The worldviews of law

Western Legal Theory: History, Concepts and Perspectives

Augusto Zimmermann

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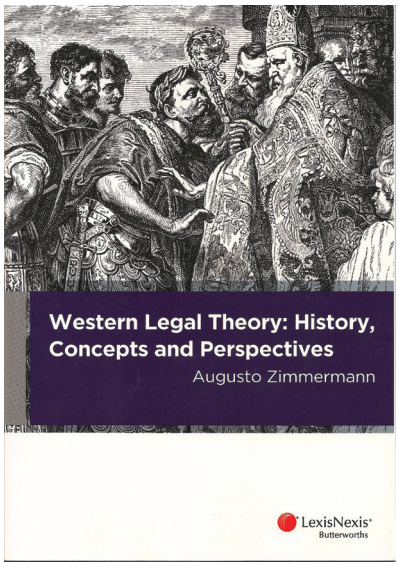

Daniel Davidson

Law is a window into the values and aspirations of a culture. It is inextricably bound up with that culture's worldview. The worldviews underlying various traditions of legal thought provide a recurring theme for Augusto Zimmermann in his new book, *Western Legal Theory*. Zimmermann is Senior Lecturer and Associate Dean at Murdoch University School of Law in Western Australia, as well as Vice-President of the Australian Society of Legal Philosophy, which publishes the prestigious *Australian Journal of Legal Philosophy* (AJLP). He is a prolific writer on legal issues, with special emphases on law and religion, Australian and Brazilian constitutional law, and legal theory. He is no stranger to the *Journal of Creation*, to which he has contributed several articles on law and its relation to the biblical understanding of creation.[1]

Zimmermann's *Western Legal Theory* is a survey text, designed to introduce law students and a serious general readership to the field of legal theory. Each chapter in the book provides an overview of a particular school of thought in legal theory. Throughout the book, Zimmermann generally adopts the tone of an encyclopedia: he describes the views under consideration and some of the criticisms of those views. He does not structure the book to put forward an overarching normative perspective of his own.

But Zimmermann's basic views become quite clear as the book progresses—and worldviews are at the heart of his analysis. The Christian natural law plays the star role in the Western legal tradition, providing the theoretical foundation for legal systems that made free societies possible. It is the objective moral order upon which legal order can be built. The objective rule of law is at least in part derivative from this natural law vision. Legal theories and practices that reject or deviate from objective moral truth and objective, neutral rule-of-law values end up having very bad consequences when put into practice. Of particular interest to readers of this journal, Zimmermann highlights the role that Darwinism played in inspiring several secular schools of legal theory.

Natural law and the Christian tradition

Natural law, Zimmermann writes, has roots both in classical Greek and Roman philosophy and in biblical notions of general revelation. Writers like Aristotle and Cicero believed that there was an objective moral law that existed apart from human law and against which the justice of human laws could be judged. The Old and New

Testament scriptures taught the same, but of course were much more explicit about the divine nature of the higher law. Both of these traditions could be characterized as a kind of natural law. They were brought together in an influential synthesis by the 13th-century theolgian Thomas Aquinas (figure 1). Zimmermann explains Aquinas's basic position: natural law was the part of God's Law accessible by the use of right reason.

There is some degree of controversy among Protestant writers in their evaluation of Aquinas; many in the Reformed tradition have suggested that Aquinas's understanding of the capacity of human reason minimizes the importance of Scripture and underestimates the significance of the Fall. Zimmermann suggests that this criticism is misguided. To the contrary, Zimmermann writes, Aquinas demonstrated a high view of Scripture by arguing that "revelation is necessary even with respect to things one can know by reason" (p. 14), recognizing that sinful man can suppress the truth in unrighteousness, as Paul teaches in Romans 1.

Photo: Wikimedia/Carlo Crivelli

Figure 1. In Western Legal Theory, Augusto Zimmermann argues that the philosopher and theologian Thomas Aquinas (1225–1274) (depicted here in a 15th-century Italian altarpiece) is one of the central figures of Western legal philosophy.

While natural law thought is often associated with the Catholic tradition, Zimmermann very helpfully reminds readers that the leading thinkers of the Protestant Reformation continued the tradition. Sometimes they changed the emphasis, putting a greater focus on special revelation (Scripture) than on general revelation discoverable by right reason. But, on the whole, Catholics and Protestants could agree on the basics—the existence of an objective, unchanging standard of right and wrong which set the standard for legitimate human law.

Natural law doctrines had very practical consequences. In England, natural law theories were foundational to the common law tradition in which no-one—not even the king—was above the law. Natural law provided a rationale for resistance to tyranny: a law or a royal command that contradicts the basic standards of natural law justice is no law at all and can be justly resisted.[2]

Natural law theories went out of fashion in the nineteenth century, supplanted by an array of secularized jurisprudential theories. Secularized versions of natural law were promoted as well. But the historical, Christian tradition still has its advocates. And its legacy still lives on in the normative vision of 'the rule of law' that is still a central tenet in Western legal systems.

The rule of law

Zimmermann gives another extensive treatment to the rule of law. It is a set of principles, not exactly a jurisprudential school. On first glance, it seemed odd to see an entire chapter on 'the rule of law' thrown in among chapters on jurisprudential schools like natural law, positivism, and realism. But, considering Zimmermann's presentation, the decision to give the rule of law treatment as a concept on its own makes sense. It is in many ways the closest thing that we have to a consensus among Western liberal legal thinkers today ('liberal' here used in the classical sense—having to do with liberty).

What is the rule of law? Zimmermann does a good job of laying out a range of the meanings attached to this concept. Some have seen it as a formal or procedural concept, focusing primarily on having laws that are clear, publicly promulgated, and relatively stable. Others would ascribe more substantive principles into the rule of law—protecting individual rights, for example. But Zimmermann identifies seven frequently discussed characteristics of a society with 'the rule of law':

1. Laws "must prohibit … coercion and violence so that citizens are protected against lawlessness and anarchy" (p. 91).
2. "Laws should be clear, certain, adequately publicised and normally prospective" (p. 92).
3. Laws must be generally applicable (as opposed to being aimed at punishing or benefiting specific individuals or groups).
4. "Laws should be as stable as possible" (p. 93).
5. Laws must limit and control the exercise of discretion by public officials.
6. Courts must be "independent, impartial and accessible to everyone" (p. 94).
7. The rulings of the courts are based on law rather than "the mere personal will of individual judges" (p. 96).

The fact that these principles seem like common sense to so many people in the West should be a clue as to how deeply Westerners have absorbed and internalized a culture of legality. The rule of law, Zimmermann suggests, needs a strong cultural grounding. It is difficult to import the rule of law into a culture without strong legal values. Although Zimmermann does not explicitly argue that the rule of law is an outgrowth of the Christian natural law tradition, the connections

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Figure 2. What sorts of worldviews have shaped Western legal systems? Augusto Zimmermann explores this issue in *Western Legal Theory*.

are fairly obvious.[2] The fundamental idea is that objective law rather than political power has ultimate authority. This is hard to rationalize on any other ground than the existence of a natural law. Yet some version of the rule of law is embraced by many liberal legal thinkers who do not at the same time accept natural law theory. These legal liberals are embracing the right result (rule-of-law values) without the theoretical grounding (natural law) that it requires.

Positivism and realism

Natural law and the rule of law may be the bedrock principles of Western law, but there are many ways to deviate from them. Much of *Western Legal Theory* analyzes jurisprudential perspectives that reject natural law and sometimes the rule of law as well. For examples, consider positivism and realism, both subjects of separate chapters. Positivism seeks to analyze law on purely formal terms. Whereas in a natural law tradition human law must comport with fundamental constraints of morality, positivism considers morality to be a category entirely separate from law.[3]

While positivism sharply separates law from the rest of human life and experience, realism breaks down the barriers that make legal reasoning unique. Legal realists believe that the law—and legal decision making—is never insulated from outside influence. Also, they do not believe that law has to conform to any kind of 'higher law'. Rather, realists view law instrumentally, as a tool for reaching desirable outcomes. Both positivism and realism reject the Christian natural law vision of fixed, unchanging moral standards of right and wrong as the foundation of law. Due to its result-oriented approach, realism also poses a challenge to the "rule of law theory of clear, stable and predictable legal rules that judges must apply regardless of social status or condition" (p. 219).

Legal theory in practice

Legal theory is usually very much, well, *theoretical*. One can expect extended discussions of legal positivism, natural law theory, and legal realism. Readers familiar with the field will be more surprised to encounter extended discussions of Stalinist totalitarianism and Nazi genocide. But they are there, too, the focus of some of the book's longest chapters. For purposes of understanding contemporary Western law, it might indeed seem odd to find that Nazi legal theory (which no-one in today's legal academy would support) gets *more* space than American legal realism (which still has considerable influence in the Anglophone legal world). Zimmermann does not explain why he decided to allocate book space the way he did, but it seems that he is trying to demonstrate how legal theories play out in the real world. In any case, that is the effect, and it makes this book unique among legal theory texts.

Nazi legal theory, for example, drew on several sources. Of particular interest to readers of this journal, Zimmermann emphasizes the role played by Darwinism. Nazi legal thinkers believed that a Darwinian struggle among races was the fundamental fact of national life and of morality itself. The influential German tradition of 'Historical Jurisprudence' already conceptualized of law in evolutionary terms as the expression of the spirit of the people. Putting these two lines of thought together, it was relatively easy for Nazis to justify the implementation of Nazi policies in the legal system. In addition, strains of legal realism (oriented toward using the law to achieve 'correct' policy ends) were employed to help rationalize the turn away from rule of law values on several levels: the courts interpreted laws loosely, enabling them to infuse Nazi meanings into old, pre-Nazi statutes; rule-making was often done on a personal level (for instance, by the 'Fuhrer' himself) without procedural constraints; after-the-fact (*ex post facto*) rulemaking was used.

As Zimmermann unpacks the jurisprudential catastrophe of Nazism, he also takes the opportunity to debunk the misconception that Nazism was based on Christianity. To the contrary, Zimmermann points out that Hitler viewed the churches as a dangerous ideological enemy, to be co-opted first and then later destroyed. The Nazis not only rejected the Christian natural law tradition, they rejected Christianity itself.

Marxist legal theory also comes in for close examination. Zimmermann explains the roots of Marx's thinking in several intellectual traditions.

First, Marx replaced traditional religions (Judaism and Christianity) with a quasi-religious secular vision of revolution and utopia. A communist society, without capitalism and without law, was the eschatological culmination that he envisioned. Second, Marx drew inspiration for his social science from Darwin's theory of biological evolution. Marx believed that his theory of deterministic historical progress toward communism was an extension of the evolutionary process. Third, Marx adopted, adapted, and modified Hegel's vision of the state as the ultimate agent of social change.

As Zimmermann explains Marx's view, law was a tool of capitalist coercion and hence would be unnecessary and discarded in his ultimate communist society. Marx's followers agreed. But, in practice, communist leaders in Russia and elsewhere came to recognize that law was a necessary tool for wielding power. Since revolution was necessary to usher in a communist utopia, law was a legitimate tool of coercion to be employed for perfecting the revolution. Suppressing dissidents, liquidating capitalists, reordering society—these were preconditions to the final lawless utopia. Law was one tool in the toolkit for accomplishing this. Obviously, the rule of law and natural law had no place in this system.

Libertarian jurisprudence and other traditions

Not all of the jurisprudential traditions in Zimmermann's book present such stark alternatives. And even among some of the perspectives that Zimmermann does not fully embrace, he includes enough nuance to distinguish positive elements. In discussing libertarian jurisprudence, Zimmermann describes Friedrich Hayek's failure to embrace the classical natural law position and notes Hayek's reliance on some evolutionary concepts. Though Zimmermann would disagree with Hayek at points, it does not prevent him from praising many aspects of Hayek's legal philosophy, which, among other things, defends rule-of-law values and describes necessary legal conditions for free societies. Zimmermann's chapter on the economic analysis of law is also nuanced. Scholars of law-and-economics have sometimes adopted realist or even utilitarian positions, viewing economic efficiency as a primary goal of the law. Without embracing this reductionist normative position, Zimmermann points out the valuable contribution that economic analysis of the law can make to our understanding of the law.

A book for teaching

Western Legal Theory is a textbook in both good and bad senses. Each chapter stands more-or-less on its own; a teacher could assign any collection of chapters in any order without worrying that the student needs to read the chapters in a particular order. This leads to some overlap between chapters—for example, the American Supreme Court (figure 2) Justice Oliver Wendell Holmes gets extended treatment in two chapters (on 'evolutionary legal theory' and 'legal realism', respectively). When things like this occur, there is usually a cross-reference to the other chapter that discusses the same figure or issue. This is great for teachers, but it makes for some dry reading when working through the book from start to finish.

More problematic, though, is the fact that throughout the book, Zimmermann only occasionally states his views explicitly. The book is heavy on description and filled with quotations. Many times, Zimmermann lets his views come through by quoting writers he agrees with. At a number of points, the book would have been stronger if Zimmermann had been more direct in stating his own perspective, both in terms of making his points and just in terms of making the book read better. Some editorial help from the publisher might have fixed this problem. Regretfully, it appears that the book received little editorial attention, as indicated by the more-than-average number of typographical errors. The publisher, LexisNexis, is one of the world's largest legal publishers, so it is disappointing to find that these issues slipped through. Hopefully a second edition will remedy these issues.

Conclusion

Western Legal Theory is a strong introduction to basic jurisprudential perspectives. As a Christian, Zimmermann is uniquely attuned to the worldviews that shape legal theory. He is especially helpful in describing the role of the Christian tradition in shaping the fundamentals of Western law, and in elucidating the place of Darwinian and evolutionary ideas in the secularization of legal thought. While Christians will certainly appreciate these features of the book, it is written in such a way that nonbelievers will not be put off by it as they might if it were written from an explicitly Christian perspective. Hopefully, this will enable Zimmermann to reach a broad audience of law students and teachers.

References

1. Zimmermann, A., The 'Darwin' of German legal theory—Carl von Savigny and the German School of Historical Law, *J. Creation* **27**(2):105–111, 2013; Zimmermann, A., Evolutionary legal theories—the impact of Darwinism on western conceptions of law, *J. Creation* **24**(2):108–116, 2010; Zimmermann, A., Marxism, law and evolution: Marxist law in both theory and practice, *J. Creation* **23**(3):90–97, 2009; Zimmermann, A., The Darwinian roots of the Nazi legal system, *J. Creation* **22**(3):109–114, 2008; Zimmermann, A., The Christian foundations of the rule of law in the West: a legacy of liberty and resistance against tyranny, *J. Creation* **19**(2):67–73, 2005.
2. Zimmermann develops these points more directly in his article, The Christian foundations of the rule of law in the West: a legacy of liberty and resistance against tyranny, *J. Creation* **19**(2):67–73, 2005.
3. To be clear, many positivists believe that law *should* be moral, but that the question of whether a law is moral is a categorically distinct question from whether a law is 'law'. By contrast, many natural law thinkers would say that a human law (for instance, a legislative enactment or a court decision) is not really 'law' if it violates fundamental ethical constraints.