

Abstracts

Barbeyrac, natural law and the political philosophy of the enlightenment

PETTER KORTMAN

The Enlightenment is often connected in general consciousness with the conscious struggle for a more secularised world-view, with the emergence of the idea of universal human rights, and with a conviction that Reason will spread light to an illuminated future. But in fact the majority of Enlightenment theorists were convinced that true morality and politics are unthinkable without religious sentiments. Furthermore, the most important source for moral and political ideas in the Enlightenment was the modern tradition of natural law theory. The sixteenth-century ex-

pressions of those theories (the theories of e.g. Grotius, Hobbes, Pufendorf) were, however, very far from a liberal human rights discourse. In order to understand what happened to modern natural law, and to see how historical circumstances led to the birth of ideals that rule today's politico-juridical reality, I examine the transformation of natural law discourse in the hands of one of the most important mediators of that tradition, Jean Barbeyrac (1674-1744), focusing in particular on his defence of religious toleration.

The obscure aim of desire. A late reflection on a dissertation and the question of the predicaments of critical legal theory of today

HÅKAN GUSTAFSSON

What does »critical« imply today? And what role can »critical legal theory« play in the

societal changes of the present day? And what is the status of legal philosophy concei-

ved as »philosophy«? By a review of Panu Minkkinen's »*Thinking without Desire: A First Philosophy of Law*« the author comments extensively on the possibility – or perhaps impossibility? – for a justice to come whereby he questions the ontological hallmarks of legal theory. Is there a future for »critical«

legal theory and how is this to be achieved, without legal-pragmatic or politico-technical overdeterminations taking place? The article partakes in Minkkinen's exciting endeavour to search for a legal philosophy that might function as a social critical tool of dismantling power in the future.

Institutional Design and Fuller's »Case Against Freedom«

STUART TODDINGTON

This article reviews and critically considers Kenneth I. Winston's revised edition of Fuller's *Principles of Social Order*. In particular, it examines the methodological contribution to sociological jurisprudence to be gleaned from a reconsideration of Fuller's writings in the light of Winston's new and expanded introduction to the collection and, most importantly, his discovery and reconstruction of Fuller's previously unpublished series of 1958 lectures here presented in composite as »The Case Against Freedom«

This latter is a vehement rejection of J.S. Mill's conception of freedom as articulated in *On Liberty*. In denouncing the »negative« and structurally dissociated account of »freedom from restraint« offered by Mill, Fuller

reaffirms the idea of liberty in an older ethic of enfranchisement and institutional responsibility. In this, Winston sees a significant shift in methodological emphasis from Fuller's »natural law« insistence (against the positivists) that law *necessarily* aim at justice, to the contemporary sounding notion that law aims at »institutional design« promoting participatory freedoms. Whilst acknowledging the *prima facie* plausibility of this claim this review article emphasises the integral relevance of »The Case Against Freedom« to Fuller's institutional theory of law and suggests an Aristotelian reading of Fuller's conception of the centrality of justice to legitimate social order.

The development of the Finnish legal thinking after the second World War and the impact of the changes in the international politics on this development

JUHA TOLONEN

The legal thinking in Finland can be divided into 3 periods. The first starts from the early fifties. The dominant way of legal thinking was characterised by legal positivism which was called »logical analysis of law«. According to it there has to be made a clear distinction between what the law should be and what it really is. Lawyer's function is only to describe the valid legal rules in force and implement it in practice. In the seventies the attitudes altered. It was perceived that law is all the time changing and it cannot be described by legal rules. The law was living in the court decisions. Therefore, the main focus was directed to the argumentation in the courts. This argumentation did not refer to the legal rules only, but, to a great extent, to the values and opinions. No clear distinction could be drawn between the law and politics. Therefore, various value systems could be used as a basis for legal arguments. The alternative jurisprudence was at fashion.

The third period started in the nineties. Two main »paradigms« are there visible. On the one hand the doctrine called »law and economics« emphasises the economic efficiency as a central argument also in legal decision-making. On the other, fundamental human

rights doctrine has also become quite central in legal doctrine. The first one is mostly in private law, whereas the last mentioned governs the discussion in the public law. Common for both of these new doctrines is that the key concepts (economic efficiency and fundamental human rights) are regarded as a basis and criteria of all positive law in any country.

Politically the development corresponds to the changes in the international politics from the bipolar to unipolar world. During the cold war period the strict legal positivism was expedient for a neutral country like Finland. It helped the country to keep itself outside the ideological battles. The Helsinki Summit on European Security and Co-operation in 1974 put the end to this period. Different political valuations were accepted as natural. The alternative jurisprudence became possible. After the collapse of the Soviet Union in 1991 the world has, however, become more unilateral. The world order in the unilateral system requires unified legal values. The doctrines of law and economics and fundamental human rights represent these values.

Custody disputes and the best interest of the child – Conflict resolution within family law guardian ad litem

ANNA SINGER AND ANNIKA REJMER

Every year over 50 000 children in Sweden experience the separation of their parents. Around 10% of these children must also watch their parents battle over custody in court, battles which cost a lot both financially and emotionally. Despite several reforms of the Parental Code during the last decades aiming to reduce the number of custody battles in court, society still has limited means to help these parents reach an agreement. A fundamental problem is that the court proceedings are governed more or less by the same regulation as in the 1920's even though society's view of the child, the parental role and the meaning of legal custody have changed. The reforms carried through have not had the desired effect and the author's claim that a contributing factor has been a lack of knowledge about the conflict at hand. But also the preservation of a very traditional administration of justice prevents a efficient conflict solving. The authors search a discussion about the role of the proceedings in conflict solving within family law but also about the grounds and functions of family law in society of today. In the article the authors suggest an alternative arrangement for solving custody disputes. It is suggested that a new office is established, the Bureau for the Best of the Child (BBB). The point of departure for making decision at BBB is that the parents through talks find their own mutually satisfactory solution. The starting-point is that almost every solution that works for the

parents is more beneficial for the child than any objectively arrived at solution that is impractical for the parents. To assist the parents in resolving their conflict, it's suggested that they each be assigned to a mentor for talk and support. A guardian ad litem caters the need of the child. The receiver also has a right to intervene if the parents are unable to make decisions regarding their child during the proceedings. When the parents agree the agreement is documented through a two-year contract that must also be accepted by the child's guardian ad litem. If the parents mutually agree to make changes in the agreement during the contract period, they should be able to do so by making and signing a new, mutually agreed at contract. If the parents fail to come to a mutual agreement, the group consisting of the parents, the mentors, and the guardian ad litem through a majority vote system forms an agreement. If one parent refuses to partake in the talks, that parent waives the right to influence the decision in favour of the rest of the group. If a parent or the child is unsatisfied with the decision, it can be tried by a board of examiners within the court system in a manner similar to the European Court. Should this board find that somebody's interests have not been upheld, it may redirect the issue to the group with instructions on circumstances that must be considered. Every decision taken at the Bureau for the Best of

the Child is evaluated after two years, at which time the parents, mentors, and the child's guardian ad litem meet again.

The authors conclude that if the best interest of the child is to be the only ultimate goal in custody dispute dissolving, it will be necessary to reshape adjudication in a way

that dispute resolution in custody cases deals with the actual conflict at hand. In order to do that the construction of societal systems for conflict solving has to take its starting point from a different vantage point than current legal structures.

Biology and the best interest of the child in Norwegian Act of Child Welfare Services

MARIT SKIVENES

The article discusses the normative foundation of the act of 1992 no 100 relating to Child Welfare Services. Using argumentation theory, which establishes standards for evaluating deliberative processes, the article explores legislatures reasoning making the act, emphasizing the principle of the child's best

interests. The analysis shows that our representatives in a lesser degree have discussed, confronted statements, or included important arguments in the decision making process. As a result it's seems to be legitimating problems with The Child Welfare Act.

Off the record: Law and Culture

MERIMA BRUNCEVIC

Art and literature have throughout time criticised society and its flaws and imperfections. This article deals with what the critique from literature, as an art form, has looked like upon law. It discusses the subject based on several classics that deal with legal aspects such as justice. Some of the works

examined in the article are Shakespeare's Hamlet, Dostoyevsky's Crime and Punishment, Orwell's 1984, as well as two dramas from ancient Greece, Oedipus and Antigone. Thus it poses the question: Has literature been a successful critic of law throughout history?