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LAW, JUSTICE AND CULTURE

PROCEEDINGS OF THE 17th WORLD CONGRESS
OF THE INTERNATIONAL ASSOCIATION
FOR PHILOSOPHY OF LAW
AND SOCIAL PHILOSOPHY (IVR)
BOLOGNA, JUNE 16–21, 1995
VOL. II
EDITED BY
ANDRÉ-JEAN ARNAUD & PETER KOLLER

FRANZ STEINER VERLAG STUTTGART

CHALLENGES TO LAW AT THE END OF THE 20th CENTURY

II: LAW, JUSTICE AND CULTURE

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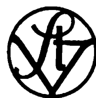

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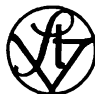

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Preface

It is a great pleasure and an honour for me to present the proceedings of the 17th World Congress of the International Association of Legal and Social Philosophy (IVR) held in Bologna from 16th to 21st June, 1995. Over seven hundred scholars from all five continents took part in the Congress, which was structured in four plenary sessions, six parellel sessions, a special session devoted to document logistics (legal and civic computer science applications), and 81 working groups.

The IVR was founded in 1909 and now counts over three thousand members in 44 sections located all over the world. Forthcoming congresses will be held in La Plata/Buenos Aires (Argentina) in 1997, New York (USA) in 1999, and Amsterdam (The Netherlands) in 2001. As current President of the IVR, and a member for 30 years, I am happy to see that by 2001 the Association will have reached its 20th official World Congress.

The goal of the 17th World Congress was to focus on the major legal, political and social issues currently addressed by legal and social philosophy. This was reflected in its far-reaching, stimulating title, "Challenges to Law at the End of the 20th Century".

Congress papers were grouped under four main topics: "Rights and other legal protections"; "New forms of sovereignty and citizenship"; "New and ancient sources of law"; "Technology and the environment". The debate focussed on the latest issues tackled by the legal and social philosophy milieu. First and foremost, a strictly formalist concept of law no longer fulfills the need to safeguard equality and protect basic human rights. In addition, the notions of sovereignty and citizenship have been reassessed in relation to the crisis of the nation state and the globalisation of economic and cultural problems alongside the tension between the idea of sovereignty and the inviolability of human rights.

The wide-ranging topic of the sources of law was also handled by many speakers, as was the relation between the theory of interpretation and the theory of sources, weighing "sceptic" theories against "cognitive" theories of interpretation and comparing different legal systems in historical terms and from a comparative law standpoint.

Last but not least, a number of speakers discussed the problem of the protection of rights with a view to revising traditional cultural categories in the wake of burgeoning technological development. Topics ranged from bioethics to environmental protection, the problems of computer science applications to law and the issue of legislative technique in relation to the computerization of law.

The Proceedings of the Bologna Congress are published in part by *Archiv für Rechts- und Sozialphilosophie* (Franz Steiner Verlag, Stuttgart/Germany), in part by *Rechtstheorie* (Duncker & Humblot, Berlin/Germany), and in part by The *European Journal of Law, Philosophy and Computer Science* (Clueb, Bologna/ Italy).

ARSP publishes four volumes: "Rights" – Beiheft 67 (eds. Rex Martin and Gerhard Sprenger, introduction by Zenon Bankowski and Burkhard Schaefer),

"Law, Justice and Culture" – Beiheft 68 (eds. André-Jean Arnaud and Peter Koller, introduction by Tom Campbell), "The Sources of Law and Legislation" – Beiheft 69 (eds. Elspeth Attwooll and Paolo Comanducci, introduction by Joxerramon Bengoextea), and "Legal Systems and Legal Science" – Beiheft 70 (eds. Marijan Pavčnik and Gianfrancesco Zanetti, introduction by Hendrik Ph. Visser't Hooft).

Rechtstheorie publishes three volumes: "Rule of Law – Political and Legal Systems in Transition" – Beiheft 17 (eds. Werner Krawietz, Enrico Pattaro, Alice Erh-Soon Tay, introduction by Ota Weinberger), "Changing Structures in Modern Legal Systems and the Legal State Ideology" – Beiheft 18 (eds. Eugenio Bulygin, Burton M. Leiser, Mark Van Hoecke, introduction by Aulis Aarnio), and "Consequences of Modernity in Contemporary Legal Theory" – Beiheft 19 (eds. Eugene E. Dais, Roberta Kevelson, Jan M. Van Dunné, introduction by Dieter Wyduckel).

The *European Journal of Law, Philosophy and Computer Science* publishes three volumes: "Practical Reason. History of deontics. Computer Law", "Legal Computer Science" – Volumes 1 and 2 (eds. Alberto Artosi, Manuel Atienza, Hajime Yoshino, introduction by Neil MacCormick), and "Law and Politics Between Nature and History" – Volume 3 (eds. Ralf Dreier, Carla Faralli, Wladik. S. Nersessiants, introduction by Roberto Vernengo).

On behalf of the International Association of Legal and Social Philosophy, I would like to thank all those who have worked on the editing of these Proceedings.

Enrico Pattaro

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Introduction
Consensus and Pluralism

A pervasive assumption in contemporary legal philosophy is the belief that we live in different and disturbing times with distinctive and troubling problems. Foremost amongst these assumed problematic differences is the phenomenon referred to as cultural pluralism, by which is meant the coexistence of incompatible but equally valid ways of life often within the same particular jurisdiction.

This is a curious assumption to the extent that, despite the continuing, even resurgent, but hardly novel disparities of religion and ethnicity, it is also considered to be a truism that we are moving into an age of monoculture based on the success of the commercial state and its homogenous media. Marshall McLuhan's global village was never a multicultural microcosm. Subsequently, the collapse of the ideological confrontation of East and West appears to have resulted in a liberal consensus despite the emergence, or, more accurately, the re-emergence of suppressed group enmities. While there are endless examples of major cultural differences, some of which manifest themselves in profound and apparently incorrigible incompatibilities, the distinctiveness of the contemporary world lies more in the harmonisation of ideology which is typified by the United Nations and its contested but generally accepted human rights base, than in the persistence of traditional religious and ethnic divisions.

However, it is not, perhaps, the fact of cultural pluralism that is so significant as the appreciation of its significance. The point at issue is the realisation, first that there is no rational or objective way to justify ultimate or non-derivable value commitments, and second, perhaps by way of implication, that all cultural systems are equally deserving of respect and protection. The intellectual awareness of value relativism, plus the ideology of equal respect, generates the preoccupation with cultural pluralism.

Again, there is no novelty here. The Enlightenment itself, while caricatured as an era of false claims to objectivity, was a response to increasing awareness of the impossibility of reaching agreement on religious matters and the new knowledge of remarkably different cultures and civilisations found and reported on by the explorers whose exploits marked the beginnings of our knowledge of the true diversity of human institutions and beliefs.

What is, perhaps, a comparatively recent factor, is the widespread acceptance of the view, amongst intellectuals at any rate, that there is no satisfactory philosophical solution to the ultimate relativity of values, and even to the more general matter of the highly dubious status of all epistemic claims. Maybe this, rather than the rediscovery pluralism is the distinctive aspect of the postmodernism that drives the concern to articulate a defensible legal response to cultural pluralism which is apparent in so many of the essays in this volume.

A sensible political response to ideological pluralism is to accept that politics, particularly international politics can, and should be a matter of pragmatic

compromises between incommensurable positions. However, this fits ill with the pervasive conviction that there can be no compromises over human rights.[1] Given that such rights protect vital interests, are generally believed to override all other considerations, and are regarded as the basis of both procedural and substantive justice, it is difficult to see how they can be traded in for other alleged benefits. Neither the possession of the Golan Heights, nor the rights or wrongs of abortion can be reduced to the status of a bargaining counter without undermining the basis of principle on which competing views rest.

One solution to this impasse, recommended in David B. Boersema's essay, is to down grade human rights and justice to the status of one means amongst others of attaining human welfare, the classic utilitarian ploy. On this approach compromise can be regarded as a virtue on a par with respecting and caring for others, for it seeks to protect and further the interests of the parties to the extent that it is feasible to do so in the circumstances. Moreover, the alternative of sticking to the trumping power of rights and the absolutism of justice smacks of "moral foundationalism" or "moral absolutism", which seem philosophically indefensible as well as politically unhelpful. Prioritising human rights is certainly not pluralistic.

These philosophically emotive terms which are used to cast doubt on the epistemic sources of political convictions cannot mask the fact that Boersema's preference for a morality of compromise can itself be viewed as an expression of foundationalism unless, that is, compromise is commended as no more than one option amongst other equally good or bad options, rather than as a better approach to political conflict which ought to be adopted as a matter of principle.

Many of the essays seek to deal with this perennial liberal paradox: the moral superiority of tolerance and accommodation to the views of others. Different ways are sought out to provide some non-question-begging basis for the superiority of compromise. Albert W. Musschenga secures the priority of conflict resolution by defining the aim of moral philosophy as "to contribute to the understanding and solution of moral conflicts, especially ones which divide society and threaten its stability."[2] However, he concludes that meta-ethical discussion of the rival plausibilities of culture relativism and moral absolutism provides no assistance to securing cultural agreement since tolerance depends on the content of a person's morality rather than the meta-ethical theory that goes with it. Annalisa Verza[3] tackles the same issues through a discussion of the familiar debate on the Report of the Wolfenden Committee on Homosexual Offences and Prostitution.[4] Her liberal conclusion rests on the premise that no moral conclusion can be demonstrated to be correct (an argument arguably at odds with Mill's own belief that debate can lead to justified certainty).

Another path out of morass of relativity is explored by Guido Pincione who considers the claim that absolutism applies only to negative moral duties, which

1 This is the theme of David B. Boersema, "Rights and Moral Compromise".

2 Albert W. Musschenga, "Incommensurable Views on the Existence of Ultimate Moral Disagreements", p. 30.

3 Annalisa Verza, "Law, Morality and Tolerance: Hart and After".

4 UK, 1963.