Schriften zur Rechtstheorie

Heft 193

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On the Resolution of Conflict

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Die Deutsche Bibliothek – CIP-Einheitsaufnahme

Fleerackers, Frank:
Affective legal analysis : on the resolution of conflict /
by Frank Fleerackers. – Berlin : Duncker und Humblot, 2000
(Schriften zur Rechtstheorie ; H. 193)
ISBN 3-428-09049-7

Fremddatenübernahme und Druck:
Berliner Buchdruckerei Union GmbH, Berlin
Printed in Germany

ISSN 0582-0472
ISBN 3-428-09049-7

Gedruckt auf alterungsbeständigem (säurefreiem) Papier
entsprechend ISO 9706 ♾

Preface

As for the substance of the monograph, I am indebted to colleagues and friends at the universities of Leuven, King's College, M.I.T. and Harvard, who taught me much of what I have written and whose reflections inspired my approach of legal theory and jurisprudence.

Thanks are due to Jan M. Broekman, Irving Singer, Henry Steiner, Roberto Mangabeira Unger, David Kennedy, Robert Mnookin, Werner Krawietz, Jacques Steenbergen and Roger Dillemans, all of whom read earlier versions of this monograph, and offered valuable comments and criticisms.

Some of them, however, are implicated more deeply than others.

Jan M. Broekman stood by me from start to finish. His numerous remarks and suggestions were conclusive for every part of the manuscript. His inspiring advice and continuous endorsement invigorated the ongoing research whenever needed. Our sincere friendship allowed for unequivocal and straightforward deliberations.

Irving Singer's observations with regard to the concept of affective law largely influenced the scope of the first two chapters. I have fond memories of his M.I.T.-seminars, our walks through Cambridge and lunches at Eliot House.

Discussions with Roberto Unger and Henry Steiner on the first draft proved both stimulating and intriguing. My frequent visits to their Langdell rooms at Harvard Law School were always greeted with a warm welcome. And I remain indebted for Henry's cordial invitations to his elegant Cambridge mansion.

Of a more prosaic nature is my gratitude for the generous financial support I received from the Harvard Club of Belgium and the Foundation for Scientific Research and Educational Exchange.

The original manuscript has been extensively updated and edited for publication. I am indebted to the ever-meticulous Karine Draeck, our secretary at the Leuven Law Faculty, as well as to Birgit Müller and the staff at Duncker & Humblot for editing the manuscript.

On a personal note, I would like to express my deepest gratitude to my wife, who stood by me during a long and intricate journey. As a recognition of loving care, support and patience, this monograph is dedicated to her. And to the two magnificent children she has given me, an accomplishment unmatched by any scientific publication.

Finally, as John Rawls accepts in his *The Law of Peoples* (Harvard, 1999) that there are limits to reconciliation by public reason, the following pages may offer a survey of those limitations and consequently portray an alternative approach of conflict analysis and dispute resolution within the boundaries of legal effectiveness.

Brussels, July 2000 *Frank Fleerackers*

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Prologue

This monograph envisages a particular journey. It is a journey into the institutional rhetoric of contemporary Western society in order to delineate the concept of civic education and its sibling, the conveyance of legal awareness. Rather than empirically mapping their presence in quotidian reality, the following pages will provide an analysis of how legal awareness and its conveyance are embedded in contemporary legal discourse, and which institutional objective they serve.

By analyzing the broader political-institutional structure as well as the pretendedly more determinate legal-institutional one, an analogous conception of institutional awareness will be examined as a prerequisite component of institutional continuity.

Civic education – as the conveyance of political-institutional awareness – and the conveyance of legal awareness fulfil a dogmatic role, focused on integral adherence of the institutional subject to the political or legal institution. They are positioned as presuppositions of institutional effectiveness: in order for an institution to be effective, the possibility of institutional conveyance is postulated beyond comment. And the connected postulates are many. They presuppose the existence of the institutional subject according to a dominant institutional ideology. They assume that the institutional subject fully understands the institutional concepts and procedures. They posit that a rationalized instruction or comprehension of an institutional concept suffices for its conveyance. They presume that the cognitive acceptance of an institutional procedure equals its conveyance.

However, this monograph does not intend to provide a positive conception of the conveyance of legal awareness. Instead of building on Lawrence Kohlberg's or Carol Gilligan's theories of moral development, writings on moral argumentation by Karl-Otto Apel or Jürgen Habermas, or socio-psychological scholarship, this book focuses on the conception of legal awareness and its conveyance in contemporary Western legal discourse.

Affective Legal Analysis

The book analyzes the dominant narratives of – political and legal – institutional discourse and the consequences of their presuppositions on – political and legal – institutional awareness. As for the political institution, *political liberalism* is identified as its dominant narrative, whereas contemporary *legal positivism* is distin-

guished as reflecting political liberalism's institutional presuppositions in legal discourse.

Within both institutional discourses, a particular rhetoric is recognized as a dogmatic discursive instrument, directed at safeguarding the underlying presuppositions of the dominant institutional narrative, by rationalizing the structural elements of its discourse. As such, *rationalizing legal analysis*, present in legal dogmatics and jurisprudence, reinterprets legal concepts, such as procedure, right, property, legal subject and legal awareness, to make them fit the constructed framework of legal discourse.

The rationalizing analysis of legal awareness and its conveyance reflects legal discourse's purported identicalness with reality. As for legal awareness, since the identity between legal discourse and reality is presumed, its conveyance is understood as a mere instruction of basic legal concepts and procedures, already present in the legal subject's everyday-life.

Legal discourse's identity with reality is predicated on an institutional presupposition, instrumental to rationalizing legal analysis.

This presupposition can be described as a rejection of the continuous affective impact of competing *comprehensive theories of the good*, offering alternatives to the dominant conceptions of legal discourse. Such ideological rejection presupposes the capacity of each legal subject to limit the affective impact of his comprehensive views to the personal realm. Hence, this rejection assumes that the affective impact of all competing, even incompatible theories of the good, can be kept out of legal discourse.

As argued, this cardinal presupposition of contemporary legal discourse is upheld by an instrumental rhetoric Unger termed rationalizing legal analysis, prevalent in legal dogmatics and jurisprudence.

Affective legal analysis, as a critical approach thereof, criticizes the presuppositions the rhetoric is predicated on, and argues for recognition of the continuous affective impact of competing comprehensive theories of the good. Since competing theories continuously affect the legal subjects adhering to them, contemporary Western legal discourse's conception of legal awareness cannot be upheld. For such conception is predicated on the identity of legal discourse and reality, and the presupposition that its conveyance cannot be affected by incompatible views and beliefs.

Affective legal analysis, after having unveiled the purported identity between legal discourse and reality as an ideological stance of legal discourse's underlying dominant narrative, underscores the continuous affective impact of competing comprehensive theories, the dominant one included, and their significance for a critical conception of legal awareness.

Accordingly, the conveyance of legal awareness and its political-institutional sibling, civic education, require a mapping of competing comprehensive views, *al-*

ternatives to the institution's dominant conceptions, the latter conceived of as *authoritative,* not authoritarian. An institutional narrative is authoritarian, when its conveyance is separated from any reference to competing comprehensive theories of the good. An institutional narrative is authoritative, when, although its dominant affective features are acknowledged, its conveyance is positioned amidst the continuous presence of comprehensive alternatives.

Concludingly, the title of this monograph reflects the conception of its project. It involves an *analysis* of the prevailing syntax of institutional discourse in order to examine its presuppositions. A *legal analysis,* particularly focused on the legal discourse, as it endeavors to comprehend that discourse's dominant presuppositions regarding the conveyance of legal awareness. Finally, the approach is termed *affective legal analysis*, since the rationalizing rhetoric's most fundamental presupposition repudiates the continuous affective, *moving,* dynamic impact of competing comprehensive theories of the good. Affective legal analysis criticizes two distinctive elements of that presupposition: its rejection of the continuous affective impact of alternative narratives and its conception of those narratives as *static,* instead of *dynamic.*

In its particular approach of legal discourse and the affective dimension of law, the scope of affective legal analysis consists of three components:

(1) the affective impact of competing comprehensive theories of the good;

(2) the affective impact of the dominant narrative of legal discourse and its dogmatic, exclusionary rhetoric; and

(3) the affective impact of a particular legal culture – such as human rights – or legal practice, involving the affective influence of the conduct of institutional actors (judges, legislators, negotiators, mediators, lawyers, parties, experts) on the legal subject's conception of the legal idiom.

All three components of law's affective dimension are neglected by contemporary Western legal discourse on account of the rationalizing presuppositions of that discourse's dominant narrative. Accordingly, they are recognized by affective legal analysis as inherently linked to the conception of legal awareness and its conveyance, following the disclosure of the ideological rhetoric of legal discourse's dominant narrative.

Emotivism

Would an emphasis on the affective dimension of law lead to unproductive emotivism, as MacIntyre might argue[1]? MacIntyre defines emotivism as "the doctrine that all evaluative judgments and more specifically all moral judgments are nothing but expressions of preference, expressions of attitude or feeling"[2] and asserts

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1 *MacIntyre,* After virtue, Duckworth, London, p. 6–35.

2 *MacIntyre,* o.c., p. 12.