

Book Reviews/Buchbesprechungen

Kaarlo Tuori, *Critical Legal Positivism*. Ashgate: Aldershot 2002 xvi, 349 pages.

Legal theory works like a garden maze with one entry, few exits, and innumerable winding paths that lead through changing areas of undergrowth and hedges. While pragmatists among the legal profession seek the shortest way to achieve one of those few acceptable outcomes, while philosophers loose themselves within their preferred area of the maze without ever reaching an exit into legal practice, Kaarlo Tuori goes for the target of applied legal philosophy: using the theory while acknowledging the need to solve everyday problems of the law. He guides the reader through his own paths, visits diverse areas of legal theory, and still keeps his footing within one of the most down-to-earth schools of legal thought, i.e. legal positivism. Departing from Kelsen and Hart, however, Tuori blends 20th century positivism with Weber and Habermas, Dworkin and MacCormick, thereby achieving his very own theory fittingly labelled as 'critical' legal positivism. He derives that critique

no longer from the *Ideologiekritik* of the Frankfurt School, but 'draws its yardsticks from the positive law itself' (p. xi).

Among the three parts of the book, the first takes its lead from classical legal positivism in the form of a 30 page introduction. The following three chapters of the second part investigate the concept of modern law in the theories of Max Weber, François Ewald, and Jürgen Habermas, respectively. Finally, the third part, by far the largest, develops the main thread of Tuori's critical positivism: from the multi-layered nature of modern law, via its formation and self-limitation, up to the problem of its legitimacy that lies at the heart of every debate about positivism.

The multi-level picture of law drawn by Tuori is quite distinct from historical examples of natural law philosophy, e.g. the thomistic hierarchy between *lex aeterna*, *lex naturalis*, and *lex humana*. It is positivistic in all its parts, distinguishing between a surface level of linguistically formulated norms and norm fragments which are being changed on a daily basis, an intermediate or 'middle' level with methodical elements subject

only to the slower changes of the legal culture at large (e.g. meta-rules regarding norm conflicts, interpretive rules), and finally the ‘deep structure’ as the most stable layer of law commonly considered as unalterable (e.g. legal subjectivity, human rights). Tuori characterizes his theory at the same time as more and as less positivistic than Kelsen’s pure theory of law: more so because even the universal pre-conditions of the deep structure are considered as alterable (p. 192); less so where the results of legal science are posited on the surface level together with law-making and adjudication (p. 154f.).

This latter feature of the theory, perhaps its most striking one, is more elaborately pursued in the final chapter on ‘legal science’. While Kelsen places legal scholarship in the descriptive and analytical realm, Tuori includes ‘interpretive legal dogmatics’ into his critical positivism, claiming that ‘inter-subjective yardsticks for assessing the validity of normative statements’ can actually be achieved (cf. p. 286ff.). In this view, the positivist’s central criterion of validity already comprises a substantive dimension because it requires a stance on the content of the norm candidate (i.e., on a specific interpretation applied to the internally contradictory surface level material) – at least on its harmony with the principles of the

second and third level of the law. Thereby, all legal science, even the reconstruction of the deep level of law by legal philosophy, gains the status of legal practice in a positivist sense (p. 293). Whereas criteria of validity are purely formal in the classical or ‘traditional’ (p. 263) positivism of Kelsen and Hart, the theory of Tuori counts substantive principles of justification among those criteria, eventually arriving at a meta-positivism that transcends the latent conflict between positivism and legitimacy.

Most of the treatise is phrased in concise and easily digestible expositions of the main line of argument. At times, however, Tuori embarks on a wild ride through legal theory, combining diverse sources at will. The sub-chapter on ‘the turbulent surface of the law’, for example, does turbulence justice in combining theoretical pieces of Kelsen, Habermas, Dworkin, Savigny(!), Bourdieu, Peczenik, Aarnio, Austin, Searle, Günther, Giddens, Hart and Suviranta – in this sequence – on only six pages. Though densely written, the reader will nevertheless miss some details regarding the central thesis. Is, for example, the necessary substantive dimension of all statements regarding legal validity restricted to ‘mature’ modern law (p. xiv) including constitutional protection of human rights? Or does it also apply where the ‘deep level’ has not yet achieved the status of

codified legal principles? Even without such details, Tuori's treatise on Critical Legal Positivism is a most inspiring book and a true asset on the bookshelf of contemporary legal theorists.

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