

The Continuity of Legal Systems in Theory and Practice

Benjamin Spagnolo

Hart Publishing, 2015, pp 280, ISBN: 9781849468831, £58

The continuity of legal systems is a fascinating area of legal jurisprudence, which requires an enquiry as to ‘whether a legal system existing in a given place at a given time is the same legal system as one existing in that place at a different time.’¹ Benjamin Spagnolo’s work critically analyses the contrasting theoretical frameworks of Hans Kelsen² and Joseph Raz³ in an endeavour to find a ‘fit’ that can best guide such enquiries.⁴ Utilising these frameworks, Spagnolo explores Australian constitutional law and history between 1788 and 2001, which is complex to the degree that it provides a fascinating case study for the application of legal systems theory. The result is a refined piece of work which is not only accessible to academics in the field of legal systems theory, but also to a wider audience, as they are offered ‘new means of understanding’ the evolution of the Australian legal system.⁵

Critics of legal systems and legal system theory have argued that the concept of a legal system is in decline.⁶ They argue that the theories available to analyse these systems are arbitrary and vary significantly, to the extent that they lack any efficacy in solving practical legal problems relating to legal system identity.⁷ In a 2005 piece on the constitutional development of legal systems in Canada, Australia and New Zealand, however, Peter Oliver showed that this area remains relevant. While Oliver utilised legal systems theory in his work, critical analysis of these theories did not form his primary focus.⁸ By shifting the central focus of his text to theoretical analysis, Spagnolo’s work therefore makes a valuable

¹ Benjamin Spagnolo, *The Continuity of Legal Systems in Theory and Practice* (Hart Publishing, 2015) 1.

² Hans Kelsen, *General Theory of Law and State* (Harvard University Press, 1945); Hans Kelsen, *Pure Theory of Law, Reine Rechtslehre* (University of California Press, 2nd ed, 1967).

³ Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Clarendon Press, 2nd ed, 1980); Joseph Raz, *Practical Reason and Norms* (OUP, 2nd ed, 1990).

⁴ Spagnolo, above n 1, 2, citing Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006).

⁵ Ibid 224.

⁶ H. Patrick Glenn, ‘Doin’ the Transsystemic: Legal Systems and Legal Traditions’ (2005) 50 *McGill Law Journal* 863, 866, 897–8.

⁷ Christopher Arnold, ‘Institutional Aspects of Law’ (1979) 42(6) *Modern Law Review* 667, 678–9; Spagnolo, above n 1, 2–3.

⁸ Peter Oliver, *The Constitution of Independence: the Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford, OUP, 2005) 1–2. See also Anthony Dillon, ‘A Turtle by any Other Name: The Legal Basis of the Australian Constitution’ (2001) 29 *Federal Law Review* 241.

contribution to the literature.⁹ The method of analysing the accounts independently then applying them to Australian history, allows Spagnolo to build a framework combining the most effective characteristics from both accounts, which will be a valuable tool in future assessments of legal system continuity.

The historical account of Australia's legal system from 1788-2001, as shaped by the materials required to apply the theories of Kelsen and Raz, should not be mistaken as being a historical or social study. Its purpose is to assess how political and economic developments have been reflected in the Australian legal system throughout history and to that end it is an effective foundation for Spagnolo's theoretical analysis.¹⁰ This analysis entails reconstruction of the theoretical accounts of both Kelsen and Raz as well as emphasis on possible issues with each framework. As these are two of the most developed frameworks in the literature, with each providing a distinctive perspective, they are effective choices for comparative analysis.¹¹ Although Kelsen's theory has been thoroughly critiqued and scrutinised by academics, it remains highly respected.¹² While Raz's account has not been subject to the same level of analysis, Spagnolo argues that this does not undermine its utility as a tool for analysis.¹³ Instead, this book is an opportunity to facilitate the advancement of Raz's theory both in explanation and application.¹⁴ Spagnolo's comprehensive conclusions for the respective parts of each theory provide this opportunity and their subsequent application to Australian history provides insights into the development of the Australian legal system.

It is important to note first Spagnolo's comments that 'fit is a matter of degree',¹⁵ meaning that while legal systems theories may not always connect wholly with the facts presented, they can still 'articulate some new insight into, or understanding of, the facts.'¹⁶ Specifically, Spagnolo proposes that his theoretical analysis creates unprecedented reflection in respect of the historical evolution of the interactions between the Imperial

⁹ Spagnolo, above n 1, 1.

¹⁰ Ibid 6, 9–10.

¹¹ Ibid 2–4.

¹² See especially John Finnis, 'Revolutions and Continuity in Law' in John Finnis, *Philosophy of Law: Collected Essays* (Oxford University Press, 2011) vol 4, ch 21. See generally Michael Steven Green, 'Hans Kelsen and the Logic of Legal Systems.' (2003) 54 *Alabama Law Review* 365; See also Dhananjai Shivakumar, 'The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology.' (1996) 105 *Yale Law Journal* 1383.

¹³ See generally Jennifer Primmer, 'Beyond the Law-State: The Adequacy of Raz's Account of Legal Systems in Explaining Intra-State and Supra-State Legality' (2015) 28(1) *Ratio Juris* 149.

¹⁴ Spagnolo, above n 1, 5.

¹⁵ Ibid 2.

¹⁶ Ibid.

and New South Wales legal systems.¹⁷ In light of Kelsen's model of authorised constitutional change, Spagnolo engages in a nuanced analysis of Australia's constitutional development, particularly its interaction with norms and total and partial legal systems.¹⁸ Subsequently, analysis of Raz's model of continuity of social form shifts the focus to the normative, institutional and coercive aspects of the law. Particularly accessible is Raz's emphasis on the interaction between legal and political systems, which is appropriately reflected in Spagnolo's analysis.¹⁹ In his evaluation of these models, Spagnolo argues that a hybrid approach taking aspects from both theories may offer the best explanation, however, Raz's 'ultimately possesses greater explanatory power.'²⁰ As to the acceptance of these conclusions by legal systems theorists, there is space for engaging debate.

Spagnolo's work is an important addition to the literature on legal system continuity. It provides valuable analysis of Kelsen's and Raz's theoretical accounts both independently and by their application to the Australian legal system. Despite criticism as to the efficacy of legal systems theory and the decline of the concept of legal systems more generally, Spagnolo shows that this area of jurisprudence remains relevant. In particular, it offers important insights and will have value in beginning an academic discourse regarding the temporal discontinuity and continuity of the Australian legal system as it continues to evolve into the future.

*Heidi White**

¹⁷ Ibid 224.

¹⁸ Ibid 88–9.

¹⁹ Ibid 162–3.

²⁰ Ibid 224.

* Fourth-year BA-LLB student at the University of Tasmania, and member of the Editorial Board of the *University of Tasmania Law Review* for 2016.