

THEORY IN PRACTICE IN A GLOBAL AGE: WHAT LEGAL THEORY CAN AND CANNOT DO

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This comment focuses on the strengths and limitations of legal theory in relation to the development of legal scholarship more generally. It draws principally on the U.K. experience. It challenges the cult of “pure” theory and argues that a much broader, historically aware, perspective is required if we are to make sense of keywords or phrases like “rule of law”, “democracy” and “justice”.

Introduction: Theory in Practice

In the sections which follow I ask: Do we live in a global age? Whose legal theory is it, then? What legal theory should we use? What are the challenges of the new and not so new? In the conclusion I will address some brief remarks to the vexed “West/non-West” issue.

1. A global age?

How global are we? Avian flu and all the risks and dangers which may be associated with it are one example of globalization. However, it is partly global because of the migration of birds, and there is nothing new about that though there may be variations in their precise patterns over time. Human migration and moving about — business meetings, academic conferences, tourism — is perhaps new or at least accelerated; but the traders from Fujian and Hong Kong and the European merchants who sailed around the world in the 16th and 17th centuries already prefigured this kind of activity. Without this activity, Adam Smith could not have written as intelligently as he did about eighteenth-century China, although this came to be forgotten as China “declined” in the nineteenth-century through overpopulation, imperialist predations, and natural disasters.

On the other hand we have the Internet, which seems to “embody” globalism. And yet international conferences are convened with some frequency to discuss the future regulation of the Internet and the prophets of doom are saying they will fail because of conflicting national interests and preoccupations.

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Scholars are divided on both the novelty and sustainability of the global. On the one hand we have new and busy international institutions — the U.N. but also W.T.O., U.N.E.S.C.O., etc. — but on the other, there is the difficult, tensional and unequal way in which these organizations work.

Some wish to draw our attention to global civil society, in contrast or opposition to these inter-state arrangements. Opposition is always a good way to bring people together, and the Internet, if it survives, facilitates this process. “Sign up to say No!” is the message. This is what Habermas regards as the public sphere and what many others label as new social movements.

I am sceptical about some of these analyses. My impression is more nuanced. We are not even at the point where we can take a universal language — English — for granted. In my limited experience, communication remains difficult. “World society”, a Luhmannian concept, which I think makes sense, works best at the level of the global interdependence of economies. It is also here where the structural inequalities show up most sharply. At a cultural level things are much more complex. It is clear that at one level globalization is at work: the celebrity of David Beckham, the wearing of “England” t-shirts, sport on the television and so on.

It may be that younger people will grow up thinking of themselves as citizens of some kind of world society. But I rather doubt it. People may wear the same clothes and use the same phones (and engage in the same games of emulation attached to these items of display) but what happens in the kitchen or bathroom or bedroom will remain rather more local matters rooted for the most part in traditional practices (although for some, the Internet no doubt opens up “another world” which can be absorbed into a refashioning of what is traditional or on the other hand reinforce resistance to Western “decadence”). The one significant global trend, which is of interest at this level is the position of women in society. I do not know if this is emulation, contagion, or something else.

2. Whose legal theory?

The main sources of legal theory in English-language or more broadly European-language publications are the U.S., the U.K., Germany and France. But what is the relevance of this for R.O.K., for China, for India, for Viet Nam?

Emulation? In what is supposed to be a global age, ministries and departments of government may seek and often do to emulate what is perceived to be “Western” rhetoric and perhaps even their ways of doing business. Whether their societies see matters in the same way is another question. This does not

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make Western legal theory worthless for scholars and students in the developing world. It does mean that its relevance should be viewed with some suspicion. Theory is rooted in practical contexts, in traditions, in culture, in ways of teaching, acting, thinking. These can be transported to some extent – the enduring (but diminishing) British influence in India provides an example. But in general terms it can be said that transplantation of theories runs the risk of a false abstraction and empty rhetoric, which results precisely from the fact or act of transplantation.

3. What legal theory?

What is the purpose of legal theory in practice? It is decorative in scholarly publications but more importantly it helps to make the study of law more fruitful, interesting and meaningful.¹ Doctrinal analysis, unavoidable in the law school, is limited intellectually, although no doubt the nature of these limitations differs between common law and civil law systems. (At the same time, current trends, if they continue, mean that global law firms will dominate the legal scene and this means that the *modus operandi* of commercial law will owe more and more to the common law tradition.)

Which theories are important for this purpose? If asked this question in the U.K. around thirty years ago, the answer would have been fairly simple – Herbert Hart and Ronald Dworkin. A few years later, the answer would have been more polarized – Critical Legal Studies and/or Marxism would have been on the list. By the early eighties, other approaches had entered the fray – Niklas Luhmann, Michel Foucault and Jürgen Habermas especially.

Hart developed an elegant analysis of the orientation of the U.K. judiciary towards legality and validity. It convincingly explained how, despite no written constitution and with the perhaps paradoxical combination of an independent but subordinate judiciary, the rule of law existed and made sense in the U.K. It was, arguably, rather parochial – not legal theory for a global age. The basic anthropological ignorance of *The Concept of Law* also exposed it to wider academic criticism. British traditions have, of course, as a result of Empire, been exported around many parts of the world, and many of the judges in these countries have been educated in the U.K. Many of these judges and lawyers took or take the view that British thinking was of limited use in their local conditions and it is not my intention to argue that they were or are wrong.²

¹ I have discussed some of what follows elsewhere: see my *Postmodernism: Legal Theory, Legal Education and the Future*, 7 INT'L. J. LEGAL PROFESSIONS 357-379 (2000).

² It may be interesting to compare Malaysia, Singapore, India in this respect.

Dworkin burst on the scene like a colossus but with a simple argument — that judges apply or should apply principles in their decisions or at least in the hard ones and that Hart’s view of the self-generated subservience of judges was wrong. This was, as was widely recognized at the time, an American perspective. At the same time, as Dworkin’s work developed and expanded, it was clear that he had spawned a rhetoric which was serviceable for scholars and for judges of a liberal persuasion. The distinction between principle and policy gave this enterprise much leverage. This became a kind of common sense (what Bourdieu calls *docta ignorantia*) in U.K. law schools. We can probably see this mode of thought reflected in the process which led to the enactment of the Human Rights Act, 1998 in the U.K., in which many critical decisions — e.g. striking a balance between freedom of expression and the right to privacy — were effectively deferred to the judiciary. But it was never clear whether Dworkin’s project was a description of what happens or a prescription about what should. And, operationally, it seems clear that sections of the U.K. government now regret this.

Given conditions in the U.K. in the 1970s and early eighties, the atmosphere was ripe for more “radical” approaches. There was an appetite for theory as “critique” rather than theory serving as a justification of the establishment. Looking back, I think the main works of both Hart and Dworkin were critical, but that is not how it seemed at the time. So “progressive” scholars drifted towards either critical legal studies or Marxism or both. Duncan Kennedy or Paul Hirst or Rick Abel became sought-after key players at conferences. The task of legal theory became to participate in the critique of capitalism and specifically in the role played by law in its reproduction. The Americans tended to focus more upon judicial “bias” and the way in which decisions were pre-structured; the Brits tended towards more structural analyses with fewer practical implications. Although nothing about any of this was pro-Soviet, the collapse of the USSR and of Soviet-dominated Eastern Europe eroded these positions and played a significant role in facilitating its implosion.

C.L.S. remains in place in a general sense although in circumstances which are radically changed, both in the U.S.A. and globally. Marxist scholarship in the U.K. is probably now just a memory.³

Given the perception — not universally held of course — of the moribund nature of Hart, the over-idealistic vision of Dworkin, and the rather passé nature of C.L.S. and the bankruptcy of Marxism, many turned to European theory. Here, however, one did not primarily encounter legal theory but a critical social theory.

³ On all of this, see generally, my *BritCrits: Subversion and Submission Past Present and Future*, 10 *LAW & CRIT.* 237-278 (1999).

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I think this was important in that this encouraged legal scholars to broaden their horizons. The principal scholars I have in mind are, as indicated already, Niklas Luhmann, Michel Foucault and Jürgen Habermas. Of these three, Habermas, in many respects, was the least challenging and his major book on law, *Between Facts and Norms* – the English translation title, is disappointingly based on an engagement with the like of Dworkin and other legal philosophers. As a teacher, I find some of his earlier work much richer for students, not least because it offers more opportunities for use in relation to some topic or area of contemporary law – or legal history for that matter.⁴

Habermas has unfolded a vision of a “public sphere” which grew and then declined in countries like the U.K. due to a retreat into what he once termed “civic privatism”. I struggle to see how this is a useful theoretical framework for other countries, rooted as it is in a rather specific part-European history. The closely linked idea of a “public sphere”, either as an objective or actuality, which was very popular in the 80s among intellectuals in China for example,⁵ seems to be largely inappropriate to transport around the world.

To move on: Foucault and Luhmann, in their very different ways, were geniuses – *magistri ludi* (masters of the game). Foucault’s work inevitably looms large in any projects to do with criminal justice, social work, even human rights. He may or may not have been right but his legacy is impossible to avoid. There were, however, many confusions about the meaning of his work – was it Marxism by other means, was it a call for emancipation, and if the latter what could that mean given his own positions? All I can say is that anyone working in the areas of criminal responsibility or of sexuality ignores Foucault’s playful genius at their peril. And at a more general level, Foucault challenged us to think about what law is really about, and therefore what legal theory should focus upon. Put differently, his example invited scholars to look at a broader range of sources and materials than had been traditional – to look at newspaper articles, journals, archives etc. You did not have to be a “proper” legal historian any more if you followed his example.

Particularly important was a distinction he formulated, with a typical combination of clarity and obscurity, between law and norm. Law, “Thou shalt not”, belongs to an old order;⁶ norms, “this is the way to go or the target to aim

⁴ See e.g. HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* (1990).

⁵ See e.g. THE ESSAYS IN XUDONG ZHANG, *WHITHER CHINA? INTELLECTUAL POLITICS IN CONTEMPORARY CHINA* (2001).

⁶ As I try to indicate in my *THE OLDEST SOCIAL SCIENCE? CONFIGURATIONS OF LAW AND MODERNITY* (1997).

at”, represent the style of our current age.⁷ The techniques of the two regimes are different, as are the consequences of failure. The raucous rhetoric of the rule of law should not blind us to this difference and to the significance of this transformation. Of course the two domains overlap and criss-cross. Norms turn into prohibitions — smoking is a current example.

I leave Niklas Luhmann until now in this section. He was the true genius. It is difficult to comment with any precision on his influence: his writing was so dense and difficult that many misunderstood him or took from him just what they wanted to suit their own agenda, and once again, so far as law is concerned, Luhmann did not set himself up as a “legal theorist”. But like Foucault, he helped legal scholars to explore issues (empirical and theoretical) which went beyond their “normal” domain. Issues or themes which had not been relevant became relevant. For example, any discussion of risk or the environment is deficient unless it takes account of Luhmann’s theoretical work on these issues.⁸ This is what theory in practice should do: enable us to think intelligently about important, practical issues, which we confront today.

This does not mean that Luhmann offers a number of benign prescriptions about how we can make the world a better place. The word/phrase “democracy”/“rule of law” can be used too often and too easily. At the centre of law as a social system, for Luhmann, are processes of adjudication and the techniques and mechanisms associated with that cluster of activities.⁹ On the periphery of “law” understood in these terms are, to simplify, legislation and contracts, as generic labels to encompass a cluster of other legal processes. Here, legislation encompasses all those processes now commonly described as regulation; contract, similarly, captures all those legal techniques of private ordering, including wills, trusts, leases and so on. (Or at least this is my reading of what Luhmann has in mind.) The central position accorded here, to adjudication, does not imply a comment on the social importance of this activity and, as should be clear, questions of the effects or impact of law-as-adjudication upon society (the “classical” sociology of law question) are largely beside the point. Luhmann offers a framework within which we can ask, rather, in what respects, lawyers make law and law makes lawyers; how society uses law and how law uses society; and what aspects of these operations are or are not European anomalies. These are better questions than those we have been accustomed to ask in Western scholarship or than many (though not all) of those, which are acquiring a new canonical status

⁷ See especially FOUCAULT, *HISTORY OF SEXUALITY VOL. I* (1984); *DISCIPLINE AND PUNISH* (1977).

⁸ LUHMANN, *RISK: A SOCIOLOGICAL THEORY* (1993); LUHMANN, *ECOLOGICAL COMMUNICATION* (1989).

⁹ LUHMANN, *LAW AS A SOCIAL SYSTEM* (2004).

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under the capacious rubric of “critical legal studies”. Luhmann may have lacked the ambition or desire or faith or vision to make either people or the world better. But he did offer a programme of societal self-awareness, which may, in its way, be something more valuable.

Some commentators question the degree to which, because the projects of Habermas and Rawls remain committed to an Enlightenment faith in reason which Luhmann dismissed as “old-European” (long before Rumsfeld and with quite different intentions), they remain, despite their protestations to the contrary, much more metaphysical than Luhmann, who is the true postmetaphysician. But the same or a related metaphysics is in play when it comes to the question of agency. The stake is so often presented as one in which the “fate of the human” will be decided. Without the “belief” (for that is what it is and that is what is metaphysical) in agency, we cannot make history (i.e. change the world). But, for Luhmann, observers need to be aware of their position/s and of their limitations. Even precautionary principles mask rather than help decision-making in this situation. The world will do what it does. It is not a question of freedom and determinism but of contingency. This is why Luhmann’s is a dismal science. But that does not make it wrong. Scholars are not — or should not be — cheerleaders. We need to know what we do not know.¹⁰

4. The challenges of the new and not so new

Here I would single out Islam, Confucianism (because suddenly we are all aware of China) and postcolonial studies (e.g. the subaltern studies literature which has emerged from India in particular). I do not see how Western scholars working in the area of theory can ignore these developments. The global age, whether or not it is new, means that the West has to engage with other traditions because their own populations are “multicultural” and now has to debate what this might mean and what its implications might be.¹¹

What I mean, precisely, is that we in the West cannot assume that our models or paradigms are sustainable, even in our own countries. I have some understanding of the situation in those countries outside this cultural universe, which have sought to move closer to these models or implement them. I also understand the defensiveness in Hong Kong for example that under the “One

¹⁰ See also, Luhmann, “The Ecology of Ignorance” in *OBSERVATIONS ON MODERNITY* (1998).

¹¹ I argued this some years ago before “the world changed” in my *Postmodernism: Legal Theory, Legal Education and the Future*, 7 *INT’L. J. LEGAL PROFESSIONS* 357-379 (2000).

Country, Two Systems” theory they will continue to teach Hart and Dworkin. To me, this is slightly bizarre. But it is not for me to say.

5. Conclusion

I do not believe that a particular people should remain rooted in their supposed traditions for the sake of it. My personal viewpoint is simple enough: people should be free to do what they want to do so long as it doesn't harm others. But we cannot easily take culture, history, tradition or religious belief out of people as if all that remains is people purified of all the determinants that give them their identity. And the law cannot change this.

A final point is about the West and the non-West. I do not for a minute suggest that this is a useful distinction. “The West” is as divergent and diverse as the different countries in South, East, and South-East Asia I have visited. There are some things in common and many things which are not. It is easy for academics flying around the world to seminars or reading each others' work on the internet to forget that this is a global community in only a very limited sense. Conferences do not equal globalization.

There is nothing new about the appetite to absorb Western scholarship in the East. Japan is the most obvious case, and many Chinese went there to study and absorbed what they were offered there. But this is not an East-West thing: it is more like the risks of Avian flu — something in the air, floating about...