

## *Editorial - Judging Judges*

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### **I. The virtuous judge**

The trial and subsequent execution of Socrates in Athens in 399 B.C. has puzzled historians; posed considerable challenges to classical linguists; inspired philosophers and teachers; and last but not least, posed substantial dilemmas to legal theorists and practitioners alike.<sup>1</sup> What prompted five hundred Athenian men to impose the death penalty on a seventy year old philosopher? How to capture in modern languages the colour and sentiment expressed in Classical Greek? How to assess Socrates' engagement of his prosecutors and judges both from an ethical and legal perspective?

When Socrates faced the assembly of men chosen by lot to judge his guilt on charges of impiety and corrupting the young through teaching them about “things aloft and under the earth”, being foreign to the manner of speech before a court of law, Socrates appealed to his judges to leave aside the style of his words, pleading: “*for perhaps it may be worse, but perhaps better - and instead consider this very thing and apply your mind to this: whether the things I say are just or not; for this is the virtue of a judge, while that of an orator is to speak the truth*”.<sup>2</sup>

Socrates did not accept that he was merely subjected to the will of those that have power, arguing that his actions are valuable in a democratic society, and do not warrant

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<sup>1</sup> **L.F. STONE**, *The Trial of Socrates*, Boston, Brickhouse, 1988; **H.M. HERMAN**, *The Trial of Socrates from an Athenian point of view*, Kgl. Danske Videnskabernes Selskab, 1995, p. 36, who states that Stone in his book neglected several important sources, and misinterpreted others; **P.E. EASTERLING**, *The Cambridge history of Classical Literature*, Vol. I, *Greek Literature*, Cambridge, Cambridge University Press, 1985; **J.A. COLAIACO**, *Socrates against Athens: Philosophy on Trial*, New York, Routledge, 2001; **R. BONNER**, “The Legal Setting of Plato’s *Apology*”, *Classical Philology*, Apr. 1908, pp. 169-177.

<sup>2</sup> Translation of Plato’s *Apology* taken from: **T.G. WEST and G.S. WEST**, *Four Texts on Socrates: Plato’s Euthyphro, Apology, and Crito and Aristophanes’ Clouds*, New York, Cornell University Press, revised ed., 1998, p. 64; the authors add in a note that virtue is to be interpreted as the specific excellence of a thing, that excellence may or may not involve what we call morality.

criminal prosecution. In expanding his arguments, through the interpretative quill of Plato, he suggested there is a connection between law and reasoned justice, and a virtuous judge is to adjudicate on this basis. However, as is clear from the course of the proceedings, law is not only linked to justice, and as his defence falters and Socrates is found guilty, it becomes apparent that law can be an instrument of violence, coercion, intolerance and oppression, and hence of injustice. In exploring the riddle as to why the Oracle of Delphi found him to be the wisest of men, Socrates -through questioning the purportedly wise men of Athens- came to a single conclusion: after decades of practice, of confronting Athenians in discussions, of challenging their conceptions of justice and how to live the good life, Socrates knew one thing; that when he knows nothing, he is wise because he does not suppose that he knows.<sup>3</sup>

In a similar vein, the second issue of the EJLS seeks to question common assumptions and hypotheses on the role of the judge, and thus develop our knowledge on a broad range of issues related to judges, both from an international, European, comparative and theoretical perspective. Rather than trace the seventeen contributions to this issue according to the section in which they appear, the articles have been embroidered on Plato's *Apology* and discussed according to their central theme: the judicial role in a globalising society, the nature of judicial reasoning, the role of justice, injustice; or, more rudimentary, emotions and intellectual curiosity of the judge in adjudication. Indeed, the contrast with Socrates' words when facing the plenum of Athenian judges highlights that these and other questions related to adjudication are as controversial in the 21st century as they were more than two millennia ago.

## **II. Justice and judicial cosmopolitanism**

The theme of justice in adjudication which figures so prominently in Plato's *Apology* is central throughout the international law section. Several of our contributors focus on the relationship between justice and law, and the increasingly important function of the judge in a globalising society,<sup>4</sup> flowing forth from, and closely related to, the relationship of law and justice. *Ernst-Ullrich Petersmann* argues that judges have a constitutional duty to settle disputes in conformity with principles of justice, as increasingly shaped by human rights. Building on this submission, he then posits that in the context of the European multilevel

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<sup>3</sup> T.G. WEST and G.S. WEST, *Four Texts on Socrates, o.c.*, pp. 69-72.

<sup>4</sup> That the importance of the judge is increasing, or at least has increased over the past few decades, is a common theme that emerges from the articles in this issue.

judicial system,<sup>5</sup> justice in adjudication at all echelons of that system was and is instrumental in the development of multilevel judicial cooperation, given that constitutional rights provided the justification for convergence and cross-fertilisation between the different levels.

*David Ordóñez-Solís* equally touches upon this theme, offering a distinct account through a bifurcated prism: firstly that of the power of the judge, and secondly the language and arguments s/he employs in deciding the case in hand. In relation to the power of the judge, he, as Petersmann, emphasises the importance of the protection of private parties' fundamental rights in the rapprochement of the judicial actors in the European multilevel system. When discussing the role of language and argumentation in the Anglo-Saxon and continental 'legal adjudicative cultures' encompassed by the European multilevel system, he reports that structure of reasoning, conceptions of the role of the judge, and other social differences and corresponding sensitivities are fading away, and converge in the European judges appreciating new judicial models that are represented by the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR). Based on this, he concludes that for the attainment of a judicial cosmopolitanism, the international judicialisation of human rights is a *condition sine qua non* although it seems at this moment a utopia. Petersmann, using a different but highly complementary set of case-law, formulates a similar conclusion, and hence it is recommended that these contributions be read in tandem.

*Miguel Poiares Maduro* and *Pierre-Marie Dupuy*, each within their respective fields, equally focus on 'the globalisation of law' and the challenges related to a legal system with multiple levels; but move away from the previous two authors' focus on justice and fundamental rights and centre more on the institutional, procedural and interpretational side of the coin. *Dupuy*, as *Ordóñez-Solís*, sketches a model of what a true judicial cosmopolitanism could look like, with the ICJ as a universal supreme court and an organic hierarchy of national and international jurisdictions to guarantee the respect of any normative overlap; and subsequently richly explores the path towards completing that model. In the final section of his contribution, *Dupuy* finds that "at the end of the day, the integration of international law will depend on what the judges decide to do with it", and the author is particularly strong in his conclusions on the role for the ICJ in the unified application of international law: all

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<sup>5</sup> By which he refers to the relationship of the European Court of Justice and the Court of First instance to the national courts; the relationship between the EFTA Court and national courts, and the European Court of Human Rights and national courts.

depends on the mindset of the judges who, when it comes to such issues as a preliminary question procedure at the international level, prove themselves somewhat naïve when it comes to political realism and diplomacy. Finally, Dupuy concludes, and one certainly ought to contrast this with Petersmann's views on the role of justice in multilevel adjudication, that institutional architecture is less important than the mental one, the latter being the deciding factor.

*Miguel Maduro's* contribution gives further insight into the role of the judge in the multilevel judicial system focusing on the specific role of the ECJ in a context of internal and external (constitutional) pluralism, and the necessity for this court to provide normative guidance to the community of actors in EU law, notably the national courts. In so doing, he further expands his ideas on the use of comparative methods of interpretation and the use of the teleological interpretational method by the ECJ, the appropriateness of which are explained by the nature of the EU legal order. Thus, a teleological interpretation in EU law does not refer exclusively to a purpose driven interpretation of the relevant legal rules, but to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules.

What Petersmann and Ordóñez-Solís discuss through the prism of justice and fundamental rights, what Maduro sees not as judicial activism but as “a systemic understanding of EU law”, Dupuy states more boldly: the role, mindset and power of the judge is crucial and decisive in the legal pluralist context and future evolutions therein. These four contributions, which of course present much more complex arguments than can be succinctly set out in this context, nonetheless help us to further understand and contextualise the power of judges beyond the realist view that adjudicated outcomes might be determined by what the judge ‘had for breakfast’. These articles, tied together by their relationship with an emergent judicial cosmopolitanism, are further enriched by -among others- the accounts given by three judges’ experiences in that multilevel judicial system. A first such complementary article is the taxonomy of judicial dialogue provided by Judge *Allan Rosas* of the ECJ as it adds to Maduro’s contribution, which is linked to the body of literature on constitutional pluralism, but also gives an insider’s view to the concept of ‘judicial communication’ and/or ‘dialogue’.

### **III. Judge's empire**

*Rosas* argues that the role of the judge in formulating values and principles through a deliberative process with decision-makers is crucial, and helps to mitigate the hardships and anxieties felt by many in a sea of change. Thus, Plato and Socrates are joined by Judge Rosas who submits that the judge's participation in that process involving law-formulation and justice is an indispensable part of the judicial profession. If such leads the ECJ to being accused of 'judicial activism', then this is due to an overly narrow conception of the role of the court as a mere economical court, rather than a (quasi-) constitutional one.

Nonetheless, one should not forget the lesson found in Plato's *Apology*. Socrates, in defiance of common custom before an Athenian court, refused to seek mercy from his judges who were given power over life and death; and in a Society which deemed itself civilised and above all democratic, a man who vigorously questioned common assumptions was put to death.

*Jacques Lenoble* in his article calls precisely for the questioning of the mentalist assumptions underlying a traditional concept(ion) of law. So as to ensure the guiding function of law, one should epistemologically look at the rule of recognition, and more importantly to its choice and identification by judges, a choice which is ultimately based on background representations. Thus, any sound analysis of governance by law must address these background representations, one that would allow for the participation of the citizens in the process, and this is the challenge taken on and tackled by Lenoble's genetic approach "which [...] takes into account all the conditions of 'engenderment' of the convention by which law is defined" and strives for a democratic concept of law.

These considerations are even more crucial given that, as *Michel Troper's* contribution reminds us, if we start from the classical definition of democracy (a system in which power is exercised through general rules adopted by the people or its elected representatives), that the current-day governments under which we live are not democratic. At most, under that classical definition, they can be considered as mixed regimes with both democratic and aristocratic elements, the latter being the judges creating general rules and the former in the form of parliament. Current governments could even be defined as 'polysynodies', aristocratic

regimes in which power is exercised by a number of collegial aristocratic organs, where only the procedures of appointment differ.

While the unquestionably pivotal role of the ECJ in European integration is somewhat less dramatic than a miscarriage of justice with lethal consequences, all contributors to the EJLS 2nd issue agree on one point: the power of the (international, European, *etc.*) judge has grown rapidly over the past two decades, a process which is still ongoing. While this is not necessarily a bad thing, some caution is in place. In the interview with Judge *Rudolf Bernhardt*, former President of the ECHR, the EJLS sought to explore further the realm of the judge as a creator of law or as a mere mouthpiece engaging in simple legal syllogisms. In seeking to provide the reader with a view from the inside, Judge Bernhardt expresses the need for self-restraint on the part of what Troper considers the aristocrats: a judge should apply a “certain reticence” when walking the tightrope of application, interpretation and creation of law. Indeed, referring to the United States, he posits that the judge should avoid judicial activism, and adjudication should “not mean the labelling of a personal agenda as jurisprudence”, which in Troper’s view captures the essential tension between the legislative and judicial power, and thus of political liberty and democracy. Bernhardt is joined in this view by *Benedetto Conforti*, former judge of the ECHR, who greets the strengthening of the judicial function at the international, regional and national level with enthusiasm, so long as it does not degenerate into a *governo dei giudici*, the rule by judges.

The contribution by *Noora Arajärvi* focuses on the judge as a lawmaker in the field of international criminal law, with particular emphasis on the ICTY. From her contribution it emerges that this tribunal (rightly or wrongly?) oversteps the boundaries of judicial reticence as identified by Judge Bernhardt. Her research finds that quite often the ICTY has invoked *its own precedents* as evidence for the emergence of customary international law, on which it subsequently bases its decision. Additionally, the paper shows that the frequency of this occurrence raises the question whether the concept of state practice itself is becoming outdated, and that as a source of international criminal law it is being replaced ever more by judicial interpretation. As the role of judges increases, so does their impact in international custom of their diverse approaches and different methodologies in adjudication, thus contributing to the fragmentation of this body of law; which, as this author seems to conclude, is not necessarily a bad thing.

*Mattias Kumm's* contribution is highly suitable to bring to a close this section related to the role and power of the judge in society, as his article presents a defence of European judicial review, countering the recent “cases against judicial review” as presented by Jeremy Waldron and Richard Bellamy.<sup>6</sup> In doing so, Kumm draws very much on the Socratic method of contestation. Questioning the common wisdom of Athenian society should not be viewed as something dreadful, leading Socrates to being put on trial; but rather it is beneficial to the polis in which he lives, and thus, if anything, he should be rewarded through being served his meals with the highest dignitaries. Indeed, according to Kumm, the value of judicial review in Europe lies in the legal institutionalisation of a practice of Socratic contestation: the critical engagement of public authority which ensures that their decisions are based on reasonable and plausible justifications. In that sense, judicial review does not merely add legalistic burdens to the political debate, or produce democratically illegitimate outcomes, but, in fact, judicial review as Socratic questioning is desirable because it expresses a deep commitment to liberal democracy.

At times, unfortunately, democracies falter, and societies are thrown into unrest, turmoil and even bloodshed. When that society then finally manages to overcome this difficult period, seeking to throw off its troubled past, come to terms with it, and fully re-establish its commitment to the rule of law and democratic values, then too, the role of judicial review is pivotal.

#### **IV. Judges and societies in transition**

The trial of Socrates took place in 399 B.C., four years after the reinstatement of the Athenian democracy which had been overthrown by the infamous oligarchy of the Thirty, a violent episode in which Critias and Charmides, two former associates of Socrates, were involved. Subsequently, Socrates and his teachings were no longer considered as being so harmless, but rather quite perilous as they had allegedly incited and corrupted the minds of the young thus leading to these violent episodes in Athenian history. In relation to that accusation, this editorial already raised the question: “what might have prompted a society that deemed

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<sup>6</sup> **J. WALDRON**, “The Case against Judicial Review”, *Yale Law Journal*, 2006, pp. 1348-1406; **R. BELLAMY**, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge, CUP, 2007.

itself civilised and democratic to condemn to death this old man”? A partial answer must be sought after in the field of ‘transitional justice’: the difficult choices a society faces when transitioning from violent, undemocratic regimes to peaceful, democratic ones. While the word ‘transition’ is rather self-evident: passing from one condition to the other,<sup>7</sup> justice in this field, as in any, is more elusive. ‘Justice in transition’ (two words which seem to be somewhat of a mismatch) can take many shapes and forms. One might seek the truth about the painful past, and in return proclaim a sweeping or limited amnesty for the actors responsible for those actions; one might seek to prosecute and punish the persons involved, applying a wide range of punishments; or as an alternative one might seek to reconcile the citizens through a process of dialogue, education and uncovering the truth of the difficult past.<sup>8</sup> The role of the judge in this process of transition can range from rather marginal to absolutely pivotal, and *Marek Safjan*, president of the Polish Constitutional Court from 1997 to 2006, explains the challenges faced by a constitutional court in finding a balance between different and competing rationales for lustration in transitional societies. Indeed, ‘transitional justice’ brings with it the challenge of being ‘temporary’, a notion which does not fit well with ‘justice’, *per se*. Hence, when seeking to purify the new Polish democracy of its potential ‘contaminants’ from the communist past, judges were and are faced with a difficult balancing exercise. When the court is represented with the societal choice for retributive justice, it needs to act in conformity with what is perceived to be the public interest: the prosecution of collaborators with the former regime; but it evidently seeks to commit itself to the democratic values that have been re-instated, and hence it seeks to respect the individual rights of the ‘wrongdoers’. In adjudicating such cases, the judge not only has great power, but also great societal responsibility. Safjan’s contribution gives the reader an insider’s opinion on the approach followed by the Polish Constitutional Court in its case-law, when faced with exactly that dilemma. He argues that only a well balanced attitude manifested by the series of the judgments of the constitutional court allowed the real revolutionary and radical break from the totalitarian past. However, in this final conclusion, he does recognise that some harm done by the former regime, unfortunately, can never be undone.

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<sup>7</sup> See further, on the notion of ‘transitional justice’: **M. AUKERMAN**, “Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice”, *Harvard Human Rights Journal*, 2002, pp. 39-97; **D. CROCKER**, “Reckoning with Past Wrongs: A Normative Framework”, *Ethics and International Affairs*, 1999, pp. 43-67.

<sup>8</sup> The Athenians had proclaimed a general amnesty four years prior to Socrates’ trial, but another failed uprising two years thereafter in 401 B.C. seems to have tipped the balance from reconciliatory justice to retributive justice.

*Darinka Piqani*'s contribution also looks to the future, but shifts the focus from the national legal order to the European legal order, and discusses the power and role of constitutional courts of central and Eastern European countries (CEEC) in the integration of these countries into the European Union. Through an analysis of pre- and post-accession case law, she finds that there too, the judges were aware of their broader societal role. On the one hand, she finds through an exegesis of relevant CEEC case-law that the constitutional courts adopted a friendly, pro-European stance, welcoming the political changes in which they found themselves; while, on the other hand, not losing sight of their role and allegiance to their own national constitutions and the fundamental rights contained therein.

### **V. The management of the adjudicative process**

Following the vote by which Socrates was found guilty by the plenary of Athenian citizens, Meletus, Socrates' prosecutor, proposes the death penalty. Following his speech, it is up to Socrates to make a counterproposal, and first he suggests that he be given his meals in the *Prytaneion*, where usually ambassadors, distinguished foreigners, and citizens who had done signal service to the city-state were entertained. After laconically mentioning this, Socrates returns to the subject of justice, defiantly comparing the procedure to which he is subjected to that of Sparta, the arch-enemy of Athens:

“If you had a law like other human beings [Sparta had such a policy], not to judge anyone in a matter of death in one day alone, but over many, you would be persuaded. But as it is, it is not easy in a short time to do away with great slanders”.<sup>9</sup>

The EJLS comparative law section contains two articles which do not focus on traditional elements of due process and procedural justice as one might expect from Socrates' excerpt above, but, approach comparatively the adjudicative process through the organisational prism, as an activity which needs to be managed, funded, subjected to quality control, and held accountable, all with the final objective of effectively rendering and doing justice, an end-goal towards which different jurisdictions have different solutions. *Richard Mohr* and *Francesco Contini* study these challenges in nine different European countries, and

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<sup>9</sup> T.G. WEST and G.S. WEST, *Four Texts on Socrates*, o.c., p. 91.

reveal that the practices in these countries have to face common problems such as the conflict between accountability and the insistence on judicial independence, problems to which different countries have different solutions. The article attempts to reach solutions that resulted solely into a ritualism that failed to improve judicial performance; but equally draws attention to responses and solutions that proved effective. So as to achieve that goal, they conclude, it is necessary to ensure the effective collaboration and involvement of such interested parties as judges, managers and the public.

The article by *Marco Fabri* and *Philip M. Langbroek* further embroiders on the theme of organisational efficiency through the comparative lens, but focuses on a more specific issue; *i.e.*, that of case distribution and assignment, a central issue in court organisation because it is essential to the practice of rendering justice and the balance between judicial impartiality and court organisation. This contribution digs deep into the world of national judges, and uncovers a range of interesting elements that influence case assignment, ranging from formal process so as to ensure equality among the judges, to the informal exchange of cases between judges.

## **VI. Speech, sentiment and sensation**

Judges are not gods, semi-gods or heroes like Hercules, immensely wise and fully knowledgeable, but rather human beings influenced by education and socialisation, by intellectual interests and political convictions, by sensation and sentiment which they inadvertently or expressly entrench in their task of adjudication. Emotions too are highly influential in the act of doing justice, and hence require further exploration. In Plato's *Apology*, emotion emerges as central in adjudication in at least two ways. The first has been touched upon already, and relates to the fact itself that Socrates was put on trial, the societal emotions that his teachings and subsequent acts of his pupils evoked in antique Athens. The second relates to the role of emotion in the adjudicative process itself, and there too the *Apology* highlights that language and sentiment are of great importance in Greek adjudicatory custom: it is the blatant refusal of Socrates to follow this custom that was pivotal in Socrates' guilty verdict.

Indeed, it was expected from the accused that he would seek the pity of the jurors, bringing in family, friends and children, so as to avoid being found guilty, or at the very least having the sentence reduced to exile rather than execution. However, Socrates stated that he “will do none of these things, although in this too I am risking, as I might seem, the extreme danger”. He added, reflecting on the possible reaction of his judges, that “perhaps, then, someone thinking about this may be rather stubborn toward me, and, angered by this very thing, he may set down his vote in anger”.<sup>10</sup> After mentioning various reasons as to why Socrates refuses to involve those close to him in a plea for mercy, he ends by saying that:

“To me it also does not seem to be just to beg the judge, nor to be acquitted by begging, but rather to teach and to persuade. For the judge is not seated to give away the just things as a gratification, but to judge them. For he has not sworn to gratify whoever seems favourable to him, but to give judgment according to the laws. Therefore we should not accustom you to swear falsely, nor should you become accustomed to it”.

These passages, together with those mentioned earlier in this paper, further highlight the potency of Plato’s analysis. Not only does it concern the role of adjudication in a purportedly democratically governed system, or brings us to think on what justice might entail in such a society, but it also very much focuses on the judge as a human susceptible to various external and internal influences, and the ways in which these can be expressed and communicated.

The article by *Carlos L. Bernal* studies the language of judges; *i.e.*, it focuses on adjudication through the theory of ‘speech acts’. While it is difficult to succinctly capture this contribution without doing injustice to it, essentially, the analytical theoretical approach expanded upon seeks to uncover the ontology of a judicial decision through the application of the speech act theory. In doing so, the article evaluates the logical sequence of illocutionary acts which constitute a judicial decision in terms of true or false; correct or incorrect, and valid or invalid. In providing this account, the article also seeks to contribute to the theory of speech acts *per se*; namely, in analysing speech in the highly institutionalised context of adjudication.

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<sup>10</sup> *Ibid.*, pp. 87-88.

That the content of the speech act is very much a reflection of the psychological state of the judge is further expanded by the contribution of *Marie-Claire Belleau, Rebecca Johnson* and *Valérie Bouchard*, and more in particular the presence of ‘anger’ in law and adjudication. The article argues that ‘wrath’ is a persistent judicial emotion, which the authors explore through an in-depth exegesis of several opinions of the justices on the Canadian Supreme Court. In this case, the Court was visibly split in relation to a case of incestuous paedophilia, and where legal technicalities lead the justices to thoroughly disagree on the need to order a re-trial, and thus for the family and victims to undergo the same painful process from the start; or rather to confirm the original conviction. The contribution, especially when read in the broader context of the judge as needing to walk the tightrope of judicial philosophy or political ideology, is highly thought provoking on the role of anger as either being appropriate or inappropriate depending on its relation to, and effect on, justice. Indeed, anger can be aroused because of injustice, and thus channel and support ‘doing justice’; but equally, as with Socrates, this emotion can lead to injustice through negatively affecting objectivity. Additionally, anger might be caused by the suffering that doing justice entails, but be the unfortunate and necessary side-effect of justice.

## **VII. Conclusion**

Socrates was accused of corrupting the young by teaching them “the things aloft and under the earth”. Faced with this indictment he confronts his accuser Meletus by asking:

- “If I, Socrates, corrupt them, then who can make them better?”
- To which Meletus responds: “the laws”.
- Socrates retorts: “I am not asking this, best of men, but rather what human being is it who knows first of all this very thing, the laws?”
- To which Meletus replies: “these men, Socrates, the judges”.<sup>11</sup>

Whether laws make people better, or whether judges do; whether judges pursue their political ideology, or rather a ‘judicial philosophy’; whether they manage to walk the tightrope of judicial activism and the application of justice; and whether speech is a mere cover for the judge’s emotions; all that might not have been definitely settled by second issue of the EJLS. Nonetheless, following in the 2500 year old footsteps of Socrates, each contribution has questioned common assumptions on judges, power, law, justice, *etc.* (to name

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<sup>11</sup> *Ibid.*, p. 73.

but a few), and shed further light on the topics they cut into, in the hope that some day, a legal order might emerge in which people are not persecuted, jailed, or worse, for their convictions on “things aloft and under the earth”.