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(Review) Critical legal positivism by Kaarlo Tuori

Abstract

Kaarlo Tuori, professor of law, judge, and counsellor to the Constitutional Committee of the Finnish Parliament, has embarked on an ambitious project. He aims to build on the positivism of Kelsen and Hart, but to discover a normative justification of law which goes beyond their limited validity claims. This is the 'critical' element which he adds to 'legal positivism'. Kelsen's basic norm and Hart's rule of recognition are irreducible underlying principles. The arbitrary nature of such principles is intellectually suspect, while their internal self referentiality renders them morally sterile. The law is the law — because we recognise it as such or because it is founded on the basic norm — and as such it is valid. This leads to a lack of critical purchase, which is the fundamental drawback of positivism when confronted by natural law or other ethically based theories. Classical mid-twentieth century positivism offers no ethical foundation outside the declared law from which we may criticise unjust laws.

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CRITICAL LEGAL POSITIVISM

By Kaarlo Tuori
Aldershot, Ashgate, 2002
364 pp
ISBN 075462272X

Kaarlo Tuori, professor of law, judge, and counsellor to the Constitutional Committee of the Finnish Parliament, has embarked on an ambitious project. He aims to build on the positivism of Kelsen and Hart, but to discover a normative justification of law which goes beyond their limited validity claims. This is the ‘critical’ element which he adds to ‘legal positivism’. Kelsen’s basic norm and Hart’s rule of recognition are irreducible underlying principles.

The arbitrary nature of such principles is intellectually suspect, while their internal self referentiality renders them morally sterile. The law is the law — because we recognise it as such or because it is founded on the basic norm — and as such it is valid. This leads to a lack of critical purchase, which is the fundamental drawback of positivism when confronted by natural law or other ethically based theories. Classical mid-twentieth century positivism offers no ethical foundation outside the declared law from which we may criticise unjust laws.

Theoretical developments since the time of Hart give Tuori the opportunity to propose a version of positivism which is open to ethical arguments and moral principles. Despite his emphasis on Dworkin and particularly on Foucault and his follower Ewald, it is MacCormick’s development of positivism and the discourse ethics of Habermas which really give Tuori the boost he needs to open the law to broader validity claims.

His theory develops a model of legal systems based on three levels of law and two versions of a ‘legal community’. What we normally think of as legal activity is at the ‘surface’ of Tuori’s three levels: it is the legislating, litigating and adjudicating which is carried out by the ‘narrow’ legal community of legislators, lawyers and judges. Most of Hart’s or Kelsen’s subject matter exists at this uppermost level of ‘visible’ law. What interests Tuori is all the paddling that goes on under the surface. A ‘middle, mediating level in the law’¹ consists of principles which guide interpretation of the law and which may, at times, invalidate or limit some of the

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¹ K Tuori, ‘*Critical Legal Positivism*’ (2002) 192.

legal activity at the surface. These principles may be those of Roman law such as *pacta sunt servanda* or principles of common law such as due process or duty of care. They are more enduring than the specific statute or individual case. The most stable level of all is the ‘deep structure’ of law where we find, according to Tuori, both the most basic principles (eg human rights) and the habits of mind or forms of rationality by which we think and argue about the law. Yet change is possible even at this level: Foucault illustrates one such change from ‘sovereignty’ to ‘discipline’, for instance.

In a society subject to modern law, the dominant form of rationality at this deepest level is communicative rationality, as described by Habermas. To ensure mutual understanding, our arguments and discourse must be guided by truthfulness, normative rightness and authenticity (that we represent ourselves truthfully). This is the foundation of discourse ethics, which builds an ethos for civil society out of the strictures of the ideal speech situation. It is central to Tuori’s argument, since law must be founded in a deep ethical community which is able to debate the validity of surface laws. This ethical community is Tuori’s ‘broad’ legal community.

Instead of insulating law from ethical or moral debates in the style of classical legal positivism, Tuori’s critical legal positivism opens itself to these debates. Yet this is an odd sort of ‘openness’ which can only enter the law mediated by law’s basic principles and its narrow legal community. This ethical democracy must operate, for Tuori’s purposes, through the law itself as a means of limiting the extra-legal excesses of legislators and other members of the top level narrow legal community. Nowhere is Tuori explicit as to the mechanisms which allow this exchange between civil society and positive law. He emphasises the centrality of the legislature in the Continental legal system, compared to the power of the common law judiciary. We might think, then, that Tuori may allow an elected legislature to be open to the political debates of the electorate. Yet this sort of openness (unless it heeded demands for improved legal and communicative processes) would let politics into law and undermine its positive legal character which positivism requires in order to distance law from the state. On the other hand, Tuori’s privileging of the legal might suggest that the courts could be open to civil society. Again, there is no indication of how this may occur, beyond exhorting the judges to explain their decisions in terms understandable to the citizens, who may then ‘comment on them’.² This looks like one way traffic unless the judges themselves are able to translate public debates into their judgments, which seems to go beyond positivism, even Tuori’s. He does not canvass any other mechanisms to reverse the traffic flow back into the law from civil society, though it is tantalising to consider the ways in

² Ibid 279.

which civil society may enter the courts through juries or some European forms of lay judges.³

The rigorous legal theory developed in this recent addition to Tom Campbell's *Applied Legal Philosophy* series is satisfying in a way that eludes Habermas's complex excursions into law. This may be despite *and* because of Professor Tuori's exuberant inclusiveness. He approaches his task in the first instance through a theoretical analysis of the most important strands of twentieth century legal sociology (Weber, Foucault, Ewald, Habermas) and synthesises these strands to show how each helps point the way toward a critical legal positivism. This is a particularly useful aspect of the book. Tuori's exposition of each of the major theorists to whom he devotes a chapter each, is clear and reliable. His leaps of synthesis to connect them to each other, or to other major theorists (eg Dworkin), are intriguing, even if they sometimes appear rather contrived. In addition to the greats of legal theory that I have already mentioned, Tuori introduces interesting though less well-known work of other European legal scholars, particularly from Scandinavia and Finland.

The European locus of this book provides a convincing bridge across a channel that sometimes seems as wide as the Atlantic in separating civil and common law jurisprudence. Professor Tuori's totalising tendencies should get a rise out of a few common law eyebrows, particularly those used to beetling over post-modern suspicions of grand theory. However, he is equally convincing on common law as he is on civil law turf since his familiarity with the Anglo-American literature and legal systems matches his Continental scholarship.

Although this book contains one or two interesting excursions on European law as a diverse and supranational phenomenon, it is at the level of international legal principles and pluralist practices that Tuori is least convincing. There is something strangely old-fashioned in the way he restricts his examples and the operation of his theory to the constitutions and legislatures of nation states. He sees human rights as typifying the deepest and most enduring layer of law, effecting its self-limitation by force of intellectual habit and common conviction. This suggests that considerations of human rights arise from civil society, the broad sub-stratum on which Tuori bases the democratic justification of law. And yet, particularly in Europe, such international principles, are applied by international courts which are very much a part of the surface activity of the 'narrow' legal community.

³ The implications for further research are apparent. Postgraduate research suggesting some of these directions is already being carried out by Gerrit Franssen at the University of Antwerp and by Sian Leathem at the University of Wollongong. They have presented this work at, respectively, the conference of the Research Committee on the Sociology of Law (Oxford, 18–20 July 2003) and at a Legal Intersections Research Centre seminar (Wollongong, 8 September 2003).

To the extent that such examples refer to principles as an ethical foundation of positive law, they support Tuori's general theme. But while they reassert legal principles, they do not operate from the deep layers which bind law into the ethical life of a community. If the dynamism of European human rights law comes from the narrow (albeit international) legal community, it is hard to justify law's ethical foundation in democracy. Bureaucratic internationalism is at another pole from democratic ethical communities. If law is more at home in bureaucracy than in democracy, then Weber trumps Habermas and an ethics of law based in a communicative civil society gives way to a world dominated by judicial decision-making according to administrative principles. Habermas himself has expressed reservations about this process of 'juridification'. Tuori's zeal for the ethical possibilities of law, including 'legal science' (jurisprudence) as one of its deepest structures, constructs an alluring world of certainties. However, the satisfying completeness of this world is unsettled by the vagaries of democracy and civil society. In common with earlier exponents of positivism, Tuori has difficulty opening law to these ethical influences while maintaining its unshakable foundations.