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Heart of Darkness for Mind, Thinking and Creativity Conference

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Abstract

This article focuses on the ubiquity of depravity in society and the promise of public conscience. Public conscience is the foundation of a culture based on the rule of law. The problem of depravity implicates the evolution of the contest between science and morality. This article draws attention to one of the historical outcomes of this contestation, which suggested that the only way to look at law is from the point of view of the "bad man's" economic interest. This discourse deeply influenced modern economic neoliberalism. Still, public conscience prevailed in holding the most depraved perpetrators to the rule of the law in the Nuremberg Trials. Public conscience additionally gave rise to the UN Charter as well as the International Bill of Rights. However, the fragility of human institutions has reflected the notion of a "heart of darkness." This remains a constant challenge to a world which seeks to promote the universal dignity of man.

"Heart of Darkness raises an important question about the vital importance of the evolution of public conscience strengthened by public values and reinforced by jurisprudence and legal culture."

In 1899, Joseph Conrad published one of the most famous novels in English literature: *"Heart of Darkness"*. The narrator, Marlowe, is part of a party traveling up the Congo River to meet with Kurtz, an idealistic messenger of Western civilization. During the voyage up the Congo, Marlowe notices that many of the colonial officials who they meet represent an almost excessive form of Western style and mannerism. As they venture deeper into the Congo, it appears that these elements of Western punctiliousness appear to disintegrate. Finally, they reach the headquarters of Kurtz. Kurtz represents the most appalling disintegration of Western civility and civilization. In fact, he appears to have been overtaken by his own heart of darkness. What happened to Kurtz? And what happened to the fellow travelers with Marlowe, who seemed to experience a level of deterioration of personality and civilization? In Kurtz's diary, there are references to his deterioration, which is expressed as "Exterminate all the brutes!" Later, on his death bed, he says to Marlowe, "The horror! The horror!" When Marlowe returns to Europe, he has a new appreciation of the fragility of the human person and his social relations. If there is one element of hope, it is that Kurtz still had the capacity

and conscience to pass judgement on himself. As Marlowe experiences his return to Western civilization, he remains concerned that the fabric of civilization is fragile, and that the capacity for self-judgement is limited. Yet, this is a truth that could not be understood within the cultural and legal frameworks as they have evolved.

> *"How are we to tell one form of reason from another? This, it seems, requires more than the simple elaboration of a rule of reason. It requires the cultivation of a disciplined form of creativity with a capacity to project itself as a creative force for the evolution of society."*

Heart of Darkness raises an important question about the vital importance of the evolution of public conscience strengthened by public values and reinforced by jurisprudence and legal culture. What is obvious to Marlowe is that without these somewhat frail rules that connect the web of social organization, the possibility of Kurtz-like failures is essentially close to the surface. In this sense, we can consider that the rule of law, as it has evolved over time, has been a critical factor in the movement of progressive society from status to freedom. However, the story of the fight for the supremacy of law is far from done.

Fifty years or more after Conrad wrote this novel, several versions of Kurtz emerged in the context of the twentieth century. In Russia, the Stalinist state emerged with a complete repudiation of the rule of law, and that state became noted for its mass murders. In China, the totalitarian state emerged under Mao Zedong, and that state also became acknowledged for its rolling mass murder. The rise of Hitler by fascism in Nazi Germany led to the mass extinction of human beings in the form of industrialized human slaughter. These are three notorious examples of the states that had evolved with sophisticated laws and cultural practices, and yet the revolutionary impulse to destroy left a vacuum which could not be filled by law, religion, or cultural practice.

Some background to legal theory and legal culture: the emergence of rule-of-law governed society in Europe owes a great debt to Roman legal culture. The Romans classified law according to *jus civile* (the law of the state), *jus gentium* (the law of nations), and *jus naturale* (the law of nature). The latter two categories often influenced the law of the state in directions that were flexible and more responsive to human needs. On the other hand, *jus civile* stressed the principle of the stability of legal and social relations.

During the Middle Ages, the influence of the Church reflected the influence of the Christian-inspired principles of natural law. These natural principles focused on the need to fully deploy human reason in the defense and promotion of human justice. This meant that the precise boundaries of natural law were undetermined. However, the United States Supreme Court, in the famous case *Marbury v. Madison*, adopted the principle of judicial review, which essentially was supported by the natural law idea that jurists bring active reason to legal affairs. This perspective has remained a cornerstone of American jurisprudence. It

is a matter that is still controverted; for example, it is said that judges exercise too much discretion in the discharge of their roles.

"Thinking creatively is an indispensable tool for the improvement of human possibility."

By the middle of the nineteenth century, science began to dominate, arriving in the form of analytical positivism. Here, the principal objective was to ensure that all legal rules were scientifically objective and valid. This could only be achieved by the recognition that all states are sovereign, and what the sovereign orders is the law. Recourse to natural law reproduced too much subjectivity and ambiguity in a field that required objectivity and certitude. The central point of the sovereignty-as-law principle was that we could not clearly separate what law objectively is from the subjectivity of moral-and-value discourse.

The influence of positivism was reflected in the infamous *Dred Scott case*, which literally read the Constitution as denying African Americans any civil and political rights whatsoever. Later, in the case of *Plessy v. Ferguson*, they read the principle of equality narrowly, to justify the principle "separate but equal".

In 1899, Oliver Wendell Holmes delivered a famous lecture at Boston University titled "The Path of the Law". This was a revolutionary expression of a scientific approach to legal theory. Holmes pointed out that the life of the law was not logic but experience. He stressed elsewhere that logic created the illusion of certitude. In fact, he indicated that as a judge, he could give any conclusion a logical form. What, then, was the law? Holmes presented a shocking idea to distinguish law from moral sentiment and value. Holmes said that to look at law realistically, we must look at it from the point of view of the bad man. The bad man consults his lawyer, because he wants his lawyer to represent his interests, and not the vaguer interest of morality and values.

This positivistic approach was in many ways brilliant, because it limited the illusion of logical certitude and stressed the importance of looking at law from the point of view of its most important consumer, the bad man. What it also did was to cement into the fabric of law and economics the idea that the only interest that counted from this point of view was the self-interest of the bad man consumer. In an indirect way, the bad man became the cornerstone of modern neo-liberalism in economics. It still remains a great challenge to determine the circumstances under which the corporate form of generating wealth may be constrained not only by objective law but also by principles of legal and ethical morality.

While this matter remains a challenge to both law and economics, the heart of darkness that fell on Nazi Germany and resulted in millions of murders provoked the challenge of public conscience. This resulted in the Nuremberg Trials, in which individuals were criminally tried for acts so egregious that they defiled the public conscience. Subsequent to Nuremberg, we had the development of a new form of constitutional order which sought to restrain the heart of darkness, reposing in the antechamber of all sovereign states. Along with the new form of global constitutionalism, there emerged an International Bill of Rights. This Bill of Rights was supported by governments and non-governmental players in the evolving public

conscience to sustain human rights norms and to ensure that all global power is subject to the human rights-conditioned rule of law.

The central problem posed by the insight into human subjectivity that it carries the seed of a "heart of darkness," raises the question of how it can produce legal and cultural institutions that cultivate and respect human subjectivity, constrain its destructive impulses, and focus on the challenges of the future evolution of society. The two elements of law that stand out are the ideas that scientifically law must be a matter of logic and from a moral point of view, there is the perspective from the natural law tradition that all law has limitations as does logic. This requires the cultivation of reason, thought, and elaboration. This natural law tradition says that all human relations must be constrained by a natural-law based rule of reason. How are we to tell one form of reason from another? This, it seems, requires more than the simple elaboration of a rule of reason. It requires the cultivation of a disciplined form of creativity with a capacity to project itself as a creative force for the evolution of society. This requires a number of intellectual forms of experimentation, including the capacity to forecast and to differentiate between destructive and constructive futures. The capacity to creatively instill a more promising future probably lies in the skill to mobilize the mental capacity of free fantasy and to consider the creativity of fantasy in terms of constructive future possibilities. In this sense, thinking creatively is an indispensable tool for the improvement of human possibility.

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