

# Scripta amicorum

*Virtù contro a furore  
Prenderà l'arme; e fia el combatter corto:  
Ché l'antico valore  
Nell'italici cor non è ancor morto  
– Petrarca*

**O**n behalf of *No Foundations*, it is a great pleasure for us to congratulate professor Kaarlo Tuori on his sixtieth birthday. For this jubilation issue, Tuori's friends from all around Europe have produced a selection of texts that we are truly proud to present. All the contributors have taken the demanding task to observe and analyze the present moment and what is yet to emerge, and they do this with an impressive critical hold. We can hardly think of anything more fitting for Kalle's *Festschrift*.

Klaus Günther discusses the challenges presented to law by the pluralism caused by globalization. The law is becoming more and more detached from nation state legislation, and the positivist uniform concept of law no longer corresponds with legal reality. The situation is problematic from the point of view of normative theory. Firstly, a fragmented legal system cannot secure the basic justice, that is, equal treatment in adjudication. Secondly, law-making uncontrolled by parliaments produces law that lacks justification, at least in the form of democratic legitimacy. After an analysis of certain manifestations of the legal globalization, Günther moves on to discuss the subject of legal pluralism. By legal pluralism he does not only mean the mixing of regional, international and national laws, but also such types of effective law that do not stem from any public authority. Here he draws on such classics as Eugen Ehrlich, Leopold Pospisil, Sally Falk Moore and Boaventura de Sousa Santos. Günther considers that the perspective of these, as well as the perspective of today's pluralistic approaches to globalization, is descriptive and external. Lawyers, however, cannot as participants in the legal practice 'avoid treating legal materials at least under the hypothesis of self-containment, unity and coherence; otherwise they could not communicate with each other'. On the basis of this Günther elaborates the idea of the universal code of legality, which for him is not a bold vision for the future, but something already at work. Günther's code is not natural law, it merely serves the individuation of what is legal, what can be negotiated on in the legal language, in today's pluralistic contexts. The universals

that the code contains are indeterminate and contested. So, as Günther has it, the code is not only the *medium* of legal negotiation but also its *subject*.

Leila Brännström examines the legal framework for Guantánamo and provides a critique of Giorgio Agamben's philosophical insights relative to law. According to Agamben, the world has crucially entered into a permanent state of exception, where the rule of law is no longer effective. Guantánamo epitomizes that situation for Agamben: everyone's life and death is in the hands of the sovereign. With great accuracy, Brännström points out considerable problems in Agamben's analysis as to its correspondence with the current situation. According to her, it still is more sensible and in any case *better* to describe the situation in legal terms, and not in terms of the state of exception. This choice is at least partly strategic, a matter of political performing. Things like Guantánamo exist, but to be able to act upon them they must be conceived legally. The main thrust of Brännström's critical argument is that Agamben loses the potential of law as a resource in the struggle against despotism.

Samantha Besson discusses the European legal order *lato sensu*. In general terms, that is a legal structure that covers multiple layers. In Europe, such layers are especially those of EU law, international law and national law. Besson produces an analytical presentation on the many ways in which these layers interlace in today's situation. There she clarifies the central concepts that include plurality, unity, fragmentation and coherence. In the light of these, she looks into the recent and ongoing legal developments, such as the *Kadi*-proceedings in the ECJ, and analyzes how everything fits together with the traditional legal doctrines on regime conflicts. These doctrines include validity theories, postulates on primacy and *Kompetenz-Kompetenz*, principles of conflicts of norms, monism/dualism divide in international law, etc. Besson reconstructs an up-to-date basic blueprint of the European legal, democratic and constitutional theory.

Emilios Christodoulidis discusses the possibility of genuine political *self-determination* through a severe critique of certain basic concepts in the field of constitutional theory. He looks first at the ideas of 'constituent power' and 'constitutional moments' that mean something that supposedly precedes and establishes the legal context. According to Christodoulidis, however, they nonetheless presuppose and require recognition, retrospectively at least, *in and by that legal context*. For him, this fact compromises their merits as representatives of the creation of something genuinely new, something not bound by law. Christodoulidis then moves to discuss 'constitutional conversation' and 'animating principles', both of which represent constitution as a continuous process. That

process should be capable of constant reproduction of the political body and its capacity of self-determination. In his critique, Christodoulidis shows by vivid examples the potential deceit hidden in the 'symbolic simulation' that these concepts have produced. In the end, the paramount critical concern for Christodoulidis is that politics, as the legal-political constitutionalism has it, leaves loose the economic sphere that governs the material conditions of life. If the economic sphere is excluded from politics, politics is in fact subjected to the imperatives of economics.

Jan Klabbers discusses the possibility of a sources doctrine in the sphere of international law against Lon Fuller's standards known as the eight ways to fail to make law. He criticizes the current trend in international law scholarship of adapting an external perspective drawn from international relations theory. Fuller's list of requirements for producing valid law however provides a more procedural approach which concentrates on the normative nature of legislation. Klabbers sees Fuller's list of requirements useful for international law in two ways: as a means of addressing the substantive value of international law without reference to universal values and as a standard against which international law-making can be tested.

Jarna Petman discusses the liberal quandary of balancing the rights of the individual with the interest of community. Petman takes a critical look at the way in which this balancing act, and accordingly human rights, constantly defer back to politics. Using the judgments of the European Court of Human Rights as a reference point, Petman illustrates how this conflict of interest cannot be solved with a neutral position. She sees the balancing act that follows as an act of political power, power to decide what the good life is like. She proceeds to discuss the possibilities liberalism produces for constraining the politics in solving the conflict of rights and concludes by stressing the importance of the knowledge of the facts behind decision-making.

Felix Herzog examines how the new forms of criminal law regulation in the newly emerged special branches of crime control, especially the law against financial crime, branch off and differ from the classic doctrines of general criminal law. In a concise manner, he shows how the very basic precepts of legal protection have begun to crumble as the law is increasingly used for purposes foreign to its inner normative rationality. Herzog's eye is that of an eagle, but it reaches down to the ground: 'it is time for a critique of the rise of instrumental rationality in law and legal practice and for a rediscovery of the power limiting gospel of law and justice'.

The last two articles are more personal addresses to Kaarlo Tuori. Zenon Bańkowski and Maksymilian Del Mar provide a vision for a research on the liminal

spaces of social life, not only in the metaphoric sense but very concretely. The no man's lands in state borders make one think of the gaps and grey zones that persist even in the sharpest of divisions, conceptual or factual. Joxerramon Bengoetxea contributes with an essay in which he, among other things, recounts his encounters with Tuori during the two decades they have known each other. This gives Bengoetxea an opportunity to discuss the different traditions they come from, as well as the very concept of tradition. 'Traditions', he says, 'become resources from which reasons for change may also be derived: the past is mobilized to invent a future'. In the end, we turn from the *constitutive* dialogue between law and polity to the *regulative* notion of a 'complete, consistent, closed and decidable' legal system, being a concept of understanding – and, therefore, a concept carried along in tradition. Here, Bengoetxea recasts his very powerful idea of the unity of law as a regulative ideal in an epitome of broken glass vase and its remaking.

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