
The concept of law and contemporary philosophical reflection

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1. Introduction

This essay provides a general insight into the controversies examined in the realm of legal philosophy. Those who have been exposed to this challenging path, realize that traveling it requires understanding the historical settings, as well as the detailed analysis of the conceptual and

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argumentative content of specific theoretical positions and debates. From the outset, it is important to bear in mind that learning legal philosophy requires an individual effort to understand the historical and current ideas and practices committed to determining the role and extent of the law. Advancing in such a path, posits to both the student and the researcher a challenge to come to terms with what philosophers of law think and teach about the law in democratic settings. But the task should not be reduced to an isolated experience, devoid of thoughtful and even material engagement in the concrete scenarios in which fundamental and all too often subtle issues and questions are raised concerning the law. Accordingly, it should not come as a surprise that we emphasize the problems depicted in the nonpositivists considerations of contemporary legal philosophy. Indeed, we dwell on the concept of law itself, and address issues regarding the philosophical inception of law as an object of thought. Such topics constitute the classical approaches to legal philosophy.

Given the general perspective that informs our exercise, the account will be compelled to choose priorities and objectives, so as to be able to uncover and focus upon what we will contend to be of the essence. Traditional and contemporary questions will emerge, and some will have to be left unanswered. The need to choose –as such a methodological decision- should not be taken for granted. Inevitable as it is, in theoretical work, exclusion is always a risk; the quality of which can form and shape, in due course, a responsible intention, enabled through communication and argument. So, before tackling the specific controversies in philosophy of law, we think it is useful to put forward a few words on the very concept of “philosophy of law”; because, it is a fundamental intellectual framework that students and researchers are called upon to engage, only then can their options and

positions assume risk and acquire meaning. In that direction, we are obliged to consider the conceptual distinction implicit in the two angles that operate therein: the law of the philosopher and the law of the jurist. Accordingly, we will dwell first on the perennial question of the definition of law – the ontological question –, and then we will turn our attention to the way one can know the law – the epistemological question. We will try thereafter to define the law in the context of the “ought” (teleology) – the question of the natural law or the ideal of law. And finally, of course, we will analyze the particularly uneasy question of ethics and law.

2. An approximation to the concept of philosophy of law

Generally, when we review the concept “philosophy of law”, its object is, for philosophers of law, not “the notion of law” properly said. Usually, a philosopher of law does not make a living as a practicing lawyer or a judge, and should it be the case, his discourses will be situated on a philosophical, that is, a universal level. In this sense, legal philosophy is not concerned with considerations related directly to the practice of law. To be sure, it often makes use of commonly acknowledged general considerations, which are independent of law and do not, normally, advance the sort of analysis geared toward clarifying the current state of legal norms: validity is normally implicit within what should be appreciated as law. In other words, it’s wise to take care of the separation of work between those who write legal dogmatic (or the doctrine of law) and those who do philosophy of law. Confusion on this foundational level is counterproductive philosophy, even if this is done in reference to the concept of “positive law”! It is thus advisable to point out that the philosophy of law is

different from any treatment of law within a positivist framework, from any approach handling law or any phenomenon related to the reign of law as a scientific object, as this is understood in legal anthropology, the sociology of law, the history of law, among others. These legal sciences are also somewhat consideration-oriented, and remote with regard to the object of law, which they view as “given,” as part of a factual world. But unlike these legal sciences, which can be evaluated according to descriptive criteria, the philosophy of law has law as its object of thought. In other words, it lays it out in the “mind.” Thereby, the philosophy of law remains fundamentally universal in its design.

Now, let us turn towards the two angles that are implicit in such a concept of philosophy of law. We should keep in perspective that the philosophy of law can be defined from both a philosophical and a legal standpoint, as the law of philosophers or as the law of lawyers.

The first angle, generally adopted by philosophers by profession (as well as by vocation), is characterized by the philosophical investigation of the object of law starting from a philosophical position that can be a school of thought, a system, a method, an issue, or a philosophical concept, among others. In general, and surely as a tendency, the law becomes here the application of the philosophical position, thereby showing that the position itself can be adequately used to equally clarify one’s way of conceiving law. In this way the philosophy of law worked out by philosophers often prone the development of an axiomatic system in order to explain their views about “law”.

The second angle is generally adopted by jurists who feel the need for more basic thoughts about law. The ground for such an approach rests above all upon their experience, which determines the breath of their thinking on the subject.

The trend known as “juristic philosophy,” as well as the one that several authors call “the general theory of law,” often curbs philosophical considerations because the latter is used only to legitimate specific positions relating to the concept of positive law itself. Consequently, the jurists’ philosophy is characterized by a marked concern for legal doctrine or legal dogmatic, and by the effectiveness of the procedures and mental patterns which it proposes. Nevertheless, this is a constructive reflection that lacks rigour.

When taken separately, these two angles favour a superficial analysis of the philosophy of law: to study the philosophy of law without “philosophy” or without “law” would betray to some extent the one as well as the other! In fact, these two distinct angles clearly show the rupture at the heart of the philosophy of law. In fact, it is similar to the debate surrounding the nature of “God”. Recall the classic and ongoing polemic between philosophers and theologians: the “God” of philosophers does not require any act of faith, it is a “God” emanating from reason, contrary to the “God” of theologians who is built above any authority or reason – it is the “God” of faith. In the same way, the rupture of the philosopher’s law is utilised as a justification that works out the formation of a “Schematic (or Organizing) Reason” and of the different forms of “Idea-Law” resulting from it. On the other side of the debate, the justification of the jurists’ philosophy of law is essentially connected to the axis of an equally “Schematic (or Organizing) Experience” but in their case by working out forms of “true” law, thus triggering the aforementioned quarrel.

Although the philosophy of law is divided between these two perspectives, the fact remains that the creative energy emerging from this rupture is extremely profitable, because it makes it possible for the two disciplines to mobi-

lize and then confront whatever is specific to both: behold the contemporary philosophy of law with all its diversity and richness.

We are however personally of the opinion that the next turn in the philosophy of law ought to be done by giving up any “schematic” or “organizing” claim, both from a philosophical and from a legal perspective, so as to allow the development of the philosophy of law between the concepts of “Reason” and “Experience”. In this article, this perspective can only be indicated, and its full development should be the object of a future essay².

3. The ontological question

First, the philosophies of law generally examine the question, or simply make an inquiry into what law “is.” This inquest requires a careful examination about the essence of law beyond the notion of legal positivism. A short incursion into the history of the philosophy of law suffices to discover that for a long time this has been a fundamental question. Historically, law was conceived either as being

2 Cf. Bjarne Melkevik, *Horizons de la philosophie du droit*, Paris, L’Harmattan et Québec, Les Presses de l’Université Laval, 1998 (2004); idem, *Réflexion sur la philosophie du droit*, Paris, L’Harmattan et Québec, Les Presses de l’Université Laval, 2000; idem. *Rawls ou Habermas : Une question de philosophie du droit*, Québec, Les Presses de l’Université Laval, 2002; idem, *Considérations juridico-philosophiques*, Québec, Les Presses de l’Université Laval, 2005; idem, *Tolérance et modernité juridique*, Québec, Les Presses de l’Université Laval, 2006. In arabic language : « انب يف ماسن : نون اول افسلف لى ع ءاوضاً : «شيديح» وينون اق عورش م qanouni hadith /Lumière sur la philosophie du droit : contribution à la construction d’un projet juridique moderne], Éditions Al-Najoie et l’Association libanaise de philosophie du droit, Beyrouth (Liban), Traduction by Georges Saad and al., 2007 ; idem, « نون اول افسلف يف صوصن » [Nusûs fi falsafat al-qânûn/Textes de philosophie de droit], Beyrouth, Édition Al Najoie et l’Association libanaise de philosophie du droit, Traduction by Georges Saad et al., 2005.

in “the things” or in “the minds”³. Consider the Ancients defence of an understanding of law as a “Verb”, whereas the Moderns lean toward an understanding of law as a “Subject”.

Aristotle views law as an art. For him, as for Roman lawyers, law is essentially synonymous with communicative justice. It is an art which consists in determining, in an orderly city, what is truly due to each citizen. Thus, law becomes part of the structure of the city and represents the word of justice, firmly rooted in the political community. If this “Verb-Law” is characterized by Aristotle through the existence of a well-ordered city or society, for other ancient philosophers, its essential characteristic remains the cosmological nature or the world of ideas.

The lesson to be learned from modern philosophy of law is to be found on the concept of “Subject-Law,” which, of course, identifies law with the philosophical construction of a subject and its intrinsic qualities such as autonomy, dignity, will, etc. The German philosopher Kant is considered to have worked out the most sophisticated of the systems of “Subject-Law”. By identifying law with a philosophical subject understood as self-legislating will, Kant submits law to the court of reason and hence infers a postulate of the *a priori* reason of these subjects. The ontology of law joins here the metaphysics of subjects.

3 See Michel Villey, “Le droit dans les choses” and Paul Amsselek, “Le droit dans les esprits,” in P. Amsselek and C. Grzegorzczuk, *Controverses autour de l'ontologie du droit*, Paris, PUF, 1989, p 11-26 et p 27-49. (Paul Amsselek and Neil MacCormick (dir.), *Controversies about Law's Ontology*, Edinburgh, Edinburgh University Press, 1991).

In the contemporary philosophy of law, the controversy between “Verb-Law” and “Subject-Law” still persists. And it should be specified that this controversy is often paralleled to theories which pretend to be “empirical” about law. In fact, the “empirical” trends, such as the theories of A. Ross and H. Hart, situate the question of the ontology of law in the predictability of people having the competence to set out the law⁴. This last perspective swung several topics of the philosophy of law over to the legal sciences where the ontological question of law rests only on the commonly accepted definitions characterizing law as a set of rules or norms. Thus, the problem whether these are truly “empirical”, or rather “psychological” theories of law?

Given the current state of philosophy of, contemporary attempts to redefine the ontology of law, along the lines of the quarrel between the Ancients and the Moderns, do not appear sufficiently relevant to us. Consideration of the various forms of ontology of law, like the systemic or autopoietic theory⁵, the new theory of the institutionalization of law⁶, and other theoretical frameworks, allows one to realize that they simply contend that the theoretical outcomes of the past are not convincing, because their metaphysical horizon is not ours any more.

4 Alf Ross, *On Law and Justice*, London, Stevens and Sons, 1958; H.L.A. Hart, *Le concept de droit*, Bruxelles, F.U.S.L., 1976 (H. L. A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 1961, 2nd edition 1994).

5 André-Jean Arnaud and Pierre Guibentif (eds.), *Niklas Luhmann observateur du droit*, Paris, L.G.D.J. 1993; Gunther Teubner, *Le droit, un système autopoïétique*, Paris, PUF, 1993 (G. Teubner, *Law As an Autopoietic System*, London, Blackwell, 1993).

6 Neil MacCormick and Ota Weinberger, *Pour une théorie institutionnelle du droit. Nouvelles approches du positivisme juridique*, Paris, L.G.D.J.1992; (Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism*, Berlin - New York, Springer, 1986).

Thanks to the linguistic turn, the ontological question of law ventures today onto new horizons, such as pragmatism. It appears to us that the philosophical investment in language and its pragmatic use in the philosophy of law may prove to be much more profitable than any “ontology” has never been. These new philosophical considerations could serve to put aside the metaphysical question of the Ancients and the Moderns, so as to pragmatically or “linguistically” develop the content and extent of the philosophy of law.

4. The epistemological question

The philosophies of law also work upon the question of how to obtain “knowledge” about law and what is implied in such “knowledge”. Is “law” an object of knowledge? Should the word knowledge be used concerning a practical issue as “law”? It should thus be emphasized that considerations about legal epistemology necessarily refer to preestablished views on scientific content and rationality. For instance, the legal philosophical thinking consists mainly in elucidating the relation between the specificity of law and the possibility of knowledge as developed by a specific epistemological theory. Two trends are confronted here, the epistemology of the observer and the epistemology of participation.

On the one hand, the legal epistemology of the observer is based on the paradigm of an individual who pretends that he (or she) “observes” his (or her) object, and according to scientific rules more or less established among the various theories of scientific knowledge, could proceed to explain the object itself. Today, this generally means that it is necessary to identify law as a scientific object of knowledge before entering any process of “observation”. Concretely, the knowledge of law is attached to a significant aspect of

law, to its concepts, or the legal language in general, or even the psychological attitudes of legal actors. We are referring especially here to epistemological trends such as empiricism or the analytical school of philosophy⁷.

On the other hand, the legal epistemology of participation rests on the paradigm according to which we cannot “observe” law and this because it receives all of its meaning in a context which also defines us. Law is not “nature,” but “culture” and it must be recognized as such and situated in its practical realisation. Legal hermeneutics, as a contemporary philosophy of law, favours this perspective⁸. This approach also claims that in any kind of knowledge the person who knows is already involved. Thus the hermeneutic perspective makes it possible for us to leave aside the paradigm of observation that dominates legal epistemology, and forces us to wonder about law from the point of view of the knowledge that a person can acquire in a context which defines him or her as well.

In fact, the question of one or the other of these approaches is not only epistemological so as to account for the object of study, but it is often also implicated with “epistemological interests.” Thus, the epistemology of observation preaches “neutrality,” while the epistemology of participation takes a necessary position on the social and political level.

Legal epistemology also involves an interrogation of legal rationality (or the rationality engaged in the legal realm). For legal epistemology, the question about how to define and

7 See Cristophe Grzegorzcyk, Françoise Michaut and Michel Troper (eds.), *Le positivisme juridique*, Paris, L.G.D.J., 1993.

8 See *Herméneutique et ontologie du droit*, numéro thématique de la Revue de métaphysique et de morale, no 3, 1990, p 311-423; Patrick Nerhot, *Law, Writing, Meaning. An Essay in Legal Hermeneutics*, Edinburgh, Edinburgh University Press, 1992.

how to understand the type of rationality who fits best the legal enterprise occupies a place of first importance. It is a “traditional” question whose importance for law increases in our modern culture impregnated with perspectives of “scientificity,” utility, effectiveness, etc. Here, the philosophy of law focuses on the possible discourses of legal rationality and, indeed, when Max Weber defines legal rationality as a rational purposeful activity, and makes this form of rationality the conceptual key of the understanding of law, he makes us believe that he is probably a very good analyst of the tendencies of society in his time, but as a philosopher, he engages this understanding of law only on the way of the rationalization of these means⁹. The success of this discourse on rationality allows us to understand why the philosophy of law is so interested in the question of the discourses of rationality and why this also implies our conception about legal modernity.

The philosophical movements that seek the introduction of a concept of communicative rationality – as in Habermas’s case – or the revaluation and the shifting of the rationality known as aesthetic – a significant trend in the philosophy of law – bear witness to this increasing concern for the question of the rationality of law.

9 Max Weber, *Sociologie du droit*, Paris, PUF, 1988. (Max Weber, *Max Weber On Law in Econoy and Society*, Cambrigde, Mass., Harvard University Press, 1954).

5. The question of the “ought”

The third aspect examined by legal philosophy is related to the question of the “ought” (or the teleology) of law or in legal practice. In other words, the establishing of what law should be is here more exactly a search for the *lege ferenda* and the normative evaluation (or teleology) inherent in any question of law. Even if this question has long been confused with the ontological definition of law and with the epistemological question related to the knowledge of law, it seems advisable to clarify the specificity of this question only as an “ought” in the realm of law. If this “ought” is surely related to conceptions of “natural law”, in its multiple variants, or of “ideal law” (and even to legal positivism if this includes a conception of obligation for individuals), it is all too fair to conclude that there is significant benefit to analyse this tendency in and of itself. Today, we can affirm that the dividing line is located between those who seek a complete and global theory of law build on the notion of the legal “ought” and those who seek only particular reference marks as to this “ought.”

We can identify the first perspective with the revival of the “jusnaturalist” thought. Indeed, we notice first of all that the natural law of the Ancients, like that of the Moderns, has made remarkably great strides for about twenty years¹⁰. Beyond the particularities of each vision, they worked out together the principle of the “Idea-Law”, which claims to explain the reality or authenticity of law. In fact, their works tend towards the development of a global theory making it possible to evaluate and judge the existing law. It is historically the concept of “Justice,” or simply of the “Just,” which was used as cornerstone in the development of this theory.

10 See Alain Renaut and Lukas Sosoe, *Philosophie du droit*, Paris, PUF, 1991.

The Moderns much sooner privileged concepts like "Reason," "Will," "Autonomy," "Social Contract," and many others, but in general, it is the paradigm of subjective rights which is used as a modern ideal measurement. The last remark leads us, moreover, on the track of the essentially idealistic character of the formation of the modern social order, built on the pillar of an "Ideal" meant to be accomplished.

Secondly, we can also, examine the recourse to the principle of a legal "ought," but in a much more modest way, as in the various trends known as "legal criticism". It is not directly a question of developing an "Ideal-Law" here, but rather one of supposing more particularly and philosophically the existence of an ideal of law. This "ought-ideal" is never explicitly developed as philosophy of law but is found in solutions and avenues considered to be righter, more rational, fairer, more equal, more democratic, etc. Besides, we can observe trends known as legal criticism which make this normative evaluation their *raison d'être*, such as the movement of legal feminism, and partly, the movements that are part of the "Critical Legal Studies Movements."

In several respects, the theories of natural law and those of legal criticism are complementary. Both are characterized by their desire to mobilize the "ought" of law while referring to factual or contextual analyses about law.

The question of the "ought-in-law" is often related to thinking about law as an institution. It is thus a question that is closely related to that of knowing the nature of a "good institution," such as it is worked out by political and social philosophy. It seems to us that today the great debate dwells on the cogency of our institutions, according to an understanding either of "justice," or of "just," or of "good." "Communitarians" like Sandel and Charles Taylor preach a justification according to the understanding of the "good," whereas a liberal thinker like Rawls insists much rather on

a justification according to the understanding of the “Just.” Perhaps, the most promising courses of action will consist in drawing the best from these two positions, as the communicational theory of Habermas subtly proposes.

6. The question of ethics and law

If we must seek a constant concern in the philosophical reflection on law, it seems that it resides within the realm of Ethics. It is then a question of understanding law from the point of view of what we must do and of the acts that we must advance. The followers of legal positivism are not entirely wrong to associate this question with the reflections about the “ought” of law; this association results either in a rejection of any ethical consideration (Kelsen), or in the confirmation of some superposed minimal ethical rules (Hart). For our purpose, we can see Ethics in “law” as a preestablished philosophical form of an “ought” coming from the outside. Ethics thus capture the question of “law” as an emanation of its supposed righteousness.

Since Socrates, it has been a constant in the philosophy of law to insist on this fundamental question: what should be done? This question is thus engaged from a perspective that emphasizes both the agents of law and a model of normative acts. We can, in fact, understand Ethics as imposing a rational justification of our individual and collective choices. As legal actors, on the legal and social levels, we constantly have to justify our acts in a rational way and to clarify the finality of our behaviour. Consequently, the capital problem consists in distinguishing between Law and Ethics. As to this distinction between Law and Ethics, the conception according to which ethics refers to the conscience or the interiority of a subject, and that law is associated with social acts or the externality of subjective behaviour, has long been regarded

as the traditional criterion. This type of explanation is more and more disputed and forsaken in favour of several others. Let us mention in particular the models developed by Herbert Hart and Jürgen Habermas.

The current debate in legal philosophy tends, generally, to reactivate Ethics in law. An observer of the contemporary legal philosophy can only be struck by the existing antagonism between those who seek to instaure a foundationnalistic discourse about legal standards, and those who are opposed to it entirely. On the one hand, we observe how the legacy of the Enlightenment is included in the various philosophical projects in order to ensure the ultimate basis for legal standards. These are chiefly various forms of legal Kantianism. On the other hand, we notice an unfounded discourse on standards. This discourse easily adopts Habermas's communication philosophy, which we have examined earlier¹¹.

There are in fact various philosophical programs showcasing designs about the ethical models of social acts as well as on the role of justice, of the good life, and many others. These are considered of paramount importance for law since they offer us the opportunity to open our mind towards the various cultural horizons of law which can be, in many respects, so distinct from ours.

11 B. Melkevik, "Le modèle communicationnel en science juridique: Habermas et le droit", *Les Cahiers de Droit*, vol 31, no 3, 1990, p 901-915; id., «Trans-formation du droit: le point de vue du modèle communicationnel», *Les Cahiers de Droit*, vol 33, no 1, 1992, p 115-139 (reprinted in Jean-Guy Belley and Pierre Issalys (eds.) *Aux frontières du juridique. Études interdisciplinaires sur les transformations du droit*, Québec, Geptud, Université Laval, 1993, p. 111-135); id., «Habermas et l'État du droit. Le modèle communicationnel du droit et la reconstruction réflexive de l'État de droit contemporain », dans J. Boulad-Ayoub, P. Robert and B. Melkevik (eds.), «L'amour des lois. La crise de la loi moderne dans les sociétés démocratiques », Québec, Les Presses de l'Université Laval, 1996, p 371-387. This tree essays are republished in, B. Melkevik, *Horizons de la philosophie du droit*, Québec, Les Presses de l'Université Laval, Québec, 1998 (2004), p 93 - 150.

The fields of law and ethics are often the subject of innumerable debates. The ethical problems facing humanity thus have often direct effects on the field of law. We have only to think of bioethics, abortion, assisted suicide, ecology, etc.

7. Conclusion

The contemporary philosophy of law confirms the initial concern for the concept of law. Crucial works by Kelsen (*Pure Theory of Law*), of Hart (*The Concept of Law*) and of Dworkin (*Taking Rights Seriously*), do nothing but take up again and again the problems relating to the concept of law in attempting to give coherent answers. Nevertheless, if we must trace a certain tendency, we could affirm that the current scenario gives more and more weight to a normative thought in relation to other disciplines, such as social, political, or anthropological sciences. In our view, the fact that the results of the philosophical considerations about law are put to the test, and thus validated, is a sign of the vitality of this field of reflection.

We mentioned that the philosophy of law remains a rather open field, offering many possibilities and bearing on both the current and the future legal culture of our modern societies. Now let us specify the range of the concept of law as clarified by a modern (or modernist) philosophy of law. This philosophical project is addressed at the legal culture available in a society that has made modern law the horizon of its choices and actions. In fact, the sought-after goal is to renew and enrich this culture. We can say, paraphrasing Habermas that the philosophy of law pursues the goal of “locating and preserving the places” that are potentially occupied by the legal practices and theories of this culture, of the unfinished modern legal project.

Lastly, we could also make a point of underlining the ethical and political aspects of the philosophy of law.

Let us so first stress the sense of responsibility that is required of any person that deals with the philosophy of law. The philosophy of law represents an extension and an enrichment of the legal culture. Its meaning as well as its role consist in opening new horizons to our culture. Since the philosophy of law is devoted to addressing the legal culture, it is connected with a field of the social and human life of major importance for all. Every philosopher of law must therefore evaluate the ethical implications arising from his or her work, choices and options are unavoidable.

The philosopher of law has a responsibility with regard to society. He must lend an ear to society and to the individuals that make it up. Injustices, oppression, ostracism, among other things remain always present within our modern societies; the international scene seems rather dark. Doing philosophy of law is also a commitment, a commitment for law, for the settling of our quarrels by means of modern and democratic law.

In this sense, the philosophy of law is characterized more by the horizon that it opens up and by the possibilities that it contemplates than by its past, however glorious.

