BOOK REVIEW: AUGUSTO ZIMMERMANN – WESTERN LEGAL THEORY: HISTORY, CONCEPTS AND PERSPECTIVES

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Jurisprudence is a challenging area of study. It requires one to reflect on complex legal issues that have troubled jurists, philosophers, sociologists, economists, theologians, legislators and the broader community for millennia. In *Western Legal Theory: History, Concepts and Perspectives*, Dr Augusto Zimmermann provides an accessible interdisciplinary approach to legal analysis so as to lead to 'the type of reflective critical self-awareness that is so fundamental to anyone who is or wishes to become a successful member of the legal community'.[1]

The approach Zimmermann takes is to explore and critique the development of Western jurisprudence from the Ancient Greeks to the postmodern legal theorists. This engaging journey commences with a discussion of natural law theory. It is shown that throughout the course of history, scholars such as Aristotle, Aquinas, de Bracton, Coke and Locke have justified resistance to tyrannical rule on the ground of invariable laws and moral standards that no person, even a monarch, may violate. In this analysis, Zimmermann states that natural law theory has heavily influenced the rule of law and that the advancement of natural

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1 Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) xv.

law 'owes much to the advent of Christianity'. Although discussing how Grotius made the secularisation of natural law possible, and how Kant later disregarded 'God-given natural law', Zimmermann criticises the inevitable subjectivity of Kantianism. He contends that '[t]o a certain degree the concept of natural law must of necessity be transcendental in its provenance to make proper sense'.[2]

Legal positivism is considered in chapter two. Although highlighting 'the positivist premise that law can be separated from morality', Zimmermann explains that not all legal positivists are 'unconcerned about matters of justice and morality'.[3] By way of example, he describes how Bentham, although deriding natural law and calling it 'nonsense above stilts', supported progressive causes such as the abolishment of slavery. However, Zimmermann makes it clear that legal positivist support for a Hobbesian 'Leviathan', or Austinian sovereign possessing absolute authority, poses grave risks to liberty. It is apparent that Zimmermann is deeply sceptical of the legal positivist notion that 'it is the validity of the exercise of a legal power, not the legality of the law in which the exercise manifests itself, which is all important'.[4]

Chapter three addresses what Zimmermann regards as a reluctance of many legal scholars 'to acknowledge or at least address extra-legal aspects that … appear to undermine the success or failure of the realisation of the rule of law'.[5] His contention that the 'practical achievement [of the rule of law] appears to require a proper culture of

2 Ibid 38.
3 Ibid 54.
4 Ibid 82.
5 Ibid 83.

legality' is highly persuasive.[6] Zimmermann warns that 'the realisation of rule of law seems to depend upon a socio-politico-cultural milieu' rather than any grand legalistic institutional design. This chapter is important reading for any lawyer and indeed any person who values democracy. From a purely stylistic perspective, however, it may have been better suited as the first or last chapter of the book.

Evolutionary legal theory and German legal historicism are analysed in chapters four and five. Zimmermann explains how, '[u]nder the direct influence of Darwinism, a profound transformation of legal studies took place in the 19th century'.[7] He cites the rejection of universal norms by leading proponents of evolutionary jurisprudence including Maine, Holmes and Hayek. Similarly, he describes how the influential German legal historicists Savigny and Hegel dismissed the idea of inalienable rights and 'asserted that law is invariably historical and so destined to be replaced by future laws'.[8] To Savigny and Hegel, he explains, law and morality were to be found in the popular consciousness of the people and this manifested itself in the all-powerful *Volk* or state. Zimmermann then argues that this evolutionary, relativistic approach to law became a significant factor in the rise not only of legal positivism but also totalitarianism and moral relativism. He argues that it laid the foundation for National Socialist jurisprudence and Marxist legal theory. While evolutionary theory may be criticised, Zimmermann's analysis is perhaps overly critical. As Suri Ratnapala contends, '[b]y understanding the process of evolution and the limitations which it places upon us, we may

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6 Ibid 97, citing Jason Mazzone, 'The Creation of a Constitutional Culture' (2005) 40 *Tulsa Law Review* 671, 686.

7 Zimmermann, above n 1, 103.

8 Ibid 133.

be able to promote more successfully the survival of the things that matter to us, including our moral values'.[9]

In chapter six, Zimmermann provides a poignant reminder of the loss of 'life, liberty and dignity' in Nazi Germany.[10] In doing so, he implicitly evokes the famous aphorism of Santayana that '[t]hose who cannot remember the past are condemned to repeat it'.[11] Zimmermann begins by analysing Nazism's connection with socialism, Darwinism and religion. He then discusses the influence of German legal historicism and legal positivism on National Socialist jurisprudence. Zimmermann argues that the Savignian *Volk* evolved into 'the totalitarian body of the Nazi state' and the legal positivism of German jurists like Kelsen 'promoted the expulsion of ethics and metaphysics from legal analysis, which ultimately offer[ed] no theoretical resource for the legal profession to resist the intrinsic arbitrariness of the Nazi regime'.[12] Notwithstanding these powerful impediments, Zimmermann is critical of Germany's powerful juridical elite for failing 'to resist the brutality and oppression of the Nazi regime', and indeed providing the 'philosophical cloak' for its murderous actions.

Chapter seven on Marxist legal theory takes a similar approach to the preceding chapter. It commences with a discussion of Marxism's relationship with religion and Darwinism. The influence of both Hegel and Savigny in the development of Marx's 'dialectical materialism' is then considered. Using the Soviet Union's experiment with communism as his example, Zimmermann contends that 'the Marxist dream of

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9 Suri Ratnapala, 'Law as a Knowledge Process' in Suri Ratnapala and Gabriel Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 204.

10 Zimmermann, above n 1, 135.

11 George Santayana, *The Life of Reason* (Dover Publications, 1905).

12 Zimmermann, above n 1, 160.

classless (and lawless) society has led only to gross inequality and class-oriented genocide'.[13] And yet, as he later reveals, Marxist ideology remains observable in the writings of contemporary legal theorists such as feminist jurist Catharine MacKinnon.

In chapter eight, Zimmermann analyses the highly influential American Legal Realism movement. Oliver Wendell Holmes Jr, its leading proponent, wrote that law is nothing more than 'prophecies of what the courts will do'.[14] Zimmermann explains how, in Holmes' opinion, legal standards are not objective but rather 'the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which Judges share'.[15] On this point, the Hon Michael Kirby AC CMG would certainly concur with Holmes. Although Zimmermann acknowledges the differing views of writers such as Brian Leiter, Zimmermann agrees with Raymond Wacks' contention that Legal Realism was an important precursor to Critical Legal Studies and Postmodern jurisprudence.

Although the Critical Legal Studies (CLS) movement only existed for a brief period at the end of the 20th century, Zimmermann's analysis in chapter nine vividly demonstrates its lasting influence. He explains that although CLS thinkers agreed with the Realists that law is indeterminate, they took a much more radical approach. CLS scholars argued that law is politics and the rule of law is a 'myth that perpetuates the power of the economic elite'. Zimmermann argues that the CLS indeterminacy thesis has 'been integrated into more moderate legal theories' while its more

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13 Ibid 215.

14 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 461.

15 Oliver Wendell Holmes, *The Common Law*, Mark DeWolfe Howe (ed) (1881) 1, quoted in Zimmermann, above n 1, 220.

radical use of Marxist ideology still exists in radical feminist jurisprudence.

Feminist jurisprudence is analysed in chapter 10 with Zimmermann distinguishing between 'classical', first-wave feminism and 'radical', second-wave feminism. He explains that in contrast to the classical feminists who fought for equal rights, radical feminists 'combined traditional Marxist methods with a postmodern interpretation of society' and regarded values such as 'objectivity and neutrality of the law as the basis of inequality'.[16] Zimmermann critiques influential feminists such as Betty Friedan and MacKinnon, before contending that the 'gender struggle' ideology of the radical feminists 'should be treated with a great deal of suspicion'. He submits that 'the holders of such views can easily find themselves in company with the likes of sexists, racial supremacists and religious bigots'.[17]

Chapter 11 discusses postmodern jurisprudence and what Zimmermann calls its 'theoretical challenges to the objectivity of truth and knowledge in Western societies'.[18] He contends that 'mainstream postmodern theory emerged from a certain Marxist tradition of anti-Western philosophy' with 'conditional and socially determined' individual rights.[19] He then discusses Derrida's view 'that there is nothing outside of context' and Estrich's opinion that law is ultimately about politics. As a consequence of its rejection of objective values, Zimmermann contends that postmodern jurisprudence leads to law becoming subjective and merely representing the assertion of power by one group over another.

16 Zimmermann, above n 1, 233.
17 Ibid 253.
18 Ibid 254.
19 Ibid 256.

In chapter 12, Zimmermann discusses 'Economic Analysis of Law' or 'Law and Economics' (L&E) as it is also known. He illustrates how the utilitarian-inspired L&E scholars 'apply microeconomic theory to the analysis of legal rules and institutions'. Whilst he agrees that wealth maximisation alone may not be the sole basis for the creation of law, still he agrees with the premise that it may be the most direct route to a variety of moral ends including liberty.

In the final chapter, Zimmermann analyses libertarian jurisprudence and particularly the work of Friedrich A Hayek. Whilst discussing Hayek's support for the rule of law as a protector of liberty, he explains Hayek's preference for spontaneous order over centralised planning and judge-made law over legislation. However, Zimmermann cites criticism of Hayek's theory from those who fear that it's 'emphasis on the evolutionary nature of morals and law compromises the case for liberty'.

On the whole, I thoroughly enjoyed reading this fascinating book. Zimmermann is a highly engaging and persuasive writer who connects the many different theories of law in an almost seamless manner. He has most definitely achieved his objective of providing an accessible, interdisciplinary approach to legal analysis that encourages critical thought.