitis c and consequently of personal injury. They claimed that they had suffered a personal injury, because virus particles could be detected in their blood. The defendant countered by invoking a clinical hepatitis (and, thus, a different take on what is a personal injury). The defense considered that they were not liable, since for a personal injury to exist the aggrieved party must develop symptoms, not merely offer evidence of contracting a disease. In

the end, the Supreme Court had to choose between the two ontologies offered for a personal injury.

Plural ontologies and their politics

Mol's contention that there are parallel multiple ontologies is just the beginning. In fact, Mol's article discusses choices between these ontologies. Yes, ontologies. That is her word of choice. The choice is conscious and serves a purpose. Mol is not merely confusing epistemology or axiology with ontology; she is making a point, in fact an ontological point. She is saying that ontologies are plural and abundant. The most miniscule phenomen of the real cannot be performed if an entire ontology – or an actor-network as others within the actor-network-theory might say – is not enacted. And as a consequence, every performance creates its own world, a veritable ontology, nothing smaller, nothing bigger. And a plurality of ontologies as there is not one ontology, but many ontologies. Epistemology – in the traditional sense – is dead, and so is axiology. It is replaced by comparative ontology, or empirical metaphysics or cosmopolitics as Bruno Latour might say (Latour 2004).

Mol's emphasis is not only on ontologies, but on *ontological politics*. Why does she couple politics with ontologies? Mol asserts that a choice between parallel possible ontologies to be performed is ultimately a political one, a choice that has consequences to the life of the collective it creates. However, the situation is not simple. Mol's article focuses on how and under what conditions ontological politics is done. Four questions rise to the front:

1. Where are the options?
2. What is at stake?
3. Are there really options?
4. How to choose? (Mol 1999, 79.)

1. The first of Mol's questions raises an important point. Ontologies of real world phenomena are assembled and imagined when different institutions – seeking to do something to the very same phenomena – are constructed. Anemia, for example, acquires its contours first when it becomes a problem, something that must be addressed. Once anemia becomes a condition to be treated, the institutions for its treatment must be constructed. And the mundane practices of treatment construct what anemia is.

In anemia, there would be, according to Mol, two options. We might build the institutions for tackling anemia on either a clinical or a laboratory conception of anemia. However, in real life no options in fact exist. Screening the entire population for laboratory anemia is impossible. It would generate a great number of false positives and negatives. People would be treated where there was no need, and not treated, even if there was a dire need to do so. Screening would also be prohibitively expensive. Mol's point is that anemia is performed in an institutional setting, which is determined – by outside factors not pertaining to the 'true' nature of anemia – to be that of clinical anemia. The effect does not restrict itself to anemia alone. In many cases, outside factors

> shift the site of the decision elsewhere: to move it along. So they displace the decisive moment to places where, seen from here, it seems not a decision, but a fact. These places are, respectively: the intricacies of measurement techniques; considerations about good and bad reasons for treatment; and health care budgets. (Mol 1999, 80.)

Thus, the 'true' nature of a phenomenon is seldom driving the decisions that enact ontologies. The decisions shift from pure thruth considerations to other places.

Fair enough, but what is the legal significance of all this? Take again pain and suffering in tort as examples. We might all agree that the best way to approach pain in a legal context would be to adhere to the 'truth'. Pain in law should be true to the pain in the real. The most obvious way out of the conundrum is probably to forge an institutional connection that links the law's rendition of pain to medical expertise. In practice, doctors – the people who best know what pain is – would be asked to give a definition of pain. However, the doctors' pain – a contentious phenomenon with multiple ontologies (International Association for the study of pain, 1986), by the way – is enacted by pain-related medicinal practices. And in these practices the true nature of pain is not the only thing that doctors have in mind. There might be concerns with adequate treatment and sufficient pain management or anxieties about drugs, their availability, addiction and side-effects. These factors – and undoubtedly many others – are all shaping the doctor's ideas of what pain is. The medical account of pain is enacted in a medicinal discourse. And that fact has its consequences.

Now, should we try transfer the 'real' medical pain into the legal framework, we must tackle not only with the 'real'. The legal environment with its prior *legal* decisions contributes to displacing decisions on pain from pure (medical) pain to other considerations as well. Pain must be made compensable. Damages law

already has a fixed conception of what compensation is. In orded to fit in, the real pain must be accommodated and transformed to be amenable to compensation. That means that pain must be rendered objectively measurable, objective and foreseeable (or at least it should be). One needs to invent tools that produce an intersubjective, objective truth of pain, convert pain into monetary units, and enable that pecuniary amount to be transferred to the claimant. These legal considerations, outside facts imposed upon the real pain, might force us to adopt a pain that is altogether different than the medical pain. In the end, the medical is squeezed in the legal environment, and changed. Discrepancies exist, but they are hardly significant. The point is that neither of the pains – neither the medical nor the legal – can be truly called the true or the real one. Both are enacted within an institutional framework that superimposes certain requirements, i.e. the weight of decisions made elsewhere, on the ontology of the phenomenon itself.

2. The second of Mol's questions (Mol 1999, 81–82) refers to interference between different ontologies. Interference is a somewhat obscure term. Here, Mol has in mind the diverse consequences that various enactments of the reality might have. E.g. legal definitions might seem technical and, thus, totally innocent, but they may have grave and surprising (political) consequences. Mol illustrates the interference effect by providing an example of how adopting a certain ontology of anemia might in fact enact and reinforce other categories elsewhere. If one chooses laboratory anemia as a tool to diagnose an anemia, the population has to be divided into subpopulations. A range for normal hemoglobine levels for each population subgroup has to be established, otherwise the false positives and negatives would render the tests useless. The side-effect of grouping the population is that certain categories such as male, female, an elderly person, child or a pregnant woman emerge. These 'things' are sites of political struggle and open to constant redefinition. A 'finding of fact' in medicine might be used at another site to maintain that e.g. men really exist.

Interference effects seem ubiquitous in law. The notion of negligence could serve as an example. In Finnish law, there are two primary tests for negligence, applied parallelly in court cases. The first the norm-based negligence test and the second the risk-based negligence test. To make a complicated story very brief, in the norm-based negligence test, the defendant is found negligent if she breaches a norm of existing law. In the risk-based negligence test, a version of the (in)famous Hand-rule, the defendant is found negligent if she had not taken adequate measures in order to prevent the injury – taking into account the costs of those measures, the likelihood of injury and its nature. Ontological interfer-

ence materializes with human identity. When a judge chooses either one, he imposes that identity, that anthropomorphic plug-in as Latour might say, on an unknown number of individuals. If e.g. the risk-based negligence test is adopted, law takes a stance and articulates an identity: a human being should be constantly and rationally calculating returns on various safety investments, in ifself a very controversial idea.

Thus, Mol emphasizes that everything is, potentially at least, connected to everything else. Networks and connections run in many directions. Not only decisions are made elsewhere and imposed as irresistible facts upon other actants, but our own humble decisions (may) contribute facts to choices made at other locations. The opening up of ontological politics calls for constant vigilance and caution. An innocent definition might have grave repercussions elsewhere.

3. Inclusion is the third of the effects (Mol 1999, 83–85). Inclusion shifts the focus in ontological politics from effects between different things to what happens within the thing, among its different versions. Sometimes two ontologies of the same thing converge. They do not remain merely parallel to each other, but interact. Blood tests done while performing laboratory anemia may reveal that many of the patients that had complained that they were tired – one of the symptons in clinical anemia – did not in fact have abnormal hemoglobin levels. This finding, a fact uncovered within the laboratory anemia may force a re-evaluation of the clinical anemia. Is being tired really something distinctive of anemia?

In law, inclusion seems to play an integral part. Aulis Aarnio once wrote that while systematizing the norms and constructing the legal conceptual system, 'every time a legal concept is formulated, one is thinking about the real life and its phenomenon' (Aarnio 1978, 204). There is – or there must be – some kind of a connection with the real and the law. Things in law have to correspond, at the very least to some degree with the things in the real world.

Invoking another established ontology is an efficient tool in bringing about a change in law. Most legal things have corresponding real things. Thus, the other version of the legal thing, i.e. a social science account, a common sense rumination or a theological dogm, enables the criticism of the legal truth about the thing. It might be argued that the notion of e.g. an employment relation incorporated in the legal doctrine, does not make much sense. The 'realities' of work do not correspond with the law's rendition of work. If a steady, 9-to-5, life-long job in which worker mobility is limited and the pay is just remuneration for the hours of work performed is not the job people have 'in real life', should we not reconsider the notions of employment we have in law?

Now, this is where I think it gets tricky. Law's ontologies have a certain stickiness, a gravitas of their own. Many factors contribute to render legal concepts unwielding once they have been articulated. The process is somewhat complex. First, a suitable ontology must be chosen. The ontology may stem from social theory, ideological precepts, common sense or religious beliefs. Second, the chosen extralegal ontology is manipulated to fit into the legal environment, incorporated into rules or legal doctrine. The third part is the delicate one. Once the ontology has settled, a lock-in effect emerges. Law, its norms that embody the concept, lifts the once political ontology from its original surroundings. The once contested and highly volatile assemblage ossifies (Tuori 2007, 144-145). Most ties to the original justificatory arguments are severed. The concept stands on it's own, by the virtue of its very positivity. It seems that the law lacks one distinguishing character of ordinary sciences. Once a concept has been established, it is usually not possible to *per se* recontest it, even if the original extralegal network of truth that once facilitated its imagining and assemblage would have rumbled. Law supports itself. Only if the concept's standing within the law's own network changes, it may become again a focus for discussion. Professor Tuori again finds a virtue in law's inertia and resistance to outside changes. Law with its positivity calms the possibly destructive tendencies of social changes and promotes both certainty and foreseeability (Tuori, 2006, 36). Even though the inertiveness might sometimes prove a virtue, one should be cautious not to overemphasize it. Many of the locked-in concepts should at least be objects of scrutiny. And the ontology approach offers a possibility to add some urgency to this concern.

4. The fourth point refers to how ontological choices are made (Mol 1999, 85–86). In anemia, there are two possibilities: democratic decision-making or decentralized choice. The current truth about anemia could be constructed either in an open discussion to which all citizens can participate or relegated to consumers of healthcare services.

It seems obvious that ontological choices are ubiquitous in law. We even know pretty well where and by whom they are made. The legislative organs, bill drafters, judges, officials and legal scholars all may end up with a selection to make. What is unclear, however, is whether the people who in fact do ontological politics in law are conscious about it or not. On the whole, lawyers seem somewhat shy to claim that they have a say in determining what the world or the people in it are.

Legal ontological politics

I hope that the idea of ontological politics may shed some light on a number of neglected issues in legal discussion. Appreciating the effects of ontological politics may facilitate a better understanding of the complex relationship of the law and the real. To sum up, I take up three points.

First, ontological politics really drives home the fact that legal concepts and parlance have something to do with the real. Law shapes and defines the real. Lawyers should not be shy or ignorant of their powers. Every speech act made with the intent of transforming or entrenching a legal concept is in fact an exercise in ontological politics, with possibly grave consequences. Law contributes to making up the real.

In this sense, the notion of ontology bears an affinity to that of ideology, but it adds important connotations lost if we just resort to talk about mere ideologies. Critical legal studies scholars were vehement in pointing out that legal doctrines and rule interpretations often involved ideological choices. Law contained ideologies, they argued. In order to formulate a norm, one had to pick an ideology, or a tacit social theory. The goal of the ontology speech is largely the same. What the talk about ontologies that I propose may add to the 'ideology speech' is a heightened awareness of the gravity of legal speech acts. An ontology is not an ideology. An ontology is a world, not some technical blueprint that stays aloof and disconnected from the real. Law not only reflects a false consciousness, it enacts them, makes them real. A legal concept with its concomitant ontology does not – as an ideology might do – mask the real reality, it is a reality that is enacted. The legal world matters, if more than it would do, because it enacts and performs a real world.

Second, the idea that even legal concepts are enacted and performed in networks of complex associations, theories, convictions, things, intermediaries, actors and actants, accentuates, I think, the fragility of the legal world. The networks are long, winding and intricate, that is indisputable. Concepts may have impetus invested in them by the institutional support of legal sources, doctrine, or general acceptance. But the network structure may call in question the significance of all institutional support. The network may prove to be ballast instead of an asset. Once the focus shifts from the brute fact of institutional support to the networks of ontologies, decisions, and intermediaries that build the things that give institutional support to other things, a new plane for analysis and criticism appears.

A careful analysis of legal networks may render surprising results. It may prove that a previously impeccable concept with ample institutional support rests in fact on extremely unstable foundations. E.g. a settled fundamental legal concept with an airtight pedigree may prove a creation of strange and obsolete political decisions, bizarre constellations of ideologies and worldviews, a series of misunderstandings, or a mundane technical decision dictated by a long-forgotten discourse. The network may very well only attest to the random and chaotic construction of legal things and take us to places where we never could have imagined we could end up.

Take e.g. legal subjectivity, one of the foundational, deep-level legal concepts in professor Tuori's account (Tuori 2000, 202–212). Now, we all know that the modern (continental) legal order is said to be unable to do without the concept of the legal subject defined in abstract terms. If the concept were modified or discarded, the legal system would lose some of its power to produce foreseeable outcomes. The concept, in addition, has at least two centuries of instutional support, thus building a veritable fortress. Still, if one quests into the network of ideas that maintain it, a nineteenth century bourgeois ontology surfaces. The person embedded in the legal subjectivity seems very closely akin to the bourgeois proprietor, a grown up man of both sufficient material and mental means, emotionally detached and rational, free to pursue his sometimes whimsical interests. If the justificatory network of associations is picked apart, new questions might emerge. We might ask whether there is any sense in trying to enact and perpetuate this fictional character or not? Or, is the ontology ingrained in the legal subjectivity a worthwile – or a functional – account of what is to be a human being? Or should we imagine something else, worthier to be performed and enacted as Law and Urry recommend for the methodology of social sciences (Law&Urry 2004)?

Thirdly, the network approach may shed some light on the way normative decisions are made within legal practices. In recent legal literature *weighing and balancing* has been a recurring theme, a metaphor used to frame what happens in legal deliberation (Siltala 2004). Policies, principles, factual arguments and normative viewpoints are weighed in order to arrive at a reasoned and rational outcome (Schlag 2002, 1080).

Take e.g. a deceptively simple tort law case. An entrepreneur has been extracting peat from a marsh. Peat – in its natural condition – is often moist. To facilitate the extraction, the marsh must be desiccated. When dried up, it will be easily combustible. It often happens that peat extraction sites flare up. The fires are hard to extinquish and may rapidly spread to threaten e.g. forests nearby.

Should a large-scale fire erupt and spread, a court may have to decide whether to apply the normal culpa-based liability rules – a solution enjoying ample institutional support – or to resort to strict liability – an approach, which, the doctrine says, should in most cases be restricted to cases where a particular provision to that effect exists. Requiring that the claimant shows that the extractor acted negligently may effectively bar compensation. A fire may erupt and spread even if peat is extracted with utmost care and caution. As all reasonable precautions against an accident are usually taken, the fire would probably be characterized as an accident as far as tort law would be considered. No behavioral rule was perhaps breached and the activity was legal, *ergo*, *casus sentit dominus*. As a consequence, the costs of the accident would have to be borne by the claimant. The outcome would be exactly the opposite should the court decide to apply strict liability rules. The defendant would have to bear the externality costs of her permitted and – arguably – beneficial social activity.

Various arguments might surface in the judges' deliberations. The judges might analyze the economic consequences of the alternative constructions of rules; seek institutional support in previous decisions concerning analogous situations; decide which of the liability grounds is the primary one; analyze the human rights effects of the choice; or just choose the frame – or ontology – into which by the fact of the decision to be made the claimant and the defendant are embedded. Should one characterize and enact a peat extraction ontology in which property owners use their property freely and are liable for damage caused to others only if they have acted negligently? Or should one instead assemble an ontology in which businesses are liable to compensate for the externalities caused by their activities? What happens is perhaps not a weighing and balancing of abstract legal precepts but a brute and essentially political ontological choice. As Bruno Latour would perhaps say, our common world is enacted in and by the decision.

Bibliography

Hallituksen esitys (HE) 167/2003 vp Eduskunnalle vahingonkorvauslain muuttamiseksi ja eräiksi siihen liittyviksi laeiksi [Government bill on the reform of the Tort liability act and related acts].

Aarnio, Aulis: *Mitä lainoppi on?* [What is legal dogmatics?]. WSOY, Helsinki 1978.

Latour, Bruno: 'Whose cosmos, which cosmopolitics?' 10 *Common Knowledge* (2004) 450-462.

Latour, Bruno: *Reassembling the Social: An Introduction to Actor-Network-Theory*. Oxford University Press, Oxford 2005.

Law, John & John Urry: 'Enacting the Social'. 33 *Economy and Society* (2004) 390-410.

Mol, Annemarie: 'Ontological Politics: a Word and Some Questions'. In John Law & John Hassard (eds.): *Actor Network Theory and After.* Blackwell, Oxford 1999, 74-89.

Schlag, Pierre: 'The Aesthetics of American Law'. 115 *Harvard Law Review* (2002) 1047-1115.

Siltala, Raimo: *Oikeudellinen tulkintateoria*. [A Legal Theory of Interpretation] Suomalainen Lakimiesyhdistys, Helsinki 2004.

Tuori, Kaarlo: *Kriittinen oikeuspositivismi* [Critical Legal Positivism]. Werner Söderström lakitieto, Helsinki 2000.

Tuori, Kaarlo: Oikeudenalajaotus – strategista valtapeliä vai normatiivista argumentaatiota? [Divisions of Branches of Law – A Strategic Stuggle for Power or a Normative Argument?] *Lakimies* 2004: 1196.

Tuori, Kaarlo: Self-description and external description of the law. *No Foundations* 2 (2006) 27-43.

Tuori, Kaarlo: *Oikeuden ratio ja voluntas* [Law's Ratio and Voluntas]. WSOYPro, Helsinki 2007.