Introduction

We are here presenting a selection of the work of scholars from the World Congress of Legal and Social Philosophy held at Lund in 2003. This is one of many such selections and the general theme of this Beiheft is Epistemology and Ontology. Thus the papers by and large deal with what sort of thing law or systems of law are and what the criteria for talking about them are. The papers show the diversity of the Association and we are especially pleased to be able to publish the work of young scholars at the beginnings of their scientific careers.

Anne van Aaken addresses the questions of Economics and Discourse theory. In combining constitutional economics and discourse theory she offers a theoretical synthesis of the two theories by finding points in common and possibilities of fruitful combinations concerning the problem of legitimacy, institutional design and effectiveness of legal norms.

Deniz Coskun outlines a conception of law as symbolic form. This is done through an examination of the way in which Ernst Cassirer applied his Philosophy of Symbolic Form to law. This implies that though law is connected with other sciences it carries its own dynamic within it. It is a mode of giving objectivity and meaning and not legitimacy. Finally, as a product of human creativity, it reflects human dignity.

Laurence de Sutter asks what we should do with legal theory. Practitioners find it abstract and pretentious; philosophers find it of poor intellectual quality. For him legal theory, as it has been known so far, has to be replaced because it sees law only as a matter of observation of what the content given to the form of law is. What is important however is the practice of law; what is done in the name of law. This is not practice as opposed to theory but rather designates the set of actions rendered probable within the framework of a specific set of constraints.

Leopoldo Garcia Ruiz takes up the theme of practice and claims that only by describing and explaining law as a social practice will we be able to confront deeper legal-philosophical issues. He does this through an analysis of the work of Roscoe Pound.

For Nikolaos Intzeissiloglou the most general object of study of legal science is the concept of law as an effective and efficient social system of regulating human behaviour. In this concept of law, and in the social reality of law related to this concept, general ideas and principles concerning law as well as legal norms and decisions co-exist with factual elements related to the law. Law becomes an effective part of real social order and a legal order is socially established only when the legal phenomenon functions successfully as a communicative social subsystem that actively regulates human behaviour.

Lorenz Kaehler asks what exactly does it mean to say that a particular question is not determined by the law? What exactly is at issue if one says that an appellate court could have decided differently as it did? The main thesis of the paper is that these claims can have different meanings and that some confusion in the current debate about the indeterminacy of law is due to the fact that different concepts of indeterminacy are mixed up. If this thesis is correct than the concept of ‘legal indeterminacy’ is itself indeterminate or, at least, ambiguous.

Matthias Mahlmann tries to reconstruct some core tenets of Kant’s doctrine and attempts to indicate what is truly impressive in this philosophy. For him the best way to continue the project of enlightened practical reason, to preserve the analytical insights of Kant’s work, to keep the humanist spirit of its material content, sometimes explicit,
sometimes to be read between the lines, is to pursue what he calls a mentalist theory of ethics and law. This theory is not directly Kantian in its outline and shape and aims not at borrowing any plausibility from Kant’s authority. But it might be as Kantian as anything can be given the findings of modern theories of the human mind. In a further paper with John Mikhail and he continue this theme of a mentalist theory of ethics and law by developing the case for a moral faculty based on cognitive and linguistic approaches.

Sten Schaumburg-Müller has some reservations as regards the ability of human rights law actually to provide humans with their rights. There are many ways of probing this question. As the problem is somehow connected with the relation between ideas (in this case human rights) and facts, he takes a closer look at theories of truth. He looks at various theories of truth and asks how they impact on implementation of human rights.

Gregor Noll carries on with the theme of human rights. He claims textbook accounts of human rights tend to depict them as safeguards protecting the individual from the excessive use of state authority. Such accounts pre-suppose, amongst others, a clear distinction between law and politics, and an understanding of certain legal norms as being pre-political. He claims that the fictions of universality and inalienability of human rights collude in their exclusionary function. Human rights take part in the formation of a polis by excluding the bare life of the human being from that community, to then re-include it and subject it to regulation. Where re-inclusion does not take place, for one reason or another, the exclusionary function of human rights creates outcasts which have no more than bare life (refugees being a prominent example). Seen as such, human rights constantly remind us how devoid of protection we are outside the polis. Yet, as there is no access right to the polis, there is no right for any human in any situation to have human rights.

In legal historical literature, Puchta has been depicted traditionally as the actual founder of Conceptual Jurisprudence; espousing a legal theoretical perspective which ascribed to legal concepts an independent intellectual existence. This means that Puchta understood legal concepts as separate from the empirical reality of the law. According to this model, the scientific creation of the law is to occur in the form of abstract conceptual constructions. The method is to be based on an inductive process. The law is to be cleansed of its impurities and, in an increasing process of abstraction, one would reach a number of “pure” basic concepts from which the law in its entirety would emanate. For Peterson this view of Puchta as a path breaker for conceptual jurisprudence has been shown to be exaggerated and has been modified to a high degree in recent scholarship. A more nuanced depiction of Puchta’s view as to the relationship between the actual organic nature of the law and its conceptual form is posited by him.

Puppo investigates the relationship between law, authority and freedom in Sophocles’ Antigone. He dwells firstly on what is meant by the term ‘tragedy’, and secondly on the relevance of Sophocles’ work – and particularly its two main characters, Antigone and Creon – to that theme. He takes a view which goes beyond the usual interpretation that Antigone’s refusal of Creon’s decree legitimates contradiction of the order when the written law, mere expression of that authority, is at odds with the dictates of the rule identified sometimes in the customary law sometimes in the divine law.

The concept of legal dogmatics has for many years has caused antagonism among European jurists and has been compared to theological dogmatism. However, the worst enemies of legal dogmatics, seem to be its advocates. For years, jurists
have trivialised the method of legal dogmatics to a point of absurdity. Legal scholars routinely refer to the "traditional" method of legal dogmatics, but when asked what this phrase entails, they are unable to give a proper answer. As a consequence, those who view themselves as methodologically advanced have been able to score easy points by pointing out the obvious flaws in the presentation of the method. Despite decades of intense criticism, legal dogmatics seems to be thriving in the civil law-countries. Marie Sandström looks at the genesis of legal dogmatics and finds it steeped in drama.

Burkhard Schafer looks at ontology and legal system. His paper attempts a case study to show how jurisprudence can profit from ideas taken from general theory of science to develop the conceptual vocabulary necessary to engage in a meaningful dialogue with comparative law. Comparative law is taken as an empirical basis to develop and test key jurisprudential concepts, especially the concept of 'legal system'. The problems that jurisprudence faces in reconciling its own use of 'legal system' with that in comparative law are remedied by borrowing key concepts from theory of science, in particular Sneed’s and Stegmueller’s set theoretical structuralism. The thus improved concept is then in turn used to refine comparative legal methodology.

The term 'person' is only apparently certain in its meaning. We are sure that it corresponds more or less to the idea that we have of a subject, corporeal or figurative, endowed with characteristics worthy of protection. However, as soon as we go beyond the level of conventional meaning, we enter a tangle of synonyms and meanings which overwhelm our intuitive idea of what the term denotes. One thing seems certain, however: the concept of person is today considered flawed and unable to fulfil its function in the field of legal protection. In fact, proposals have been made from various quarters to discard it. Paolo Sommaggio considers Boethius’ definition of persona to aid our understanding of the concept

Xingzhong Yu analyses three types of societies. Firstly what he calls legal societies with rule of law and democracy, the striking features of which are demonstrated in an unswerving reliance upon law and legal institutions in social, political and economic life. America is a paradigm. Secondly there are moral societies; in such societies rather than cold, rational legal rules, live and entangled relationships are the focus of communication, transaction and interactions. China is a paradigm. Thirdly there are religious societies; they make no distinction between matters divine or secular and deals with them by means of a pan-ordering religious system which predetermines the tendency of its political and economic activities. The Muslim world is a paradigm. He asks why are there three types of societies. What is the internal logic, which has determined their separate development and what accounts for the great distinctions between them?

Finally Wojciech Zaluski looks at Kantian rationality and game theory. The game-theoretical approach to law is a precise method of investigating the way in which legal rules shape human behavior. Its attractiveness lies not only in its formal elegance but also in the fact that it can be helpful for legislators in their efforts to pass efficient laws. Legal philosophers, in turn, are likely to be particularly interested in foundational questions related to it. Zaluski provides an analysis of this kind of a question – namely one about the place of the concept of Kantian rationality in the game-theoretical considerations.

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