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## JURISPRUDENCE OF LIBERTY

Edited by Suri Ratnapala  
& Gabriel A Moens

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THE editors say that this interesting collection of essays is “chiefly concerned with the connection between liberty and the *concept* of law as opposed to the *content* of law”<sup>1</sup>, and that many of the contributions were “inspired or provoked”<sup>2</sup> by the work of Friedrich von Hayek. Hayek was an internationally renowned economist whose interest in the inter-relationships between prosperity, free markets, liberty and law led to a distinctive reformulation of classical liberalism, which he expounded in his books *The Constitution of Liberty*<sup>3</sup> and *Law, Legislation and Liberty*<sup>4</sup>. Prosperity and general well-being, he argued, ‘depend on people being free to employ their knowledge and skills as they see fit, within limits imposed mainly by the need to protect the equal freedom of others. That mutual freedom, in turn, depends on law, understood mainly according to formal “rule of law” criteria such as abstractness, generality and predictability. Hayek’s political and legal theorising (not to mention his work on economics, epistemology and sociology) covered a vast range of topics, including the idea of social or redistributive justice, the proper role of government, the nature and comparative merits of customary or common law versus statute law, the nature of common law adjudication, the reform of legislative institutions to better protect the “rule of law”, and so on.

Hayek’s political and legal theories have attracted considerable attention since the late 1970s, with book-length studies by Andrew Gamble and Chandran Kukathas having recently been added to the earlier works of Norman Barry and John Gray.<sup>5</sup> Some of the

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- 1 Ratnapala & Moens, “Law, Legal Theory and Liberty” in Ratnapala & Moens (eds), *Jurisprudence of Liberty* (Butterworths, Sydney 1991) p1 (emphasis original).
- 2 Ratnapala and Moens, “Preface” in Ratnapala & Moens (eds), *Jurisprudence of Liberty* pp vii-viii.
- 3 Hayek, *The Constitution of Liberty* (University of Chicago Press, Chicago 1960).
- 4 Hayek, *Law, Legislation and Liberty* 3 Vols (Routledge & Kegan Paul, London 1973-79).
- 5 Gamble, *Hayek: The Iron Cage of Liberty* (Polity Press, Cambridge 1991); Kukathas, *Hayek and Modern Liberalism* (Clarendon Press, Oxford 1989); Barry, *Hayek’s Social and*

very diverse contributions to *The Jurisprudence of Liberty* explicate, criticise or defend aspects of Hayek's work. The others explore either issues which interested Hayek, or related issues, in their own right, without examining Hayek's treatment of them.

Neil MacCormick, in a previously published article usefully reprinted here, criticises several of Hayek's arguments, including his attempt to show that the concept of "distributive justice" is unintelligible. MacCormick also uses Hayek's arguments to turn the tables on economic rationalists who propose a radical retrenchment of governmental economic regulation and welfare programs, in order to restore the purity of the free market. Their proposals, MacCormick argues, amount to precisely the kind of social engineering, based on "constructivist rationalism", which Hayek condemned.

Alan Fogg provides a spirited and interesting comparison of Hayek's theory of adjudication with that of Dworkin, and with those of the legal positivists and legal realists which Hayek and Dworkin both reject. Hayek's and Dworkin's theories are similar in some respects - both defend the now unfashionable view that common law judges discover and declare, rather than make, law - but, as Fogg explains, the similarities are superficial. He argues that Hayek's theory is for many reasons superior. While I am no great admirer of Dworkin, I am not sure that Fogg does enough to clarify some aspects of Hayek's approach which I still find somewhat obscure. I would also take issue with the approach to statutory (and by implication constitutional) interpretation which, if Fogg is right, Hayek's theory recommends. This seems to me to entail just the kind of judicial law-making which Fogg condemns elsewhere in his discussion.

Suri Ratnapala argues that the evolutionary theory of knowledge, associated with philosophers such as Karl Popper as well as Hayek, can be used to rebut the radical scepticism of post-modernists concerning the nature and accessibility of objective knowledge, both in general and in the law. I enjoyed this chapter, and even more his long critical review of Margaret Davies' book *Asking the Law Question*<sup>6</sup> which a footnote in the chapter alerted me to. No doubt Davies would reply that Ratnapala does not really understand Derrida (which is what he says about her), but then, does anyone? And even if someone does, how could we ever really know that they do?

Another article which focuses on aspects of Hayek's work is Viktor Vanberg's excellent discussion of Hayek's complex attitude towards the deliberate design and reform of governmental institutions, defending him against allegations of inconsistency. Another is Douglas Kmiec's criticism of Hayek's failure to subscribe to a theistic natural law theory, which Kmiec maintains is needed to underpin and supplement Hayek's theory of customary law and the liberty which it protects. Kmiec may well be right to think that

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*Economic Philosophy* (Macmillan, London 1979); Gray, *Hayek on Liberty* (Basil Blackwell, Oxford 1984).

6 Davies, *Asking the Law Question* (Law Book Co, Sydney 1994) reviewed by Ratnapala at (1995) 16 *NZULR* 326.

Hayek's analysis and defence of liberty is incomplete. However a theistic natural law theory cannot be found plausible by those incapable of believing that a loving, all knowing and all powerful God presides over a world whose creatures suffer from horrific diseases and natural disasters. In response to Kmiec's question, "where is [Hayek's] positive proof of the denial of God?"<sup>7</sup>, I mentally replied (inter alia): a loving father does not set booby-traps in his home, so that his children's characters can be improved by experiencing suffering or sympathy for their siblings' suffering, and no loving heavenly father could be responsible for a world stocked full of lethal booby-traps.

As mentioned above, other contributions are either less, or not at all, concerned with Hayek's work. Gabriel Moens discusses recent cases in West Germany involving the prosecution for murder of former East German border guards who shot people attempting to flee to West Germany, and questions the propriety of judging their actions according to natural law notions which, he says, were alien to the culture in which they were raised. I found his account of the German cases slightly confusing in places, and wished that he had devoted more attention to the Hart-Fuller debate, and more recent work (for example by Stanley Paulson<sup>8</sup>), concerning Gustav Radbruch and German jurisprudence earlier this century. But nevertheless it is an intriguing topic which poses extremely difficult moral and jurisprudential questions.

Professor M Sellers describes how historically influential theories of republicanism, propounded during their heydays in Rome, Italy, England, America and France, advocated the design of governmental institutions in order to safeguard liberty. Alice Erh-Soon Tay and Eugene Kamenka describe recent Marxist and other radical left-wing theory, particularly as it pertains to law, and include a few pungent criticisms. (For example, a well known Critical Legal Studies symposium is described as "a remarkable and often embarrassing display of ... emotionally centered juvenile self-importance".<sup>9</sup>) Igor Grazin examines the role of ideologies in the economic and political changes occurring in post-communist Eastern Europe. Ian McEvin provides a useful introduction to the economic analysis of law, the various measures of efficiency which it employs, and the extent to which it allows for the independent importance of liberty. He concludes that

until economic efficiency can be defined in such a way as to incorporate values such as liberty more explicitly in the efficiency analysis, economic analysis should play only a limited, descriptive role in dealing with legal

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- 7 Kmiec, "Liberty Misconceived: Hayek's Incomplete Theory of the Relationship Between Natural and Customary Law" in Ratnapala & Moens (eds), *Jurisprudence of Liberty* p145.
- 8 Paulson, "Lon L Fuller, Gustav Kadbruch, and the 'Positivist' Theses" (1994) 13 *Law & Phil* 313.
- 9 Tay & Kamenka, "Contemporary Radicalism and Legal Theory" in Ratnapala & Moens (eds), *Jurisprudence of Liberty* p238, fn17.

issues. Normatively, economics has little to say about the desirability of alternate legal rules and institutions.<sup>10</sup>

Francesco Parisi examines the nature and spontaneous formation of customary rules as efficient solutions to co-ordination problems, and argues in favour of their being accorded greater recognition within legal systems. Geoffrey de Q. Walker provides a rather thin summary of his previously published book-length analysis of the various components of the “rule of law”. Ben Brazil proposes a simplification of Hohfeld’s analysis of liberties and duties as legal concepts, and the relationship between them. The contribution with the slightest connection to the themes of the book, and whose inclusion is somewhat puzzling, is that of RC Van Caenegem, who discusses the nature and history of legal history.

As in any collection of this kind, the quality of the contributions varies. But it is sufficiently diverse that any legal theorist should find at least several items of interest within it.

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10 McEwin, “Liberty, Law and Economics” in Ratnapala & Moens (eds), *Jurisprudence of Liberty* p182.