

On Hartian Questions of Legal Philosophy

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Abstract: In a broader research project my principal aim is to analyse contemporary French legal philosophy and to highlight its historical origins and its connections to other legal cultures. The framework is based on Hart's 'persistent questions' whereas the content consists of the 'would-be answers' of French legal philosophers. With regard to these Hartian questions, this paper develops the following argument. Although law itself is intrinsically connected to a given political community characterised by its culture and history, legal philosophy recommends an abstract and general approach to law. 'Abstractness' and 'generality' urge the legal philosopher to treat basic legal problems independently of this or that legal system. I shall argue that this 'independence' requires analysing the spirit of the legal system rather than positive law. The pursuit of legal philosophy seems feasible if legal philosophers can elaborate sufficiently 'basic questions' that can be 'transposed' to other legal cultures and if by answering these they can understand the spirit of the other legal system. My claim is that Hart's 'persistent questions' meet these criteria.

Le plupart de mes collègues détestent la philosophie. (Villey 1989, 25)

Since fairly long, lawyers, students and scholars coming from different legal cultures have known Hart almost by heart.¹ Also the perplexities at the beginning of his *The Concept of Law* have become commonplaces: 'How does law differ from and how it is related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?' (Hart 1961, 13).

In this essay I am going to argue that these questions arising from his 'perplexities' may be considered as 'general problems of legal philosophy'. It would be, without doubt, somewhat far-fetched to say that these are *the* general problems of legal philosophy. My claim here is more modest and necessarily abstract, which may account for the title. I shall merely plead for the feasibility of legal philosophy, adding that Hart's 'perplexities' can be conceived of as its 'basic' questions. I hope to provide logical arguments while trying to avoid contingent

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historical and/or sociological explanations. Such arguments are indeed necessary since authors often elaborate lists of basic questions of legal philosophy without justifying the list.²

1

Any serious theoretical attempt in the field of social philosophy, which seeks to understand the ‘point’ of any regulation of human behaviour in a given society has to face the following problems. On the one hand, a normative system is intrinsically connected to a given political community with its particular culture and history. On the other hand, a social philosophy must be an abstract and general approach to the normative systems or else it cannot be called ‘philosophy’. Even if the meaning of ‘social’ and ‘practical’ is still in question, no one has seriously questioned that legal philosophy has certain features in common with social (or practical) philosophy.

By virtue of the ‘abstractness’ and ‘generality’ of legal philosophy, its basic problems have to be treated independently of the content of a given legal system. ‘Independence’ requires the scholar to analyse not positive law but the ‘spirit’ of the legal system. The pursuit of legal philosophy is feasible only if legal philosophers formulate questions that are sufficiently ‘basic’ and capable of being ‘transposed’ to other legal cultures, and if by answering these one can understand the ‘spirit’ of the other legal system as well. ‘Spirit’ is something less than the ‘essence’, but more than the ‘content’ of the law. Usually, it has a political character, and is shaped by contingent factual circumstances and crystallised from the social practice and institutional framework of a given legal system. Nonetheless, ‘spirit’ is something that needs to be elaborated in a formal and abstract way.

One may state for example that the ‘spirit’ of French law has to be defined with reference to ‘equality’ (*égalité*). This is a highly abstract concept which calls for an abstract philosophical explanation. Still, if one really seeks to understand it, one must not forget to take into account the contingent criteria of its application – or, as Rawls or Dworkin would put it, the various conceptions of the concept of ‘equality’ – throughout French history since the Revolution or even before it.³ Positive legal rules of the French legal system of a given period contain these

² See for example Le Fur 1937

³ Cf. Hart (1963, vii): ‘justice is a concept of complex structure within which we should distinguish a constant formal element and a varying material element. This distinction might be presented in terms used in

criteria of application. One should take these into account but one should also bear in mind that without philosophical explanation they are insufficient to demonstrate the ‘spirit’ of that system. Obviously, a particular French theory of justice as equality without reference to legal rules says nothing legally relevant about the ‘spirit’ of French law either.

2

One can formulate many kinds of arguments (sociological, historical, etc.) for the very existence of legal philosophy. Here I take into account only those using (or being compelled by logic to use) philosophical justifications. I would like to show that even an ‘empirical’ legal theory cannot dispense with philosophy.

Let me give two examples. Reading Kelsen’s apologetic essays on the purity of legal science as opposed to the ‘impure’ philosophy of justice, one can discover without much intellectual effort that the author uses a simplified neo-Kantian framework coupled with an even more oversimplified anti-cognitivist meta-ethics (which are, by the way, inconsistent with one another) (see Kelsen 1960). Now, in the light of subsequent criticism, it is a commonplace today to state that the whole Kelsenian enterprise is nothing but ‘normative metaphysics.’ In Kelsen’s case, the reader finds no serious justification for the choice of the philosophical framework (why ‘purity’?) or for its possible meta-ethical corollary (why ‘impurity’?).

The second example may be less known to those not familiar with French legal philosophers. According to Léon Duguit, scholarly research in the field of law has to focus on the facts if it is to avoid metaphysics. Like later Ross, Duguit argues that normative concepts are meaningless, since they have no facts as their semantic references. Although the original targets of his criticism were Rousseau’s notion of the ‘general will’ and German doctrines of subjective rights (these theories were rejected by Kelsen as well), his anti-metaphysical stance clearly opposed him to the author of the *Pure Theory*. For Duguit, only an individual will can be considered as empirical fact. It is not some imaginary social contract but solidarity that integrates these individuals to a human community. Solidarity is a social fact and it is based on the empirically observable sense of justice. This sense being the same in the case of every individual, one can reformulate it by using general patterns. In order to justify that general

recent English moral philosophy as one between the constant *definition* of justice and the varying *criteria* for its application [...]’ See also my presentation of the Dworkinian theory of justice in a French context (Paksy 2009).

principles of justice are empirically well-founded, Duguit simply claims that the authors of the best theories of justice, like Aristotle and Thomas Aquinas, were sociologists. What counts for our purpose, however, is the very fact that Duguit's argument for empiricism is clearly 'philosophical'. It goes without saying that he pays a considerable price with the argument of 'Aristotle and Thomas Aquinas were sociologists' when he tries to avoid metaphysics in this highly superficial way. In fact, it would have been more adequate and less controversial to accept that the notion of solidarity implies normative – not empirical – research in the field of legal theory (or philosophy) (see Duguit 2003 [1901] and 1927).

For our present purpose, it suffices to see that even 'positivist' and/or empirical legal theory implies philosophical argumentation. In this sense, 'philosophical' simply means that the research is not purely empirical. And, on the other hand, if it is feasible, it is not necessarily counterfactual either. I shall not analyse the second option here, for now I am going to focus on Hart who did not use this theoretical 'trump'.⁴

It seems that Hart's famous perplexities have an overlapping area, namely, the problem of normativity. His major contribution to legal philosophy consisted in finding a middle way between empiricism and idealism with regard to the problem of normativity and his theoretical path was justified in a philosophical way. When speaking of 'perplexities', he seems to be using the methodological tools of ordinary language philosophy (see Green 1997, 1688, n. 1). Yet he is not satisfied with a possible conclusion which would state that the task of legal philosophy is to 'clarify' or 'correct' the ordinary language of lawyers (see Bayles 1992, ch. 1).

I am far from saying that this is unproblematic. Kelsen would separate the 'ordinary' discourse of lawyers from the language of legal science, separating 'what the law should be' (lawyers' 'impure' discourse) from 'what the law is' ('pure' discourse on lawyers' 'impure' discourse). This is one reason why Kelsen could not come to the problem of normativity through linguistic analysis. Duguit would say, following Comte, that legal discourse has no meaning, since in this discourse 'meaningless' metaphysical concepts are used. However, if the normative discourse is 'pointless' or 'meaningless', the problem of normativity is

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Counterfactual theories are e.g. those proposed by Rawls or Habermas.

necessarily excluded from scholarly research on law. Hart's argument against Scandinavian realists can be used, *mutatis mutandis*, against Duguit as well (see Hart 1955).

Hart's first problem ('How does law differ from and how it is related to orders backed by threats?') can be interpreted to raise the question of whether the 'vagueness' or 'open texture' of ordinary and legal language calls for 'philosophical' arguments or not. Perhaps 'vagueness' implies discretion in the case of the application of law, or 'perplexities' if the concept of law is in question but it is the very problem of normativity which cries for philosophy. The question of how and why rules are to be followed is independent of the question of whether these rules are vague or not. Methodologically, the same distinction can be made between the vagueness of a concept of law and the discretionary character of legal adjudication, caused by the open texture of the legal rules. Whenever an official is obliged to slot some empirically observable fact into a legal category ('Is the atheist church a church at all?'), (s)he does not use logic but decides and, for the sake of legitimacy, develops a reasoning in order to justify his or her decision. Legal philosophy should show for what reasons an official is obliged to decide. This is a sufficiently general and abstract question, independent of the cultural or political context of the given legal system. An official is obliged to decide, regardless of whether it is explicitly or – as Article 4 of the French Civil Code stipulates it – implicitly prescribed by law. In the latter case, legal philosophy is able to transform the latent obligation into a manifest one.

Hart's legal philosophy is characterized by himself as a 'descriptive sociology' seeking to describe law as a complex system of rules from an internal point of view. Still, one may object that the 'generality' of legal philosophy is highly questionable because of the uniqueness of legal systems. As I mentioned earlier, 'uniqueness' here stems from the particularities of national history and political culture. Is legal philosophy an impossible pursuit then? I think this is not the case. But my claim about the spirit of the legal system notwithstanding, I may agree with someone saying that no legal philosopher can elaborate a position independent of his or her own legal culture. Indeed, *The Concept of Law* is an important contribution to one's legal discourse – provided one has a 'common law mind'. Are the 'perplexities' mentioned at the very beginning of Hart's book too 'British' to be considered as 'general problems' of legal philosophy? Let us now have a look at this question.

A purely contextualist theory of legal scholarship would take a sceptical attitude. One could claim that Hart was a product of his time and socio-economic context and that *The Concept of Law* is nothing but a reflection of that. Simplistic as it is, such criticism is sometimes formulated against others, like Kelsen ('The pure theory is in fact impure, because it is Austrian'). In France it had been a commonplace for many scholars that the "pure theory" fits well to the federal system of Austria but it loses plausibility when applied to describe the legal structure of the Third Republic in France. This attitude changed when French scholars were to be faced with the problem of constitutional adjudication during the Fifth Republic. In this situation they re-read Kelsen in a decontextualised way in order to justify this new and strange institution.

There is an obvious reply to the above mentioned kind of criticism: a purely contextualist reading may backfire, as it cannot justify for what reason it and it alone is not a product of its socio-economic context. And even if there are such reasons, it cannot be shown that these are not products of their socio-cultural context...

It seems clear on the other hand that the opposite, i.e. a 'pure' analytical legal theory, is impossible, too. Even in its purest form, it reflects to a certain extent at least the prejudices of its author. Complete 'generality' can never be obtained. Even within the common law family, one can observe different institutional frameworks: 'constitutionalism' or 'Rule of Law' can be justified in various ways in different common law systems with a rigid written constitution (USA), with no written constitution (UK), or with a written but more or less flexible constitution (Canada) (see Corcoran 2010). In France, a scholar who has been trained in the field of (uncodified) administrative law necessarily has a different attitude towards codification than a civilist who, at least in some respects, regards the two hundred years old Code as the 'holy scriptures' (see Steiner 2010). A moderate Cartesianism is still plausible: the observer should always take a critical self-reflective position in terms of his or her own scholarly enterprise.

3

On the basis of the above arguments, it seems feasible to write an essay with Hart's 'persistent questions' as the theoretical framework, with the content consisting of 'would-be answers' of French legal philosophers.

3.1

One of the ‘persistent questions’ concerns the difference between the brigand’s and the legislator’s commands. I do not claim that the following is the only way to ‘translate’ this question and to put it into a French context. It is nevertheless possible to discuss the problem this way without seriously misinterpreting either Hart or the French legal culture.

For Hart and other English-speaking theorists, the ‘gunman’ is nothing but a methodological construction (or analytical tool), since these political communities (UK, USA, Canada, New Zealand, etc.) have never really experienced a ‘brigand-state under the rule of gunmen’, namely, a totalitarian and/or authoritarian regime. The case was, however, different on the Continent. The Vichy government (1940–1942) in France may be seen as a regime governed by a group of brigands. Even though their *coup d’Etat* was justified by certain of the relevant French constitutional theories, they were brigands as their commands were obviously and – to use Gustav Radbruch’s terminology (Radbruch 2006 [1946], 7) – intolerably unjust. One of the questions for a legal philosopher is related to the positivist attitude of the professors of that time: does legal positivism mean that a professor, like Maurice Duverger, is incapable of criticising these commands? According to Danièle Lochak this attitude was one of the Vichy government’s main sources of legitimacy, and she puts the blame on legal positivism in general. Michel Troper defends legal positivism and accuses these lawyers of ‘antipositivism’ (see Lochak 1989; Troper 1989).

The ‘Duverger case’ is obviously different from the debate that took place between Hart and Fuller. In English-speaking legal cultures, where constitutionalism has been continuous, professors of law have not been forced to justify their arguments with references to ‘science’ [*science juridique*]. During the 19th and 20th centuries, in Continental literature the ‘science’ of law somehow replaced the constitution itself (in Germany) or the authority of the constitution (in France). In Anglo-American legal philosophy the central theoretical question was that of the obedience to unjust laws, while on the Continent professors accused one another of providing additional legitimacy for the tyrannical legislation when writing commentaries on inadmissible statutes. By contrasting these debates, it becomes apparent that the problem of normativity is formulated in different ways.

3.2

In *The Concept of Law*, Hart develops a theory of interpretation according to which interpretative power must be conferred on the official when applying law because of the open texture of normative texts. The very notion of ‘open texture’ is culturally independent, and for British and French legal cultures at least, it is true that the original idea was to establish a strictly limited judicial authority which gives effect to the legislative intent as formulated in normative texts. In the common law tradition, canons guiding statutory interpretation have been justified from both apexes of the institutional hierarchy. On the one hand, the ideology of parliamentary sovereignty requires that judges give full effect to the legislative will. On the other hand, legislative penetration into the local *ius commune* (the common law) have been considered as an exception and for this reason judges can and should limit this somehow ‘illegitimate’ legislative activity.

Montesquieu’s famous metaphor of the judge who should be the ‘mouthpiece of the law’ (*la bouche de la loi*) seems to be a common point for both continental and common law cultures. As it is well known, Montesquieu used this metaphor in the chapter of his *Spirit of Laws* where he ‘described’ the British constitutional system. The original French text uses the term *loi*, which translates as ‘statute’ (*lex*) rather than ‘law’ (*ius*), and it was true that judges tried to limit themselves to the ‘plain meaning’ when performing statutory interpretation. Montesquieu deliberately avoided the term *droit* (law), for it is obvious that the metaphor would not be plausible for case law or equity (cf. *L’Esprit des Lois*, Ch. 11).

However, in Montesquieu’s theory it is the legislation that is regarded as the centre of gravity in social regulation. According to him, the best case would be if the legislator were able to remove citizens’ prejudices, and in this way, the judges being at the same time citizens, they might lose their prejudices, too. With this argument in mind, it does not really matter whether the term *loi* or *droit* was used by Montesquieu. Reading the chapter on the British legal system in that way, one is compelled to interpret it as normative political philosophy or utopia hidden in a descriptive sociological text. In this sense, Montesquieu’s claim was that in an enlightened society – and the Britons were certainly closer to this than feudal France – the judicial power should not be a power at all. The question of whether it is a plausible claim or not is still discussed by legal philosophers of both legal cultures.

Be this as it may, ‘open texture’ has not been perceived as a problem in France for long, neither in public nor in private law. As for the interpretation of the written rule of recognition, it was not so much about the meaning of the rule, as about its extension and place within the legal system.

In the Third Republic, the question was whether a bunch of statutes could be considered as the constitution. This was the ‘longest Republic’ until now and – regarding their structures and institutional operations – the British and French legal systems were very similar during this period. The rule of recognition or the *ultima ratio* of the validity of legal rules was in both cases the principle of parliamentary sovereignty. This institutional framework was termed ‘legal state’ (*l’Etat légal*) by Carré de Malberg. In this context, his criticism of the pyramidal structure of law as developed by Merkl and Kelsen questioned the ‘generality’ and ‘abstractness’ of legal philosophy. Carré de Malberg argued that the *Stufenbaulehre* cannot be right, since in the absence of a constitution the normative structure of the Third Republic does not fit into this theory at all. The only basic (and ‘unwritten’) norm is the provision to respect the will of the majority. If the pure theory cannot be applied to the French system, then it is a wrong theory (see Carré de Malberg 2007 [1932]). Otto Pfersmann rejects Carré de Malberg’s argument and writes that a particular social practice (the one which existed during the Third Republic) cannot invalidate an abstract theoretical construction, like the one elaborated by Merkl and Kelsen (see Pfersmann 1997).

By the time historical circumstances gave birth to substantive constitutional adjudication in the Fifth Republic, in 1971, interpretive attitudes towards the rule of recognition had been well established in French legal mentality and practice. For a legal philosopher, the basic questions of legal interpretation and the justification of constitutional adjudication are still open for discussion. Yet one should be very careful when discussing canons of constitutional interpretation. French, British and American textualist (‘originalist’) schools, for example, show similarity in terms of their conclusions but they justify these in different ways. In addition, an analysis can show why the Dworkinian theory of ‘moral reading’ cannot be transplanted into the French legal culture. (See Paksy 2009)

The last Hartian problem is related to the difference between a legal and a moral obligation. According to classical French doctrines, the ultimate reason to obey the law cannot be identified in the field of legal science. If the question is dealt with in a normative way then it is political philosophy that has a 'scholarly' competence, while for a descriptive approach it is sociology. Rather than speaking of a rule of recognition, French scholars tend to use the notion of a 'constituent power' (*pouvoir constituant*). This notion would be the theoretical substitute for the social contract, a 'hypothetical basic norm' in the Kelsenian sense, even though the same concept came into play in political and/or legal discourses during the Enlightenment (see Klein 1996). In the French Republican tradition, arguments from natural rights had never been plausible until the last decades of the 20th century. Instead, such rights were considered as political programmes.

For Hart, the rule of recognition as the ultimate criterion of legal validity is neither valid nor invalid itself: it is merely accepted by the courts (at least). In the French context, the existence or non-existence of some distinguished social fact, like an accomplished revolution, determines whether the commands of the parliamentary majority are obligatory for the officials or not. The interpretation of these social facts is always a political question. The 'Frenchness' of the French legal system can be defined as the adherence in its spirit to the idea of 'equality', understood in its material sense in most cases.

If 'validity' means that a given legal norm makes part of the legal system, French doctrines can be divided into at least three main groups: normative, sociological and moral theories. Carré de Malberg gave a Kelsenian answer to this problem, Duguit followed Durkheim's path, and Maritain elaborated the natural lawyer's perspective. The potential of Hart's legacy is shown in this field, too: his criticism of normativism (pace Kelsen), realism (pace Ross) and the 'old fashioned' way of natural law thinking can help to understand why French doctrines fail to justify the obligatory force of law.

Let us see three French strategies to avoid the very problem of normativity. I will call them as follows: strategy of exclusion, transformation and saturation. In order to save the scientific purity and objectivity, Carré de Malberg excludes the *ultima ratio* for normativity from the field of scholarly research. In the French case this *ultima ratio* would be the "constituent power". For Carré de Malberg this notion is not legal which means by virtue of the negation that it is political and this is the reason why one cannot treat it at all within legal scholarship. Duguit argues that social science like jurisprudence should deal with social facts. The

solidarity which creates societal links among individuals recognized by the legislator as law is a social fact, too. In order to explain this notion, classical theories of justice – like Aristotle’s or Thomas Aquinas’ – must be transformed into sociology. A scholar can take into account these theories in this form because of their scientific character. However, one cannot analyse the normativity of the law or morality, because facts do not have any normativity. Among these three scholars, only Maritain takes “seriously” the problem of the obligatory force of law. But his theory which claims that law is necessarily connected to morality and an unjust law is not law at all, fails when it tries to justify why the validity of legal norms must be saturated by morality and what kind of morality can overlap different individuals’ ideological engagements in a pluralistic society.

4

In this essay I argued that the three Hartian questions formulated at the outset of his *Concept of Law* can be seen as general problems of legal philosophy. It goes without saying that one can formulate these questions or ‘perplexities’ in different ways, too. My claim was that legal philosophy, i.e. a non-empirical analysis of basic legal problems, is a legitimate enterprise and this position is supported by a philosophical explanation. For the sake of this argument, I used the concept of ‘spirit’. I do not claim that other general problems different from Hart’s perplexities cannot exist. One can find others like the gaps and other inconsistencies of legal systems, the relation between law and economics, literature or religion, etc. One can discuss whatever seems important but what one cannot do is to neglect the very problem of normativity, at least if one claims that what one does is legal philosophy. Research in the field of French legal scholarship can show certain paths which in most cases try to avoid the problem of normativity. Yet, if someone scrutinises their final axioms, one will discover that these ways are logically impossible or lack the force of rhetorical plausibility.

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