WHY STUDY PHILOSOPHY OF LAW?

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Abstract: *The question concerning the relevance of the philosophy of law continues to influence the perceptions and attitudes of the researchers, scholars and professionals engaged in designing the academic and practical standards of the legal profession. Though the question may assume several modalities, it often remains embedded in distrust and resistance, despite the fact that the discipline has evidently produced, and continues to deliver multiple intellectual frameworks: the sort of analytical and dialogical settings needed so as to describe the ongoing issues and controversies challenging the coherence of democracy and stressing the validity of the law. The author of this article reconsiders some of the contemporary opinions which reproduce this question, and in so doing pleads for a consideration of legal philosophy as an investment in legal modernity. In this sense, the philosophy of law reveals itself as a building trust in an open-minded reflection about law as characterised by a modern democratic society. Thus, it is an invitation to think about law in the perspective of authors engaging themselves in favour of the law. In this view, the philosophy of law is construed as an intellectual enterprise build along the path of democracy, and contributing to the development of a modern conception about law.*

Key-words: Law and philosophy; philosophy of law; legal philosophy; legal teaching; Law School.

If one puts oneself in the shoes of a law student examining the listing of course options, the following question might appear to mind: "Why choose a course in philosophy of law?" Actually, if a student has the option, he or she might reasonably ask him/herself the following questions: "How does philosophy of law relates to the practice of law? Does it contribute to the depth and skills that I need in order to become a competent and successful lawyer? Are there any reasons at all to take an interest in this field of research? Why finally study philosophy of law?"

The answers we wish to formulate to these questions reflect both our experience in teaching philosophy of law, and the understanding of the role of law in modern society[1]. The former is connected to the latter like two slopes of the same mountain. In this perspective, the researcher's conception of the philosophy of law, and the role he attaches to it, are simply mirrored in his teaching. Hence, the description of one's experience in teaching philosophy of law is inextricably linked to the comprehension of law, society, and modernity that one defends and stands for.

Engaging distrust in the philosophy of law

The common elements of the aforesaid questions suggest that we should look more closely at the resistance, even distrust, towards philosophy of law within legal circles. This resistance/distrust appears to be transmitted "magically", passing through law professionals to law students. However, the influence of this equation appears to be fading away, as a renewed interest in philosophy of law gains momentum within the legal milieu. Significant as this revitalized tendency appears to be, the fact remains that the impediments set up by decades of misunderstanding on the nature and role of philosophy of law, persist in academic and professional circles alike. Upon close examination, the researcher discovers that this resistance/distrust is formed by two distinct propositions. The first perceives the philosophy of law as a harmful "Schematic Reason", and rejects it; the second describes it as being useless, and insists that today the "scientific" resources are much more relevant for the development of the skills and standards needed for both the production and the practice of contemporary law.

As for the rejection of philosophy of law due to its being a harmful "Schematic Reason," the French philosopher of law Michel Villey provides us with a vivid outline that allows us to understand this preconception. He describes it in a confiding, revealing tone:

> "I'm convinced that we, the jurists, have been harmed by the modern philosophers. I am speaking of Hobbes, Locke, Hume, as well as Leibniz, Kant, Fichte, Hegel and of virtually all the philosophers from the fourteenth up to the twentieth century. When they happen to talk about "law," it is with an utter ignorance of the specificity of how the jurists work. What do they know? A bit of mathematics, a sociology more or less influenced by evolutionism, logic, and a little dose of ethics. Thus, they have transplanted a scientific system based on extrinsic experiments into our discipline. Their influence has disrupted our own representation of the legal phenomenon by inoculating it with legalistic or sociological positivisms"[2].

Here, we can observe how Villey addresses "modern" philosophy, by working out a strategic reasoning geared towards linking up modern philosophy of law with the "quasi-causal" emergence of legal positivism. His allegation of ignorance against the philosophers in question, goes straight to the point. The main thrust of his argument being that if modern philosophers of law were generally well informed about the public affairs and relevant legislation of their times, and if they had read the classical sources of rational "natural law," they certainly do not demonstrate specific knowledge of the practical work of jurists; that is, they passed over in silence the social, political and economic issues which jurists must come to terms with in the exercise of their duties. Hence, the relevance of the charges brought against them: for allowing themselves to produce a theoretical system which purported to explain and prescribe the role of law in society, but was unable to incorporate in its content the material

conditions needed to validate its outlook; and even worst, for inviting others, through their publications, to follow the same path. Having read Villey, the obvious conclusion is that it is not worth studying the so-called modern philosophy of law. In his perspective, no one can be instructed intellectually by listening to nonsense, and no one can aspire to any kind of knowledge by falling for the enticement of ignorance[3]. Alternatively, Villey proposes the return to a practical conception of natural law[4].

For others, the philosophy of law is simply useless, inefficient, and even counterproductive. For the legal philosophical mind, this second reason is particularly interesting; because its content requires the sort of research, conceptual abstraction, practical deliberation and argumentative exposition required in the methodological formulation of legal problems in philosophy of law; but the fact remains that no one comes forth with a proper articulation of such a refusal. Rather, so the argument goes, the philosophy of law brings nothing to mind that is not already within the reach of legal sciences. What is not within their reach is perforce nothing else than fleeting speculation or the metaphysical beliefs of its originator. Interestingly enough, although the adherers of such a proposition achieve nothing beyond bona fide hostility, they claim to base their arguments on the facts: legal sciences have a legitimate right to take up the place left vacant by the (forced) withdrawal of the philosophy of law. Moreover, according to this view, the philosophy of law ought to be considered as a pastime, or as a quasi-spiritual activity that each individual can cultivate as he or she pleases, adjusted to the tempo of his readings and private conversations between peers. It is thus an activity that one reserves for days of leisure or even for retirement. In short, nobody has anything against the philosophy of law; it is just that it is a pursuit that ought to be relegated to the non-active part of one's life, whereas the development of legal sciences belongs to our time and our practical needs and aims.

It is beyond our objective to rigorously evaluate these two types of resistance/distrust reasons against the philosophy of law; rather, we are interested in recording the facts. Nonetheless, we should not avoid considering that this equation is the troubled legacy of an era in which the philosophy of law, acting in a maternalistic (or paternalistic) framework, disregarded the dialogue with jurists -who had an unquestionable grasp on legal practices- and neglected the ever growing clashes between the scientific discourses of law and theirs aims towards achieving hegemony. This is no longer possible today, unless one reduces the philosophy of law to the role of commentary, of old books and their theories, or to the role of semantic and "systemic" exercises which simply risk turning around and around in circles of non-practicality. Be that as it may, if we synthesize these two types of rejection/distrust towards the philosophy of law, it seems that they encapsulate each in its own way, the situation in which the teaching of the philosophy of law finds itself today.

Of course, there are always some enthusiasts, for whom legal philosophy is important, and for whom no legal practice can be adequately done without a well formed legal mind. In their perspective, the philosophy of law should perform intellectually as a leader among equals discipline, capable of producing discourses and practices which come to terms with the fundamental issues that the other legal disciplines all too often pass over in silence, due to their methodological or theoretical preconceptions and limitations. It is important to keep in mind that legal environments are not only influential policy and intellectual spaces; they are also communities in which the professional distrust of jurists against discourses they view as hollow and futile, all too often produces hierarchical and ideological frameworks that determine, to the point of exclusion, what is considered to be useful and original for the study and development of law.

The philosophy of law as a theoretical-practical engagement

What we shall subsequently defend is a viewpoint granting the philosophy of law the role of a theoretical-practical engagement in favour of the modern legal project, as far as arguments and reasons are concerned[5]. Consequently, teaching philosophy of law ought to consist in understanding this role and its practical implications.

First of all, understanding the teaching of the philosophy of law in this role, involves giving up any "Schematic" comprehension whatsoever, on both the philosophical and juridical level. In fact, if one can say that the philosophy of law, often supported by those whose profession or whose calling is philosophy, can be characterised by the elaboration of an "Schematic reason" and the corresponding formulation of an "Ideal-Law" (and an Ideal-right); the philosophy of law created by jurists can on their side be viewed as based on the idea of an "Schematic Experience," and thus by the corresponding formulation of a "True Law", (and of True-Rights). In fact, this latter tendency does not intend to be named philosophy of law any longer. It reclaims to be known henceforth as "juristic philosophy" (or "general theory of law"), so as to underline its distance from the philosophy of law.

Although the tension between these two tendencies can be assessed and, moreover, used as a source of fruitful contest, any philosophy of law hoping today to appoint itself as "Schematic", will all the same miss out the importance of an informed dialogue with positive (valid) law, and with the democratic dimension that should, in our view, characterize the modern legal project.

We should acknowledge the fact that the philosophy of law can no longer pretend to light-up the path of law in exclusivity and that law is also generally well enlightened by positivistic resources. For the sake of intellectual honesty and clarity, acknowledge

that legal philosophy does not possess any "wisdom", "message", "foundation" nor "intelligence" *apriori*, *a posterior* or *post festum* likely to contribute, "in substance" or "in principle", to anything at all within the modern legal project. Therefore, if the philosophy of law relinquishes its "Schematic" role, all it has left is the possibility to engage –theoretically and practically- the modern legal project, so as to actively and effectively participate in the reflections, the arguments and the reasons that support democracy.

In this view, it follows that the philosophy of law does not hold any answer or recipe, but that it takes part, without monopolizing and without conceding anything, neither to established philosophy nor to legal dogmatic (or legal theory), in the activities associated to the reflection of, and intervention in, contemporary juridical complexities. This is the task we pursue. If we are right, then the philosophy of law is nothing but an in depth argumentative pursuit whose corollary is its public nature.

Openness, modernity and democratic philosophy.

As a matter of fact, the role that we can grant the philosophy of law today, particularly in the area of teaching, is that of engaging the development of arguments and reasons in and about the modern legal project. The philosophy of law should, in this respect, help us open up and universalize our convictions, our values and our preestablished ideas. It should assist us in the process of developing solid and sound arguments and valid reasons**.** Accordingly, the philosophy of law should provide, recognize and identify the various cultural or philosophical parameters mapping out the legal field in a reflexive and open manner. In this view, the philosophy of law should allow us to get acquainted with the various conceptions of the relationship between law and "morality," between society and the individual, or between other subjects of the same kind. Thus, the philosophy of law does not work on the formal qualities of law; willingly leaving them to the legal sciences; and concentrates in engaging those reflections which energize the perspectives of the modern legal project.

It is by means of rationality and argumentation that the legal-philosophical reflection can open us up to the realities of modern life and contemporary society. Still, that certainly cannot happen directly, for the philosophy of law has no direct access to reality; this can only happen through a dialogue with sciences and especially with social, political and legal sciences. It is their task to provide the philosophy of law with the facts that can sustain the reflection on the modern legal project. Legal Kantianism, represented especially by Hans Kelsen, has harmed the philosophical reflection on the modern legal project by refusing a reflexive comprehension about the expectations that modern society has about the law. He wanted, perhaps against

Kant's own intention, to confine the modern legal project to a purist scientist's version, rejecting all dialogue with the political, social, moral, and religious convictions of individuals[6], but there is today no reason for the philosophy of law to follow such a narrow and dogmatic strain. When we transcend the belief in any Schematic (or Architectonic) role for philosophy of law, the dialogue with the sciences ceases to be a form of "decline," and emerges rather as sound reasoning, as an ongoing opening up of shared epistemic possibilities and mutual alternatives.

In a similar vein, the philosophy of law can help understand legal positivism and its important role in the development of legal dogmatic and legal theories. Both are essential components in the formative process of contemporary legal students, and they constitute pivotal components in every curriculum of competent Law faculties. In this sense, a reflection about the production of legal dogmatic advances the task of articulating a philosophy of law that contributes to the understanding and communicative participation in the modern legal project. Indeed, the reductionism that so strongly characterizes legal positivism reproduces a legal culture that obviates the fact that law, in theory and in practice, concerns the legal positions defended by individuals, and even more so, that we confer the law to ourselves through mutuality. Law is surely prescriptive, in the sense that the content of these positions is written as a "possibility" that makes us the authors and the addressees of a potential realisation, within a society were "law" has acquired a modern and democratic sense. Hence, it is simply not good to be too obsessed with Texts, when our scope should be the law and the relationships and engagements it needs and spurs, so as to bring forth the democratic project.

In this vein, we can point out the fact that the Supreme courts of modern democratic states, such as the United States of America, Canada and elsewhere, take more and more into account the analysis articulated in the field of philosophy of law, the writings of the philosophers of law, and thereby, jurisprudence represents a good starting point for teaching philosophy of law[7]. We could stimulate the critical perception of students if we can show them how reflections in the field of philosophy of law influence the decision making process of the aforementioned courts, and how these reflections influence the legal result of the legal issues in question.

However, we should clarify that when judges take a stance on abortion, assisted suicide, inherent rights of Native peoples, or any other subject, it does not mean that they constitute some "ultimate solution", nor some final legal philosophical judgement[8]. If the philosophy of law must feel the pulse of today's legal reality, particularly with regard to jurisprudence, it should never be understood as the "groundwork" of various legal-philosophical positions, but just as a legally authorised stance and an opinion to be evaluated, particularly by students. Judges should not be considered as

philosophers of law, as they are implicitly and blindly treated by many contemporary philosophers of law (Dworkin)[9], but as conversational partners worthy of interest to all of us, and even more so to a law student interested in adopting a democratic orientation, by insisting that we are always, at the same time, the authors and recipients of our positions in the legal realm.

Philosophy of law and public discourse

If we want to teach and conceive the philosophy of law solely as engaging in the arguments and reasons that are well informed and mindful with regard to the modern legal project, it follows that philosophy of law relinquishes its role of "Arbiter" in public disputes.

As a matter of fact, the philosophy of law must abandon all reference to the "philosophy of conscience" (Kant, Fichte, Hegel, etc.), that is, to the judgment that a single person can make on the modern legal project. Viewed from an argumentative angle, the philosophy of law should situate itself as a participant among others in the multitude of discourses surrounding the modern legal project. It should be considered as explicitly testing its arguments and reasons against the public space. It is within this public space that the "weight" and the "value" ascribable to each and any argument and reason must be openly debated and sorted out.

Only by taking the public space into serious consideration can we ponder over the question of rationality, and more specifically, come to grips over differences concerning legal rationality, which the modern legal project can both mobilise and stand for. As for our own preference, it can now be encapsulated in the idea of the primacy of a "communicative rationality[10]. Actually, by seeing the production of arguments and reasons as the main issue of the modern legal project, the philosophy of law engages this venture with a demonstration of the fact that the practical rationality pertaining to law is embodied in public discourses. Discourse, as an inter-individual practice of legal subjects, should produce arguments and reasons, and advance them to the audience with a view to getting them evaluated and validated.

By insisting on the importance and the democratic role of the public space in legal-philosophical teaching, we should motivate the students to engage the idea that, in law, the public space is the first recipient to our reasons and arguments even before they can be presented in court. Students must understand that this public space plays an essential part in the development and maintenance of the process of the formation of will and opinion with regard to the modern legal project.

For a democratic conception of law

To situate the philosophy of law as a starting place for the communicative elaboration of in-depth arguments and an enlightened public reason is, in itself, a philosophical position. The teaching of the philosophy of law is intimately connected to a social-political will committed to revising, creating and transcending conventions, so as to contribute to the kind of practices which favour people living together through the power of building-experimenting democracy, through the ongoing development a legal modernity. Thus, the question about "what is the purpose of teaching philosophy of law?" is properly treated when the answer includes a defence in favour of modern law, of modern democracy and in favour of all the men and women who have made, and continue to make this choice. Precisely, it is this creed, emphasizing a democratic setting for all questions about law (and legal position/ rights), which is reflected in our conception about teaching legal philosophy. Thus, law without democracy is always a question of law awaiting a more appropriate symmetry between legitimacy and legality.

To understand such a democratic conception of law, it may be useful to underline the fact that this conception differs from the conception of a "liberal morality" of law, so generally taught in North American law schools. The conception of "liberal morality" is a philosophy of "law", which has undertaken a fusion of "law and morality, justified by a range of a priori principles and rules of pre-political origin, in the belief that law ought to be conceived together with the presupposition of some "moral rights," capable at the same time to ensure negative freedom and to censure collective activity. The teaching of the philosophy of law in North America has often taken the role of the initiation into this belief: a kind of leap of faith that grants the virtue of such liberal "institutions", and accounts them as a moral emanation. We consider a philosopher of law like Ronald Dworkin, particularly in his book on *Freedom's Law*, as the typical representative of this conception[11].

The consequence of such a "liberal natural law" theory is that the teaching of the philosophy of law has become a motivation to having faith in "our" Institutions. It trains law students, legal professionals and others, to believe that democracy is the means, the instrument for propagating and realising "liberal morality." This has surely led to a greater "liberal morality," a phenomenon we obviously deem positive, but which does not mean that man, to paraphrase Kant[12], has left the ranks of inferiority nor obtained private and collective autonomy. In other words, the beliefs in pre-political arrangements have always been an obstacle to mobilise a common political will, issued in and from a public space, in favour of ever growing democratic positions and arrangements.

Societies and nations struggling with their democratic development need a communicative, participatory and inclusive relationship with the law. In our view, the law is always best served by democratic openness and the broadest potential of implications, issued by an anarchic public space, where everyone has the liberty and the freedom to express their opinion, their arguments, their reason, and this without fear and constraint.

The philosophy of law as democratic practice

In our teaching experience, the democratic conception of law has a specific purpose: engaging the ever growing experience that democracy and the law constitute a day-to-day struggle. This, above all else, because democracy as law has for us a value in itself, and represents not only a means or an instrument for something else. If philosophy of law represents, as stated by Kant, man's way out of the realm of heteronomy (the arguments of authority) and a way in favour of autonomy (reasonable arguments as seen by the individual), one must at the same time assume this autonomy and raise it against philosophical (political, religious, ethnic, cultural, etc.) indoctrination.

If the modernity of law may, in our view, be epitomized in the requirement that all legal subjects must be able to see one another as authors and recipients of rights, norms, and institutions, it follows that the teaching of the philosophy of law cannot be confined to an exercise of heteronomy, albeit one of "liberal morality," but that it should make its own an option in favour of democratic modernity. The philosophy of law cannot replace the authors of law, but it must engage them and critically have the thrust in modern democracy and modern law. Hence, the philosophy of law must reflect the democratic objective of the modern legal project.

Indeed, placing the teaching of the philosophy of law within the scope of the present, entails favouring the modern legal project. In this sense, we hope to connect the practical side of law with the prospective side of philosophy: thinking, creating, debating, in short, engaging in the kind of mutuality committed to living and developing the democratic experience. Hence, the need to reconcile the modern legal project with the idea of a philosophy understood as democratic practice.

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[1] B. Melkevik. *Horizons de la philosophie du droit*. Ste-Foy: Les Presses de l'Université Laval and Paris: L'Harmattan, 1998. p. 13-36.

[2] Michel Villey. *«Préface», to* Chaïm Perelman*, Le raisonnable et le déraisonnable en droit. Au-delà du positivisme juridique*. Paris: L.G.D.J. ("Bibliothèque de philosophie du droit"), vol. XXIX, 1984. p. 8. The same idea is expressed in his *La formation de la pensée juridique moderne* (Paris: Monchrestien, 1968, several times reissued). Cf. Alain Renaut and Lukas K. Sosoe which strongly critique this opinion, idem, *Philosophie du droit* (Paris, PUF, 1991).

[3] Alain Renaut, in his *Kant aujourd'hui* (Paris: Aubier, 1997), p. 322, criticizes precisely Michel Villey's "contempt towards philosophers."

[4] Michel Villey, « Epitome of Classical Natural Law", 1 part: Griffith Law Review (Queensland, Australia), 2000 (9) 1, and 2 part: ibid, 2000 (10) 1.

[5] B. Melkevik, Horizons de la philosophie du droit, p. 14 s.

[6] H. Kelsen, Pure theory of law, Berkeley, University of California Press, 1970. (In French: idem, *Théorie pure du droit*, Paris, Dalloz, 1962, coll. «Philosophie du droit» n° 7, or, idem, *Théorie pure du droit,* Neuchâtel, Éditions de la Baconnière, 1973 (1re éd.), 1988 (2e éd.), coll. Etre et Penser, n° 37.).

[7] B. Melkevik "La philosophie du droit: Développements récents." In Raymond Klibansky and Josiane Boulad-Ayoub (eds..) "*La pensée philosophique d'expression française au Canada. Le rayonnement du Québec»,* Québec: Les Presses de l'Université Laval, 1998. p. 465-483.

[8] See Josiane Boulad-Ayoub (ed.). *Carrefour: Philosophie et droit* (Montréal: L'ACFAS, 1995), p. 231-315: "Langage des droits et conflits des représentations ultimes," with contributions from L. Bégin, F. Blais, G. Legault, and L. Tremblay.

[9] R. Dworkin. *Law's Empire*, Cambrigde, Mass., Belknap Press, 1986, and, id. *Taking rights seriously*, Cambrigde, Mass., Harvard University Press, 1977. (In French : idem, *L'empire du droit,* Paris: PUF- coll. "Recherche politique", 1994, and , idem. *Prendre les droits au sérieux*, Paris, PUF- coll. "Léviathan", 1995).

[10] B. Melkevik. *Horizons de la philosophie du droit*, op. cit., p 91-150.

[11] R. Dworkin. *Freedom's Law* (Cambridge, Mass.: Harvard University Press, 1996).

[12] I. Kant. "Vers la paix perpétuelle, que signifie s'orienter dans la pensée ?" *Qu'est-ce que les Lumières et autres textes* (Paris: GF-Flammarion n° 573, 1991).