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REVIEW

Of the member of the dissertation council for the dissertation of
Kulikova Mariia Sergeevna
on the topic: “H. Kantorowicz’s Judicial Methodology: A Critical
Analysis of the ‘Free Law’ Pursuit”,
submitted for the scientific degree of Candidate of Sciences in the scientific speciality
5.1.1 Theoretical and historical legal sciences

The dissertation of Kulikova Mariia Sergeevna is an innovative and important work, reviving the once-influential ideas of Hermann Kantorowicz (1877–1940), and applying them to contemporary problems of judicial decision-making in Russia and elsewhere.

The thesis is well-organized and develops the overall argument in an orderly and persuasive way. It consists of an Introduction, four chapters, a Conclusion, and references. Relevant literature -- both older works and contemporary articles from a number of different languages – is cited, discussed, and effectively incorporated into the analysis. The work offers an important contribution and is written in a way that makes it accessible even to scholars unfamiliar with the area.

The Introduction appropriately offers an overview of the dissertation, including a placement of Kantorowicz among other legal theorists, both in his own time and among

contemporary scholars. The Introduction also offers a concise overview of other scholarship on Kantorowicz, summarizes the author's sources for the current project, and lays out its objectives and methodology.

Chapter 1 offers a more detailed context for considering Kantorowicz's best-known and most influential work, *The Battle for Legal Science* (1906) (published under the pseudonym, "Gnavius Flavius"), which is then summarized and discussed at greater length in Chapter 2. As the author illustrates, one can best appreciate Kantorowicz's work by appreciating the intellectual traditions of his time: the rhetoric around the development of civil legal codes, the rise of historical jurisprudence, and the later reaction of the free law movement and various forms of legal realism.

Chapter 3 explores Kantorowicz's judicial methodology, as constructed from *The Battle for Legal Science* and some of the theorist's later works. As the thesis properly points out, what was most important and radical about the work was the claim that for many disputes, the relevant statute or code would not provide sufficient applicable law. The law – Kantorowicz's particular focus was the German civil code of 1900 -- has gaps, and judges must create new law ("free law") to fill those gaps.

As the dissertation summarizes, Kantorowicz offered a detailed prescribed methodology for judges, a process constructed around a hierarchy of potential sources: (1) formal explicit law, (2) formal implicit law, (3) free nascent explicit law, (4) free desired explicit law, (5) free nascent implicit law, and (6) free desired implicit law. In Chapter 4, the dissertation explores and clarifies this methodology by an application to a hypothetical case involving land-owning neighbors, where one neighbor keeps bees while being aware of the other neighbor's severe allergy to bee stings. The author shows how a

court, applying Kantorowicz's approach, would ultimately conclude that the beekeeper landowner should reimburse the allergic neighbor for the reasonable cost of life/health/accident insurance.

The relatively few criticisms I have, collectively minor relative to the overall achievement of the work, are offered below, in a constructive and collegial spirit:

1. While "charity" is important to the interpretation of any work, at times the present work is *too* charitable towards some aspects of Kantorowicz's works. It is a natural inclination in a project to revive and support a long-ignored theorist or work to refrain from substantial criticism, but respect for theorists requires apt criticism as well as praise. In particular, it would sharpen the analysis and critique of Kantorowicz's ideas if the latter's claims were more clearly distinguished, between descriptive, analytical/conceptual, and prescriptive, and that status further tested. For example, when is Kantorowicz making claims that purport to be based on the nature of law (or the nature language, legal rules or legal decision-making), and when is he making prescriptions that may be advisable for some legal systems but not necessarily for all?

2. One aspect of the suggested resolution of the hypothetical case in Chapter 4 warrants further discussion. A judicial order that the bee-keeping neighbor pay for the cost of insurance for the allergic neighbor may be an accepted type of remedy in Russian courts (I have no basis for knowing), but among Anglo-American courts and legal scholars it

would be considered a paradigmatically *legislative* solution, and inappropriate for courts to provide. This difference should be noted, and perhaps discussed further.

3. While, in general, the quality of the English in the translation of the dissertation is quite clear and idiomatic, there are exceptions where the grammar or word choice needs to be improved. Additionally, there are a handful of places where a sentence appears to have been cut off in the middle of an idea.

I read this dissertation with great interest and pleasure. It is an important project which may begin the process of reviving the recognition of Hermann Kantorowicz's importance for judicial methodology and legal theory, both in Russia and beyond. The author's approach is both careful and comprehensive. It is a very significant work, and I hope that it, and the author's subsequent works, receive the wide attention that they deserve.

I would like to congratulate the author on this very significant achievement and to wish her success in future work exploring and promoting the ideas of Kantorowicz.

The dissertation of Kulikova Mariia Sergeevna on the topic of "H. Kantorowicz's Judicial Methodology: A Critical Analysis of the 'Free Law' Pursuit" meets the basic requirements established by Order No. 11181/1 dd. 19.11.2021 "On the procedure for awarding academic degrees at S. Petersburg State University. The applicant -- Kulikova Mariia Sergeevna – **entirely deserves to be awarded the academic degree of candidate of law** in the scientific speciality 5.1.1.

No violations of paragraphs 9 and 11 of the specified Order have been detected.

Date 08.08.2023.

A handwritten signature in black ink, appearing to read 'B. Bix', written in a cursive style.

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