EDITORIAL: CONTEMPORARY LEGAL THEORY

"Die Menschenwuerde ist unantastbar" – Human dignity is inviolable. So starts Article One of Germany's Basic Law (Grundgesetz). After the nightmare of mass murder and the disrespect of human rights, no calmer yet more radical statement of the central role of human rights in the Post-Westphalian era can be found. In this issue of the Journal, Jurisprudence we examine what Duncan Kennedy calls "post-positivist integration" – the rise of a constitutionalised and juridified global *legal* system centred on human rights, economic freedom, and seeking to attain peace through prosperity via the rule of law and open borders.

As your guest editor I am pleased to say we have found several exciting and thought provoking essays for your consideration each of which addresses one or more aspects of post-positivist integration.

First, Thomas Kupka in *Constitutional Nominalism* discusses the idea of legal formalism before the California Courts in the context of human rights - gay marriage. This article outlines the conflict between text and justice. The German tendency to clear terminological analysis of law shines through here: while we might disagree with the result of the California Court's decision, we are compelled to accept that, in mechanical terms, the Court's decision is correctly reasoned. More interestingly, Kupka points out the different results which obtained in the Court's decision when interpreting a *statute* as opposed to the opposite result when analyzing essentially the same text in the *constitution*. Again, doctrinal discipline and clarity mark the German approach to law, belying claims of radical legal indeterminacy.

Continuing with global perspectives, the second article, *Earth Jurisprudence* by Samuel Alexander seeks to develop a "Gaia" centric jurisprudence aimed not at irrational "growth" but rather at sustainable development. Alexander's piece can be seen as a "green" perspective as an alternative to "constant growth" of neoliberalism.

Max McCann gives us a longer third article, *The True Cost of Economic Rights Jurisprudence*. McCann examines the conflict between individual (i.e. fundamental…) human rights and economism at great length and in depth. He concludes the that the usual opposition of individual rights to economic rights is a false dichotomy. While I happen to think that fundamental rights are inalienable and thereby distinct from alienable economic rights, I also think that the level of attainment of human rights in materialist terms depends very much

on economic development – that richer societies are better at securing basic human rights than poorer ones. While economic rights and individual rights are often interwoven – McCann's point – I must point out that fundamental rights are such precisely because they are of higher value to society than the economic factors on which they depend, i.e. there are axiological as well as ontological differences between fundamental rights and economic rights. Once more, the dialectical method helps us attain precision in understanding the interactions of fundamental human rights and economic rights. We look forward to seeing McCann deepen his ideas to meet those counterpoints.

Donna Lyons, a rising jurist, presents our fourth and most detailed article. She examines hermeneutic theory, and concludes it is essentially a doomed enterprise due to the inherent subjectivity of any theorist. While I think dialectical materialism allows us to find the closest approximation to truth, her warning to other theorists is well put. In her own words, "Theories purporting to provide universal truths about the nature of law are fallible and thus do not provide necessary truths because such theories must be founded on presuppositions which are reflections of fallible intuitions." For Lyons (I believe I agree) conceptual analysis is no escape, for it too is ultimately founded on intuitions - subjective presuppositions. Furthermore, "the tendency of the legal theorist to superimpose her own intuitions onto those of her subjects renders her results even more likely to be erroneous." I can only reiterate her argument which is complex, nuanced and cogent, yet analyses what, to me, is new ground. Her argument in sum is this:
"1) Hermeneutics is a method used by the theorist which involves understanding a social system from the perspective of the social subject.
2) A majority of legal philosophers use hermeneutics during theory-construction.
3) Using hermeneutics does not mean that a philosopher must endorse a specifically moral position but it does mean that reliance on personal intuitions is inevitable.
4) Legal positivists who employ hermeneutics cannot claim to have discovered the nature of law because reliance on intuitions, which is inevitable, produces faulty results.
5) Rather than making false claims regarding law's nature, we, as philosophers, ought to strive to accept law as an essentially contested concept, and thereby acknowledge the limitations that are placed on our pursuit by intuitionism, but remain satisfied to choose between theories of law based on their pragmatic value."
The overall argument is brilliant, even if points of it can be contested.

Inasmuch as hermeneutics is one more variety of discourse theory I agree with Lyons, that much of liberal legal theory is "a blind alley". However, I also think that through materialism we are able to ground theoretical claims which enables an objective dialectical synthesis – the closest possible approximation of truth, i.e. "best practice". Essentially, Lyons is arguing against philosophical dualism. We look forward to seeing her grapple with monism versus dualism as well as with dialectics and materialism in the construction of legal science in her future works. I am certain they will be at at least as brilliant as her critique of hermeneutics and we are certain to hear more from this young brilliant theorist.

As to dialectical materialism, Professor Bidzina Savaneli in our final article describes a dialectics between human rights in national and international law and between positivism and natural law in the second article. He argues, quite correctly, that human rights are now the focal point of the international system, the sine qua non of the juridified and constitutionalized international legal system. I share his point on the central character of human rights in the post-Westphalian international system – and so does Professor Duncan Kennedy. Interestingly, Professor Savaneli seems to argue that positive law states what ought to be and that moral theory, as a reflection of the material facts of society states what is – a reversal of the usual correspondence between positivism as "is" and moral theory as "ought". While I happen to think that the is/ought dichotomy arises from misreadings of Hume, and thus is a blind alley, the supposition that one cannot infer "ought" from "is" is so prevalent that Professor Savaneli's article is noteworthy at least in that context – as well as for raising the idea of dialectics in law. Moreover, he points us to interesting legal scholars from the Caucuses who might otherwise go unnoticed due to distance and language. Professor Savaneli also, to my view rightly, critiques Kelsen, and also argues that comparative legal theory should not merely compare laws within one system (civilianist or common law) but also between different systems. Professor Savaneli's post-positivist theory is interesting and highly relevant as an example of the post-positivist consolidation of legal theory currently taking place within contemporary legal thought. Whether this consolidation can lead to peaceful global governance via human rights is one of the key practical questions of our epoch. I believe it will be answered in the affirmative.

Post-positivist integration (i.e. consolidation of "Empire") is the current reality facing legal theory. Whether one supports or opposes globalism from the "left" or the "right" all of these articles manage to address key points in contemporary legal theory. Taken together I hope that they help the reader understand a key contradiction in contemporary legal thought:

1) Human rights are the centrepiece of the constitutionalized and juridified post-Westphalian international system.
2) Classical liberal theory cannot construct rights discourse effectively due to individualism, subjectivism, and discourse theory.
I believe these weaknesses in contemporary liberal theory which undermine globalizing constitutionalization and juridification of human rights can be surmounted using dialectics and materialism. Seen in this perspective, the articles presented hopefully take on deeper meaning due to greater context.

We wish to thank the authors heartily for their kind contributions. And, to our readers: *Bonne lecture!*

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