Right and Prejudice: Prolegomena to a Hermeneutical Philosophy of Law (Book review)

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Right and Prejudice: Prolegomena to a Hermeneutical Philosophy of Law

Jarkko Tontti

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This monograph by Finnish critical legal theorist Jarkko Tontti is an exploration tour de force of the intersections of contemporary hermeneutics and legal thought. Tontti offers sufficiently engaged readers a sophisticated overview of the 'hermeneutic turn' within continental philosophy during the last century, and a charting of the ongoing legacy of Martin Heidegger. He does so through sketching not only the relations and parallels between continental hermeneutics and Anglo-American jurisprudence, but through delineation of a regional ontology of law that he claims can ground both the pragmatics of legal research and legal practice.

An immediate aspect of Tontti's book is his locating of his project within multiple critical traditions. His work is not one of applying hermeneutic theory to law, but that legal events, especially the trial and the pragmatic skills required by the doctrine of precedent, presents to hermeneutics clarifying windows into the 'structure of all interpretative ventures' (p 35). In so doing, Tontti develops an original account of 'critical hermeneutics' that emphasises the hitherto neglected dimensions of '*power, conflict* and *normativity* in interpretation' (p 9, italics in original). A guiding image that Tontti deploys throughout his text is a reformed dialectic. Unlike the familiar dialectic where thesis and antithesis give way to synthesis, Tontti's dialectic remains synthesis-less, two parallels bordering and energising a field of conflict, where there can only ever be marginal and conditional 'agreement'. This image, with its normative frame and its primordial conflict, sustains Tontti's articulation of critical hermeneutics. Further, Tontti's 'critical hermeneutics' is not a simple transmission of jurisprudence to first philosophy. Tontti remains critical of existing contributions to what can be conceived broadly as legal hermeneutics — whether that is Jackson (pp 176, 181), Dworkin (pp 111–14), MacCormack (pp 180–81) or even Douzinas (in his criticism of Levinas, pp 141–44). What Tontti offers is an original contribution to hermeneutics generally, *and also* legal hermeneutics specifically. Tontti in this respect is performative, for he enacts through engagement with these traditions the two dimensions that he claims belongs to critical hermeneutics: Ricœur's concepts of the 'hermeneutics of faith' and the 'hermeneutics of suspicion' (p 76). Tontti performs a hermeneutics of faith in his remembering of his traditions, and his attempt — to a point — to remain faithful to them. Tontti performs a hermeneutics of suspicion in his attempt to, from a position of relative autonomy, offer critique.

The book is divided into three sections. The first section is devoted to Tontti's development of critical hermeneutics. This section offers an unfamiliar legal reader with a good understanding of the critical moments and

disputes within continental hermeneutic. Beginning with Schleiermacher, Dilthey and Betti, Tontti sketches how hermeneutics emerged as a practical discipline concerned with epistemological questions of the social sciences (pp 11–19). He discusses how, through Heidegger, hermeneutics became concerned not directly with epistemology, but 'first and foremost an existential-ontological task ... primarily an *explication* of the existential-ontological foundation and primordial historicity of *Dasein*' (p 22, italics in original). Heidegger allows Tontti — although he admits that he moves away from a strict Heideggerian frame at this point (p 27) — to posit the 'three existential-ontological conditions of interpretation': language, historicity and conflict (pp 27–33). The following four chapters follow Heidegger's legacy in the work of Gadamer, Vattimo and Ricœur. From Gadamer, Tontti draws the importance of traditions: that interpretation occurs within the possibly stifling effects of prejudice and authority (pp 29–30). In contrast, from Vattimo, Tontti draws a call to ethics (pp 43–44) in that the necessary conditions of interpretation disclose a nihilistic world in which the interpreter is left with the 'modest and unpretentious attempt to interpret the structures and modes of Being-there and the meaning carried by human artefacts' (p 45). From Ricœur, Tontti derives the key observation of 'narrative temporality' — that is, that Being is narrated and that this narration discloses normativity (pp 65–70), and also the return from ontology to epistemological and methodological issues. This section, which comprises almost half the book, sets out the resources through which Tontti's critical legal hermeneutics is developed in the next section.

The second section convincingly lays claim to the necessary importance of a regional ontology of law. It begins through a remembering of Heidegger's cryptic references to law (pp 87–88) and moves on to the few legal scholars that have attempted, through Heidegger, to articulate the ontology of law. Tontti disagrees with Wolf's, Hirvonen's and Minkkinen's attempts at this project. He criticises them for locating within Being a supplement of 'Being-law' or 'Being-right' that confuses the fundamental task of ontology in the explication of Being. In this I think Tontti is right. Law is a thing, a human artefact, something at hand that can never be the proper subject of ontology, as the subject of ontology can only be Being. Claims to have identified the 'law of Being' are actually identification of the normativity of Being, or just Being (p 94). Use of the term 'law' gives the impression that there is a necessary relation between law as conventionally understood by legal theory and primordial Being. This is misleading, for while '[n]ormativity may well be part of Being and *Dasein's* Being but law and right as beings are not.' (p 96) In formally excluding his enterprise from what he considers to be doomed attempts at legal ontology, Tontti locates himself as undertaking a regional ontology of law — that is, an ontology of beings, entities, rather than of Being.

Tontti's organising theme for his regional ontology of law is time. Following his acceptance of the narrational frame of Being, Tontti proposes that legal hermeneutics occurs within a temporal order of past, present and future: 'In interpretation the demands of today are answered with the tools drawn from the past and with an aim to affect the future.' (p 104) In terms of

past, Tontti examines 'five modes of transmission of traditions in law'; legal scholarship, precedents, practical legal work, legislation and legal education (pp 119–23). His claim is that '*the intertwined and dialectical relationship between tradition and interpretation, which, constitutes the ontological status of law. Law is a tradition and tradition comes into Being as a tale of temporal interpretation.*' (p 117, italics in original) In the following chapter, Tontti considers the present of law as the time of decision and conflict: 'The ontological structuring of law as a tale of interpretation, hence, takes place in the *field of the production of legal knowledge* where different actors compete against each other.' (p 132, italics in original) This conflict means that violence and power are not external to law, but an unavoidable condition (p 134). This leads to Tontti's final chapter in section two, concerning future. Like Derrida, Tontti positions law's future as justice. He accepts, following Vattimo, that the description of the present as a groundless arena of conflict, power and violence opens to nihilism and, also following Vattimo, that the saving comes from recognition that this nihilism obligates ethics. While Derrida claims that the future as justice remains messianic and unknowable, Tontti in contrast claims that the normative structure of Being allows the sketching of a relation of temporality to justice (p 136). Tontti offers an innovative rereading of modernity's justice of 'liberty, fraternity and equality'. He roughly dispatches liberty, identifying that freedom is an impossibility given Being's thrown-ness in the world (p 138). Equality, in its traditional sense as totalitarian sameness, is similarly dismissed. Tontti then engages with recent critical legal literature that has attempted to soften 'equality' through Levinas and the demands of the Other (pp 140–42). Tontti addresses this through the problem of the third, that the 'Other–I' relationship does not account for (p 144). Tontti's dialectic can be seen in play here. For him, equality as sameness and the radical love for the unique difference of the Other are two parallels that demark the realm of fraternal ethics (p 145). This opens to Tontti's temporal mode of Being of justice as fraternity to the future:

> *Equality* before the law must then be 'equality' where the singularity of the other is respected as much as possible, but there is still a *limit* to that respect. The limit is that we must try to *preserve, protect* and *promote* the possibility of everyone to present their interpretations of every contested subject matter. (p 145)

Up until this point, I found the book condensed and complex, but also illuminating and engaging. I was ready to see how Tontti enacted his regional ontology of law. Unfortunately, I found the final section disappointing. While condensation was a hallmark of the earlier chapters, they were convincing, especially when read with Tontti's injunction that he was sketching the elements of a hermeneutic philosophy of law. The chapters in the final section seemed too brief and posed too many unanswered questions. The beginning of this questioning is with Tontti's ontological grounding of ethics as respecting the plurality of alternative interpretation. The world might be, as Tontti expresses it, 'a conflict of interpretation' (p 135), but factual location within tradition means that some interpretations are so unsavoury that they should be

'violently' suppressed. Carl Schmitt, to whose later work on the history of law and land Tontti refers (p 97), famously articulated the concrete limits of such 'liberalism'. Recognising the chaos and violence of endless interpretations, Tontti (following Gadamer), does affirm 'prejudice' as a necessary aspect of the historicity of interpretation (p 29). Herein is a primary difficulty for the epistemological and methodological work of Tontti's regional ontology as set out in section three. The injunction to be open to interpretation, to question prejudices, to engage in the hermeneutics of suspicion, if it is going to successfully ground acts in the world, requires a delineating process. This is Tontti's hermeneutics of faith, a knowing reliance on the tradition within which the interpreter is located to close and silence competing alternatives. However, besides delineating this structure of interpretation, Tontti does not seem as successful in articulating this within the practical reason of legal life.

Tontti's chapter on legal scholarship is dominated by an elaboration of the theatre analogy from Ort and van de Kerchove. The image, derived from reflection on the hermeneutic impossibility of Hart's internal and external positions, conceives the legal subject as an actor on stage, the judge as the director and the law as the script. Tontti creatively extrapolates this image into a taxonomical locating of various schools of legal scholarship within the theatre (mainstream legal researcher as prompter, legal philosopher as gnome, critical legal philosopher as critic in the balcony) (pp 162–67). Aside from an amusing masquerade, this chapter ends with an appreciation of interdisciplinary legal scholarship (p 172). In his final chapter, dealing with legal practice, Tontti's focus on the judicial role seems to lead to an affirmation of the common law's reasoning of analogy and judgment:

> The conflicting and discrepant narrative composition of all legal decisions ... is ultimately based on the ontological structure of law ... the tradition never presents us with correct answers, but always a range of possible solutions and the choice between them necessarily, in the end involves moral and political deliberation. In this sense legal decision-making representing a critical attitude of suspicion, can more overtly aim to *stretch the limits of the legally possible.* (p 185)

There are a series of unanswered questions suggested in section three. Specifically, is Tontti, through continental sources, suggesting that the common law has more authentically engaged with law's being? Further, Tontti continues legal philosophy's blindness to the bulk of legal practice. How does the ontological structure of law manifest in the daily activity of a law office? How does the ethic of minimising violence of competing interpretation guide an advocate writing an opinion? Concerning legal scholarship, is it possible to consider the narrational mode of being as prioritising specific forms of interdisciplinary scholarship, specifically the burgeoning fields of law and literature and law and culture that take narrative, plot and historicity seriously?

Together, these concerns animate the difficulties that Tontti faces in attempting to bridge Heidegger's ontic/ontological divide. It is tempting, given these concerns with Tontti's third section, to consider that a hermeneutic philosophy of law properly remains ontological, exposing the deep structures

that form the legal, but remaining in the background for the pragmatic tasks of everyday research and legal practice. However, putting aside Tontti's third section, there is much of value in Tontti's book for a theoretically engaged reader. His development of critical hermeneutics provides a solid account of the field for Anglo-American readers, and his injunction concerning the possibility of a 'pure' legal ontology was well made. His critical hermeneutic scheme, with consideration of conflict, narration, faith and suspicion, provides rich material for subsequent theorists. Even his attempt to follow Ricœur in returning from ontology to epistemology does not foreclose a future crossing. It is hoped that Tontti attempts such a crossing when he provides his opus on the hermeneutical philosophy of law, which the current work serves modestly as only a prolegomena.

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