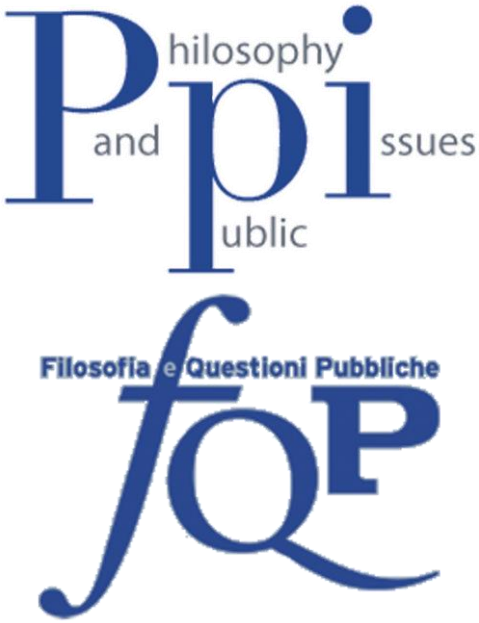
SYMPOSIUM

DEMOCRACY AND LAWMAKING



PENSER LA LOI
A PRÉCIS

BY

DENIS BARANGER

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Penser la Loi
A Précis

Denis Baranger

I am very grateful to "Philosophy and Public Issues" and to the panel of reviewers for the opportunity to discuss my book. There is no greater privilege for an author than to be offered that chance and I very much look forward to the conversation that will ensue.

I should begin with a remark on vocabulary. In the French language, '*loi*' means generally 'statute' or 'legislation.' In order to translate the English word 'law,' it is generally preferable to use the French word '*droit*.' So "*penser la loi*" does not mean "thinking about law", but rather, "thinking about statutory law" or "thinking about legislation."

I should also attempt to offer a clear statement of the book's purpose, as this may help clear up a misunderstanding. This is not a book about the *history of the philosophical concept* of 'law' or even of 'legislation,' even less – as this would have other implications – about the *philosophical history* of the said concept. Neither is this a book on the legal history of statutory law. Both these wider projects would have been too ambitious, and in any case, they would not have solved the riddle I was trying to address.

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I

Our legislative disenchantment

Although this book is unapologetically an inquiry into the history of ideas, the question that gave rise to it is very much anchored in the present. I am fascinated by the role of legislation in the modern world: its qualitative as well as quantitative importance, but also the fact that legislation is perceived as a relative failure. In many western states, you can sense a great deal of disappointment with the way we make our laws. This is not only a disappointment with this or that piece of legislation. It is a more general phenomenon. We are dissatisfied with our legislation. At the same time, never in history has a civilization produced so much written law and regulations of all kind as ours.

The purpose of this book is to come up with an explanation for this legislative disenchantment. We experience it nearly every day. Democratic elections are the high tide of legislative enthusiasm. Public opinions express faith in the legislative platform of a party or a certain leader. Then that party and/or its leader get to power and accomplish, to a certain extent, that program. And then, the enchantment wears off: public opinion turns against statutes before they are even enforced, or in the course of their enforcement. Disenchantment about legislation has won the day.

II

A historical problem

Why are we entangled into such a tricky relationship with our laws? The book makes the claim that in order to solve it we must stand at the crossroads between, on one side, the history of philosophical and political ideas and, on the other side, the history of legislative practices.

Nothing resembles more our modern bemoaning of bad, overly lengthy, too frequently amended, incomprehensible, internally and systemically chaotic legislation than the similar condemnations expressed in the past. From the Romans onwards, everybody, it seems, has deplored the chaos of laws. I call this a long-term 'topos' of our legal psychology. And it raises a serious question: when the same claim is brought forward today, can we accept it as an objective statement of a social phenomenon? To take only the frequently articulated critique that there are "too many laws": is it possible to establish a mathematical ratio between the social need (or demand) for legislation and the amount of statutes that end up in the statute book? The answer is clearly, I think, that it is not. The problem is not an objective – i.e. scientifically observable – one. It is a cultural problem, rooted in our history.

The book's approach is to focus on the relationship between actual legislation and the intellectual projects that have, over time, tried to shape it. The ambition of the book is to show contemporary statutory law as the offspring of past intellectual projects as well as past historical practices. Legislation epitomizes in my view a human endeavour, which unites theory and practice in a very intricate fashion. The book is not based on certain assumptions about the relationship between theory and practice in the case of law – except, maybe, in a nutshell, that, when it comes to understanding social practices, *metaphysics matters*[1] – but it sketches out certain ties, certain ways in which theories and practices interact in the field of law and politics. Especially, modern

[1] Or, in other words, that the metaphysical constructs of a certain age are a key to the understanding of the practical reason of the same age (or a later one). Practices matter no less, certainly, and the relation between the two is not one of causal influence. But the strategy of setting aside metaphysics, and more generally philosophical ideas, from the analysis of society and social transformations is not a successful one.

philosophy has evolved into a new kind of practical reason aiming expressly at influencing social practices, governing conducts and transforming concrete reality. But one should never overlook the fact that, on the other side of the fence, legal practice is based on a deeply rooted theoretical self-understanding of the legal world: *lex est vera philosophia*.

III

A roadmap

There are four parts to the book. To sum up: Part I is devoted to a fairly general outlook of the emergence of a new conception of legislation, which can be delineated as a complex of philosophical projects and legal ideas – as this book is very much based on the premise that law is first and foremost a matter of ideas, even before it is about rules or norms. Part II is concerned with what one may call the "creative dead end" (*impasse créative*), the fruitful inability of classical political philosophy in the eighteenth century to pave the way for the practice of legislation in the modern state. Whatever Montesquieu and Rousseau contributed to the idea of legislation, it is suggested, they cannot be held to be the forefathers of our modern statute book. Who, then? Part III considers an important group of suspects: the whole gamut of intellectual projects that have, in the long eighteenth century, shared the premise that legislation could be made into a science, or at least the object of a rational approach. Mapping out the field, which is now all but forgotten, of those sciences of legislation, is not easy. There are several ways to understand the idea of a legislative rationality. One is metaphysical and rooted in German idealism. The book tries, amongst other things, to re-evaluate that approach by offering a more nuanced vision of the eighteenth century German "philosophical codes." More nuanced, that is,

than the very critical depiction given by twentieth century liberal thinkers such as Isaiah Berlin, Michael Oakeshott or Friedrich Hayek. Another current is clearly empiricist and will give rise to the utilitarian school of thought. The key names of the latter school are Cesare Beccaria and Jeremy Bentham. The sciences of legislation are neither a full success nor a complete failure. It has not succeeded: our legal science is still that "lawless science of our law" that Tennyson has chanted in 1793.[2] It is not a complete failure as the requirement of rationality still plays a major role in our public sphere. The influence of Beccaria and Bentham still matters. Yet one would be hard pressed to say that their views have entirely won the day. Rather, the pendulum has swung in the other direction: those rationalist ideas have been fought – mostly successfully – by the return of "lawyer's law" and the traditional ways of approaching legislation that have prevailed in long-term legal culture. Also, the rise of political economy and liberal thought have gone down the same path, as I try to show in the book's last two chapters.

IV

Legislation ancient and modern

I will not aim at summarizing the first three chapters as they mostly aim to adduce adequate empirical and historical evidence in order to show in what way the new concept of legislation differs from that obtaining in pre-modern Europe. This is a difficult case to make as there is no clear timeline and no clear-cut turning point at which one could safely say that 'modern' legislation has appeared. Yet there are certain things that it seems safe to say. First, the idea – as put forward, for instance, by Friedrich Hayek –, that

[2] "The lawless science of our law, / That codeless myriad of precedent, / That wilderness of single instances." Alfred Lord Tennyson, *Aylmer's Field*.

legislation is a new development in western legal history while some kind of unwritten common law had prevailed previously appears unsustainable. Second, I have tried to hammer out a model of premodern legislation which is based on two main ideas. First, premodern legislation was based on *pouvoir édictal*. *Pouvoir édictal* was not the same as our legislative function. Rather, it was a manner for the Prince to deliver 'justice' under many different forms. There was no single act of State that could be singled out as legislation. Rather, there were many different legal formats (letters patents, ordinances, 'constitutions,' proclamations, letters *de proprio motu*, etc.). Second, there was a discrepancy between this haphazard practice of legislation and a more grandiose "princely metaphysics" (*métaphysique du Prince*), an expression which I have coined to denote a set of quasi-theological principles that justified the King's legislative power. Legislation was irregular and mostly corrective. But at an abstract level premodern Kings already affirmed their legislative power in a very assertive way.

The modern "legislative state" is one in which all these component parts of the premodern model are more or less reversed. I can only summarize here what the new framework looks like. Modern legislation involves a specific normative format (preamble, rational plan, separate articles,...) based on the Hobbesian model of law as a manifestation of the sovereign's will. It is also an instrument of government, which aims at furthering collective autonomy with two main goals: the maximization of well-being on one side; the promotion of individual rights, autonomy and dignity on the other side. I have called these the "categorical imperatives" of modern legislation.

As a matter of fact, this new framework of legislation is one which is closely associated with the idea of government. My targets here are the ideas of Michel Foucault and notably the way in which he distinguishes – too sharply, in my view – sovereignty on one

side, "governance" and "disciplines" on the other side. This is a complex debate which I can only sketch out here. But basically, I find it difficult to accept that legislation and government were as firmly partitioned as Foucault is inclined to think. Rather, I try to adduce as many evidences as possible to the effect that legislation was indeed an instrument of government, and that it still is.

V

The Enlightenment:

Towards a "*Nouvelle Positivité*"

In the seventeenth century, this new concept of legislation becomes at the very least thinkable through a variety of cultural projects. The most significant one is the idea of legislation as a science. This idea of a science of legislation must be set in the larger context of a series of development that took place at the crossing between the seventeenth and the eighteenth century. This is a new context of law and politics for which I only have found a French name: "*nouvelle positivité*." The reasons for this shift towards a new context of law and politics are at the same time intellectual and linked to more general features of political history. This new era has witnessed the rise of a new and fruitful relationship between law and politics. Its core features were: a new political stability, enabling the law to take a new form and become more effective; a new attitude of political philosophy with regard to power; a new legal philosophy: positivism; and, finally, a new moral project.

Some major European states (France, England) or at least some geographical entities (Germany, Italy), have gained sufficient political stability to justify the sense that an era of chaos that had begun with the religious wars of the sixteenth century had come to an end. At least, there is now little doubt about the capacity of the

sovereign to create new laws. The philosophical ideas developed at the same time are following a characteristic inflexion. The problem for many authors is not so much to establish or discover the foundations of authority. Rather, thanks to the move towards what we now know as the sovereign state, political thinkers tend to acknowledge the sovereign and identify him as an omnicompetent legislator.

European 'philosophers' in the eighteenth century are, in the main, reformist intellectuals who address political power-holders in order to suggest that they should aim at changing society. Many political writers do not question the legitimacy of kings and rulers. Instead, they try to take advantage of the state's effectiveness in order to induce the sovereign to enact laws, create new social institutions, foster new social arrangements and social forms.

At the same time, the modern concept of law as the will of the sovereign is now well established. Most of this concept of law could already be found in chapter XXVI of Hobbes' *Leviathan* ("Of civil laws," 1651): law is not a counsel but a command; the legislator is the sovereign (and vice versa); authority, not truth makes the law; law is identifiable through formal characters ("adequate signs"); law consists in the 'meaning' of acts of will and this meaning is to be identified through in the intention of the legislator.

This new concept of 'law' as 'legislation' is very well suited to a project of governing human conducts which is itself in phase with a deep change in the moral orientation of European societies. Charles Taylor has insisted on this shift of moral thought towards ordinary mundane life and earthly pursuits. This move is not entirely separable from our present concern. Legislation as we know it is also a result of this transformation of moral ideas. This is the shift towards a greater concern for what Cesare Beccaria has called the "happiness of this mortal life."

VI

Montesquieu and Rousseau

Three chapters in the book's second part are devoted to the legacy of Montesquieu and Rousseau. I will not attempt to summarize them, as this would involve a long and somewhat intricate delving into their respective thoughts. But let me just clarify why they appear in the book. A French reader, who happens to be a philosopher, has recently questioned this very point: why pay homage to Montesquieu and Jean-Jacques Rousseau in a book mostly devoted to the sciences of legislation? The response is straightforward: because it isn't one. This is a book about the rise of a new concept and practice of legislation in the modern age. In such a narrative, Montesquieu and Rousseau occupy a certain space, but one should be careful to say which one it is. In a nutshell: they are not the forefathers of modern actual legislation. L'*Esprit des Lois* and *Le Contrat Social* are by no means the blueprints for concrete lawmaking in modern European states. What they teach us is a different lesson. Each author comes up with a different, yet equally important, philosophy of political autonomy through legislation. Montesquieu's political philosophy of legislative autonomy is well expressed, I believe, in a figure of speech that I analyze in depth in chapter 6 ("*Comment parler des lois*"). He speaks of the "lois romaines," the barbaric laws or the feudal legislation as historical entities that are capable of a certain kind of agency: "the laws" do this and that, and through them, it is the "nation" that acts. Laws are the agents of the national character. It is as if individual lawmakers (emperors, kings, tyrants) had never existed. A direct link is established between a nation, or a people, and its laws. What Rousseau does is, unsurprisingly, more complex and more ambiguous. The chapter insists on the balancing between the abstract part of his theory of laws, based on the general will, and a "concrete part," which is less metaphysical and more empirical as

well as prudential: how Poland, Corsica or other sample polities should legislate their way towards freedom and virtue. However, the concrete part of Jean-Jacques Rousseau's legislative theory is much less developed than the abstract part and does not always lead to the same conclusions.

I have summarized the legacy of Montesquieu and Rousseau as being 'monumental' rather than 'instrumental.' They have aptly established legislation as the horizon of modern political philosophy. Yet they have not contributed to our legislative practice, which is much more instrumental than monumental. This is, for instance, the sense of my developments on Rousseau's general will as operating as a kind of 'screen' – in the sense both of a theatre screen on which we project our political ideals and of the "*souvenir écran*" (*Deckerinnerung*) of psychoanalysts, which in fact hides what really takes place in parliaments and statute books.

VII

The legal apparatus of a modern society: From Beccaria to Bentham

The landscape of political ideas in the Enlightenment is a remarkably variegated one. But, despite their diversity, many of these political projects share a certain insistence on legislation. This « legislation » could be the work of private drafters, or rather be enacted by a state authority. It could take the form of codes which, more often than not, were announced rather than enacted.

Yet legislation, the modern version of written law, is one of the horizons of modern enlightenment. The desire to legislate could be triggered by philanthropy – a desire to improve the human condition and reach a "science of human happiness" – or by a wish to regenerate society. Be that as it may, in the melting pot of

enlightenment ideas, legislation appears as the jack of all trades, the universal vehicle of political and moral projects. There is little surprise, then, that so many authors of that age may have agitated the idea that legislation should be turned into a science. The book attempts to describe this landscape before focusing more particularly on two great personalities: Cesare Beccaria and Jeremy Bentham.

They could not be more different and, in a sense, more complementary. Beccaria only contributed a small book of less than two hundred pages: *Of Crimes and Punishments*. Yet despite this apparently small achievement Beccaria is undoubtedly one of the midwives of modern legislation. The book is also remarkable by its insistence on concrete legislation, and its details. It is an outstanding example of the kind of intellectual shift I have tried to depict earlier on. Unlike Bentham, Beccaria does not aim at drafting a private codification. He is very much addressing his thoughts to the legislator, but does not wish to substitute his own work to that of the actual legislator.

Beccaria's legacy takes another form. My claim is that he stands as the creator of a theory of justice through legislation. Beccaria is a fox rather than a hedgehog: he builds his critique of existing criminal law on several principles rather than just one. The dominant atmosphere in *Crimes and Punishments* is empiricist. Beccaria draws heavily on Locke. At the same time, this does not prevent him from drawing on a metaphysical understanding of legislation. While he poses as a follower of Locke, Beccaria also claims that there are some "necessary relations" in nature. He also speaks of the "decrees which nature has put in the immutable relations between things."

The entry point into Beccaria's theory of justice could be found in one of the sentences in *Crimes and Punishments*: one should aim, says he, at bridging "the gap between the laws and the natural

sentiments of men." I will not go into the details of the intellectual foundations of *Crimes and Punishments*. But the idea of a potential contradiction in thought that, as a matter of historical opportunity, solves a concrete problem and defines a certain "moment" in time is appealing to me. I have also used it to describe, later in the book, the "*moment Portalis*" as a transaction between the lawyers' law of the *Ancien Regime* and the revolutionary and Napoleonic eras.

Bentham did the exact reverse of Beccaria: he wrote thousands of pages of legislation and arcane legal theory. He should be credited for thinking through many aspects of the modern state. He has theorized the moral theory of utilitarianism as well as many practical aspects of concrete legislation. He is far from ignoring the practicalities of law.

My approach to Bentham makes the claim that at the core of his overall project, there takes place a gigantomachy between two *Gegenbegriffe* (counter-concepts): irrationality vs rationality. He sees contemporary social arrangements as deeply irrational. His response to this state of affairs is a fully-fledged project of rationalizing human action. Bentham's theory fits quite well into what James Tully has called a new framework of "governing conducts" in the modern era, in which legislation plays a central role. Bentham is certainly one of those who have achieved this result, by placing legislation at the forefront of the utilitarian ruler's strategy of welfare maximization.

VIII

The return of "lawyers' law"

Bentham has influenced the Victorian reformers and later technocratic thinking. Beccaria has had enormous influence on penal reform up to the present day. The sciences of legislation may

have failed as such but they have paved the way for modern technocracy and social engineering. The project of welfare maximization has been taken up by economics and economic policies. Yet to a large extent, law has remained what it was: an internal project of rationality (Coke's "artificial reason of the law") that was extremely reluctant to become a subordinate instrument for the social sciences. The sciences of legislation aimed at taking power away from the class of professional lawyers which was subject to a direct and scathing critique in the later Enlightenment (Bentham, Beccaria, French Revolution,…).

But philosophical reformers failed to acquire the « know how » with which to implement legal reform in social life. The scientific approach to legislation has collapsed because it has not been able to offer a substitute of to the time-worn methods of legists when it came to making and implementing laws. The capacity to « govern men » in private arrangements (drafting deeds or sales of land) or in public lawmaking (drafting regulations, ordinances, decrees, statutes,…) has remained with the professional experts.

The science of lawmaking and lawfinding has always remained the business of the class of professional lawyers and state legists. This return of professional lawyers and lawyers' law was accompanied with a return to a more traditional understanding of reason and legal rationality. These *jurisperitii* (legal experts) were not mere practitioners. They had a jurisprudence and a social theory of their own, which was mostly based on pre-modern natural law and aristotelian philosophy. The legal rationality of the past thus made a remarkable return.

Classical philosophy understood 'true' law (*vera lex*) as 'right' reason ("*recta ratio*") guided by a moral "upright intention." It is important to observe that this understanding of legal rationality has made a significant come back in law and legislation in the late eighteenth century and in the nineteenth century. This is true of

the drafters of the French civil code of 1804. Most of them were trained during the late *Ancien Régime* (Portalis, Bigot de Préameneu,…) and were versed in the writings of French eighteenth century legal writers (Domat). In fact, many of the French revolution's legal experts had a similar training. Revolutionary law was not drafted under the guidance a revolutionary legal science, something which in fact never existed. We can also witness this return of traditional legal science in the English speaking world. In England, the "common law mind" has never lost any ground. In the U.S., a very prudential approach to legislation prevailed in the early years of the American Republic. Finally, a quite similar narrative, with a very different intellectual background could be written about Germany.

IX

Economists and classical liberals

I won't even try to sketch the shift from the eighteenth century projects I have covered and modern political economy. Political economy has acted as an external rationality, aiming at constraining lawmaking from the outside. This process is based on what I see as a divergence between legal rationality and economic rationality. A good example is the move from Adam Smith's "science of a legislator" to David Ricardo's "political economy." Smith's somewhat unclear intellectual project has not succeeded. With Ricardo, political economy has diverged from law.

The last chapter in the book is devoted to the 'blindness' of classical liberal authors, especially Benjamin Constant, on the topic of legislation. Based on an analysis of certain key texts, I try to

show that Constant,[3] and after him an entire thread of classical liberal thought , has not been able to see that the modern industrial and individualist state stood in dire need of a great volume of legislation. The classical liberal – and today neo-liberal and libertarian – denunciation of abundant legislation is a self-defeating myth. Modern capitalism and the modern individualist society stand in need of a plentiful supply of legislation, as the historical evidence adduced in the book attempts to demonstrate. There is no way back: we will never be able to do without a thick statute book. And if we do, other types of regulations will take over, at the expense of the democratic added value of representative parliaments. If this book serves only one purpose, it might be – or so I would hope – to dispel the mythology of a state that would legislate "only with a trembling hand."

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[3] But not *all* the classical liberals. Notably Tocqueville, on whom I plan to publish a separate piece in the future, stands out in this regard as a supporter of moderate legislation.

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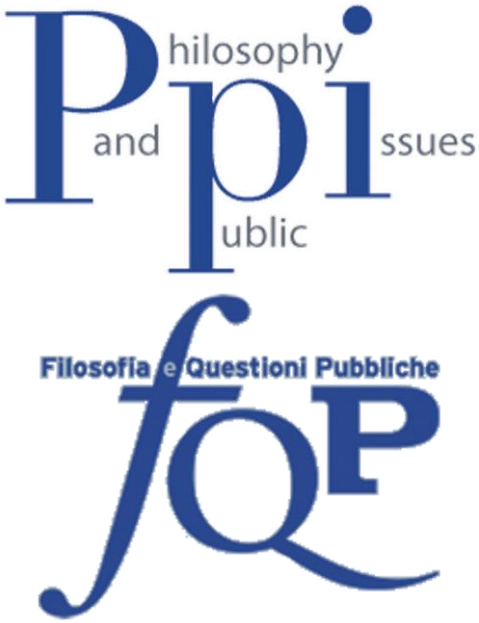

LAW AND METAPHYSICS
A NOTE ON DENIS BARANGER'S *PENSER LA LOI*

BY

AMNON LEV

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Law and Metaphysics
A note on Denis Baranger's
Penser la Loi

Amnon Lev

We do not normally associate law and metaphysics. More so than any other intellectual formation to which we might compare it – religion, art, the economy –, law is, it seems, grounded in the *pragma* of everyday life, so much so as to resist the move towards the metaphysical realm. It bears testament to the remarkable nature of Baranger's work that, where most would despair of distilling from the law more than a catalogue of disjointed philosophemes, he shows not one but two metaphysical systems to be at work. One springs from the *architecture* of the law; the other from its *practice*. As we shall see, the two systems map onto very different projects of law, of which one is political and one jurisprudential. We shall first consider how, and to what ends, each of the systems of metaphysics uses law. These are question of considerable philosophical import, and constitute stables of legal theory. But ultimately, the interest of Baranger's work rests in the way he conceives of the *interaction* between the systems. If each aims at, and achieves, some sort of resolution, it is not given that the relationship between them admits of one. As we shall see, it is here that Baranger's work provides a platform for interrogating the nexus of philosophy and law.

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I

Metaphysics and Political Modernity

The first metaphysical system is generated by the operation of modern public law. The theme of modernity is only discretely present in Baranger's book, but the defining characteristic feature of *modern* public law is the fact that it, unlike the Ancients, modern publicists operate a distinction between the laws and the constitution. This distinction reflects the preoccupation of the Moderns with the unity of the body politic, of which the constitution is supposed to be foundation. The hierarchy thereby introduced into law is, quite literally, a matter of perspective, a matter of how one interrogates the law. It is clear that, on Baranger's understanding, none of the entities that people this first metaphysical system have any subsistence outside the perspective, or language game, if you will, to which they are tied. As with languages that have the capacity to blend into each other, so the two metaphysical perspectives co-exist, and overlap, both within a given historical situation and within the work of a particular theorist. If the eighteenth century is, on the whole, a century of legal law, the picture that emerges if we consult the works of some of its preeminent legal thinkers is a more complex one: "In a concerted and critical conversation with their seventeenth century predecessors, some legal thinkers, and not the least important ones, continued to examine the law in terms of its foundations rather than its concrete content and capacity to advance the development of government and the State" (Baranger 2018, 115).[1]

Baranger gives a metaphor for this co-existence of two distinct perspectives on the law, a metaphor to which he returns at critical

[1] All translations are by the author.

junctures in his book and which we shall therefore interrogate not in its individual applications but at a general level where it organises his text. The different forms, and metaphysics, of law are like the two sides to the same coin, inextricably linked and so always present, though not intuitively given, at the same time. Seemingly stating the obvious, Baranger tells us that "[when] you are looking at one side of the coin, you cannot see the side that is hidden. Nonetheless, it is there" (*ibid.*, 110).[2]

This hiatus between what *is* and what *is given* is crucial to his theory of the law. It is the source of the dialectical movement of political modernity, of which the law constitutes the primary axis. Modern political power is tied to the law, and it demonstrates its pedigree as secular law by being founded on power alone – the Hobbesian dictum that what makes law is not truth but authority. Baranger is well aware that there is more to Hobbes' political theory than these bare bones, but insists nonetheless that they make up the skeleton of the modern theory of legislation. More so than any other thinker, Hobbes was instrumental in laying the foundations of the modern theory of legislation (*ibid.*, 64). At the same time, Hobbes' theory, with the distinction it makes between the form and the content of the law – other two sides to a coin –, is just the opening move that kicks off the dialectical movement. If the two sides of the law must remain distinct, their non-identity cannot be the last word. With the foundations of the law in place, theorists would turn their attention to the workings of the laws. Standing on the shoulders of Hobbes, they would attempt to bring together what he took apart. The project of *constructing the moral world* that Baranger associates with the legislative state of the eighteenth century is an attempt to map one side of the coin (theory) onto the other side (practice) by taking "right" conduct as

[2] Cf. also *ibid.*, 100.

the object of legislation, bringing the law to bear on that which conditions its work.

This line of enquiry leads Baranger to take an interest in what he calls the philosophical codices of the eighteenth century; attempts by publicists like Savigny, Filangieri, and Bentham at operationalising natural law into rule-based systems of conduct that extend to everyday life and can, for having the form of law, be enforced by the coercive apparatus of the state. Baranger is breaking new grounds in foregrounding the overlooked legislative proposals of these men who would often double as privy counsels and so were in a position to determine how society was governed. This is not the least of the many merits of his book. One suspects that others will follow suit, so compelling are his arguments. One also suspects that Savigny *et al.*, being men of moral conviction and principle, would feel deeply uncomfortable with the instrumental, quasi-Machiavellian rationality that Baranger, in a sort of ruse of reason, finds to be at work in their codices. For our purposes, the interest of his account is the significance he attaches to the *concrete* nature of legislative practice, which is the basis of its primacy over philosophy. The word returns almost obsessively in Baranger's text, marking out the distance that separates philosophical theory about the law from its object. Philosophical theory, of which he takes Montesquieu and Rousseau to be exemplary, may teach us "profound political truths about the law that we do not call into question," but this philosophical theory could not "fully instantiate itself (*s'actualiser*) in our *concrete* governmental practices" (*ibid.*, 107, my emphasis).

The incapacity of philosophical theory to reach all the way down to governmental practice warrants a certain indifference to theory on the part of practice. If Montesquieu and Rousseau are indispensable to an understanding of political modernity, and the

place law occupies in it, their theories leave us wanting in relation to the concrete practices of legislation:

> In seeing how the great authors we have encountered [Montesquieu and Rousseau] speak of legislation, we can gauge how ill equipped classical political philosophy was to deal with the transformations of European society. To sum up, we might say that the philosophy of Montesquieu and Rousseau was monumental, not instrumental. Better than anybody, they were able to delineate the political horizon of the law, [identifying] the basic meaning of the legislative project as a political project. But subsequent legislative history would, to a large extent, deal in the instrumental rather than the monumental. And the instrumental component had no reason to align itself on abstract political projects. (*ibid.*, 135-6).[3]

Philosophical theory is flawed because, being monumental, it is *abstract* and so unconcerned with the business of legislation. This is why legislators need not concern themselves with the strictures of philosophical theory. The flaw, however, is not a fatal one. The truths philosophy articulates about the law are just that, truths, only their domain of application is limited. Philosophy articulates the political truth about legislation, but there is more to the practice of government than politics. A comprehensive theory of legislation would need to cover governmental practice and philosophy, and the mode of their implication.

The first of these planes concerns government. Striking a balance between philosophy and the practice of legislation imposes moderation in the production of laws. A society that believes it can ground itself by legislating incessantly is a society that does not rest on the foundations philosophy has put into place. Seen in this

[3] Cf. also *ibid.*, 100.

perspective, the proliferation of legislation, and the rise of constitutional review which, as Baranger notes (*ibid.*, 10 and 141), calls into question the legitimacy of the law, is a sign of a crisis of metaphysics, a sign that the metaphysics of the laws lacks purchase on the Real it is supposed to order. It is also, one might say, a sign of a modernity that is forever getting more entangled in the modern project.

There is something profoundly Hegelian about the way Baranger situates the law within the state. As in Hegel's work, the law straddles the line between the two dimensions that make up social reality. It partakes of both the monumental and the instrumental which distinction aligns, albeit not perfectly, on the distinction Hegel makes between what, in social reality, is transparent to philosophy and what is merely factual and so does not rise to the level of the Concept (Hegel 1970, § 214, 366-7). To both Baranger and Hegel, the law is a point of intersection between the two dimensions, and, when successful, ensures a balancing of them. One might object that, unlike Hegel, Baranger locates the actuality (*Wirklichkeit*) against which social reality and thought are to be measured away from philosophical theory. But what, at first glance, looks like a regression to a pre-Hegelian position in fact sets up a Hegelian move that takes us from one project, and one metaphysics, of the law to another.

The closeness of the fit that exists between legislation and human conduct, as reflected in the *concrete* nature of the former, serves as a standard not only for legislative practice (which must strive to mediate between the universal and the particular) but also for philosophical theory itself. It is not that theory is called to eclipse itself in practice. Rather, theory must express itself in another idiom, one that is tied to a specific practice. It must adopt another language in order to gain traction on social reality, or

rather, it must situate itself differently in relation to social reality, in which connection it becomes tangled up with law:

> This is why, from the moment philosophy sought to effect change (*devenir agissante*), to actually be practical so as to impact on the social reality of its time, it could not find the requisite surplus of reality and authority elsewhere than in an already existing and well-functioning idiom of human life: that of the law of jurists, especially that of Roman law. […] In order to become the real language of human affairs, philosophy had to extend its domain to encompass law (Baranger 2018, 174).

The significance of this passage cannot be overstated. In it, philosophy, which has always reserved for itself the question of defining what it, is overtaken by an idiom that carries a surplus of reality, which gives it more immediate purchase on what goes on in the world. This is, at the same time, a *demotion of philosophy* and the *fulfilment of its most fundamental ambition*. In relinquishing its privileged access to the world, its superiority to other discourses, philosophy becomes the world-wisdom (*Weltweisheit*) as which Hegel defined it (Hegel 1968, IV, 924). What happens in the above passage is nothing less than the *Aufhebung* of philosophy in the direction of the law. Like the law, philosophy must become concrete. Where it would formerly speak of the law only in an abstract way, as the conduit of sovereignty and as an element of the trinity of powers, philosophy must now concern itself with the ever-growing legislative output of States (Baranger 2018, 15).[4] It must embed itself within the law or, rather, the laws.

Ultimately, everything in this operation hinges on the choice of examples. Baranger is right to point out that Montesquieu and Rousseau have been instrumental in shaping our conceptions of

[4] Cf. also *ibid.*, 91.

the law; their work is a constant reference in our efforts to understand the law (*ibid.*, 106). But if the inclusion of these two thinkers is self-evident, what Baranger does with them is less obvious. In contrast to the standard approach, which is to focus on the differences between their philosophies, he is concerned to bring out the commonalities between them, the "striking analogies" that exist between their metaphysical representations of the world. Baranger does not employ the image in this context, but we might say that their philosophies share the ambition of making the leap from one side of the coin to the other, the ambition of arriving at a determination of *what is* from *what is given* (where givenness refers back to the particular vantage point of a theory). To the Baron de la Brède, this means knowing the material world by its laws; to Jean-Jacques, it means changing social mores so as to render men fit to be governed by the laws.

The methodology of the philosophical theory of the laws that we find in Montesquieu and Rousseau determines the valence of theory. The attempt to mint the two sides of the coin from the same cast engenders the singular play of identity and difference that, to Baranger, constitutes the metaphysics of the monumental. It also situates theory at a high level of abstraction, at a distance from the *pragma* of government. In telling us that "something is keeping these two grand figures of our politico-philosophical theory of the law at a distance from the concrete reality of legislative modernity" (*ibid.*, 119), Baranger is not only pointing to a limit of two particular philosophical theories. He is pointing to a *limit of the metaphysics* of which they are the ideal types. As we shall see, this does not spell the end of the conceptual adventure of metaphysics in law, far from it.

II

The Other Scene: Metaphysics and Diachrony

Throughout the first three parts of Baranger's book, philosophical theory is found wanting for not being able to deal with the actual practices and usages of legislation. As we embark upon the fourth, and final, part of the book, we discover that legislation alone will not suffice. It may have the advantage over philosophy because it is concrete, but this, we now learn, is not enough (*ibid.*, 267-8). The science of legislation that eighteenth century theorists were looking to elaborate rested on the naïve supposition that the laws, as laid down by the legislator, would be self-executing and change society without the need for further intervention. Against this mechanical model, Baranger introduces a conception of the law's development that ties it to the figure of the judge. Legal history is there to remind us that law is no more self-executing than it is self-sufficient; it develops "situationally" (*en situation*), as a function of the contentious cases the judge is called to decide (*ibid.*, 269, 270).

In the text, the move from philosophical theory to legislative practice to adjudication is a seamless one. The judge may no longer be simply the mouthpiece of the laws, as which Montesquieu defined him, but he is still merely an enabling condition of their successful operation. But clearly, more is at stake. With the transition to adjudication, we leave behind the conceptual opposition between abstract and concrete that served to frame the enquiry into the nexus of philosophy and legislation. Adjudication is not situated *between* the abstract and the concrete, the poles of philosophy and legislation, because it is both. If the knowledge (*science*) of jurists touches on the particularity of men's life, it also contains, at its core, an abstract conceptualisation of the world of human action and social relations. The opposition of abstract and

concrete, and the movement between them, is replaced by a unity that is articulated in terms of the abstract and the positive:

> Legal thought has always been both "abstract" and "positive." This, in fact, is the domain of law (*droit*). Law is abstract but aims at the positivity of human existence. To say of law that it is "abstract and positive" is a way to escape the opposition of abstract and concrete. Law is abstract because it is analytical and works by generalisation. Beyond a certain level of positivity, nothing is more concrete than law (*ibid.*, 267).

Positivity, we learn in the above passage, is concrete above a certain level, which would seem to imply that what is positive law is not always and everywhere concrete. This would be to misread Baranger's text. Granted, it is not entirely clear wherein the positivity of the jurist's law consists, and how it differs from the concreteness of legislation. Baranger gives us an indication of what he is thinking about; the law of the jurist is "pragmatically superior" to the law of the legislator. In qualifying the superiority of the jurist's law in this way, Baranger is, I think, referring back to the ambition of effecting social change through law that warranted the move from philosophical theory to legislation. What grounds the primacy of the jurist's law is that the judge – its emblematic figure – is more deeply and more immediately implicated in the work of doing things with the law. For being so closely bound up with of social action as to be almost indistinguishable from it, this form of law trumps the law of legislation. When successful, the latter reaches all the way up to human existence. It is as *concrete* as the human life it models and purports to regulate. But the law of the jurist goes further. Rather than to model human life, it puts in place a conceptual structure capable of being iterated over a large population which it then treats as a social reality, on a par with a person. The law of the jurist is, of course, both abstract and

concrete, but just as we would not say of a person that he or she is abstract or concrete, we would not use those terms to describe the jurist's law. The jurist's law simply *is* which is why it offers a means of escape from the opposition of abstract and concrete, as Baranger tells us in the above passage.

We should, therefore, not think of the positive law of the jurist as being substantively different from the concrete law of legislation, but as being differently situated, or rather situated within a different realm where the opposition between concrete and abstract has no place or, rather, is itself an abstraction. This might, at first glance, seem to beg the question inasmuch as it is only by positing the existence of a vantage point that is not situated between the abstract and the concrete that we can speak of such a realm. But in trying to untangle this *petitio principii*, we would miss the point that Baranger is making, viz. that what separates the two projects of law is not a difference of degree but a fundamental difference in how the worlds to which they belong are structured.

We access the world of the jurist through the work of Jean-Étienne-Marie Portalis. What it shows it that, in the world of the jurist, the semantic rules and distinction that structure the world of the metaphysics of the monumental do not apply. Adjudication straddles the line between different, and competing, sources of law. It also straddles the line between different temporal strata of law. Portalis moves effortlessly between the position of Montesquieu (in deriving the laws from the given social relations) and of Rousseau (in distinguishing between laws that come about through sovereign acts and rules that emanate from the judicature), at the same time as he insists that legislation is conditioned by the jurisprudential acquis that has built up from time immemorial (*ibid.*, 281-2).

The diachrony of adjudication has its condition of possibility in a move from political macro-history to the *granularity of social micro-*

history. The objective of the law is no longer to dovetail with the founding acts of the commonwealth – the overriding imperative of the metaphysics of the monumental[5]– but to construct a social bond around the resolution in law of contentious cases (*litige*). This minimalist, transactional conception of human society correlates with an understanding of social life as essentially open-ended. No code exists that could determine in advance the myriad of cases to which legislation might give rise. In consequence, the work of the jurist, which consists in adapting legislation to social life, correcting for its shortcomings and overreach, is unending. This has important ontological implications. For one, it means that the world is not something out there, an object the jurist must first intuit and then align his theory on; rather, the world is something the jurist is always called to construct.

As we have seen, this was already the ambition of the philosophical codices of the eighteenth century. But that construction moved within the world of political modernity, a world that is, in equal measure, a world of *action* and of *science* that would be subject to the same laws. In contrast, the construction undertaken by the jurist is unconcerned with how the rules it lays down map onto the domain of another science. In fact, the jurist does not recognise that the dictates of other sciences are relevant for the world he inhabits. That world is subject to its own laws because the stuff of which it is made is *sui generis*. In establishing the rules of marriage, Portalis does not look to something outside of the social institution we call marriage (*ibid.*, 288). It is from the institution that he determines what should be the rights and the obligations of spouses. Law is its own yardstick, its own source of

[5] This is why Hobbes insists that no relevant difference obtains between a commonwealth by acquisition and a commonwealth by institution. Both are entered into out of fear (Hobbes 1994, II, xx, 127). The element of violence that defines the realm of history is thus taken back into theory.

being. This definition sets the stage for a final twist in the story of how law and philosophy intertwine. At this point where we would seem to be furthest away from the traditional domain of philosophy, we find that we are right back in the thick of it.

> Until now, the general movement was to reject the notion of essences, dismissing the possibility of knowing "the thing in itself." And yet, the distinguishing feature of the jurist's law, that which, always and everywhere, makes of it the *vera philosophia*, is that it is the last form of knowledge in the Occident that can lay claim to have access to the essence of things. Law does not have to give an account of itself to philosophy because it belongs to a world of entities that are not of the order of nature nor of natural science. Law is the last great metaphysics, and the last that is still going (*ibid.*, 288-9).

Baranger makes several points in this dense passage. As we have seen, one point concerns the ontology of the objects of law. Another point concerns metaphysics. A curious inversion has taken place. Where theory was formerly called to overcome metaphysics, it now proudly repositions itself as metaphysics, indeed the last of its kind. It is clear that, whatever else it may mean, the return of metaphysics signals the resolution of tension. In the jurist's law, the different aspirations and ambitions of modern life are reconciled. *In the last metaphysics, the duality that opened up the space of a metaphysics of the monumental is healed*. This allows Baranger to revisit the metaphor of the coin one last time. The *ergon* of the jurist, the activity that defines him as a jurist, represents the resolution of tension. In his activity, the two sides of the coin come together. This is why Baranger describes the skill (*savoir*) of the jurist as "this two-faced coin."

We might well ask why he chooses to retain the reference to metaphysics, setting himself apart from a philosophical tradition dating back to Hegel that has seen the healing of the metaphysical

rift as the way to finally exit metaphysics. In part, his reasons are no doubt strategic. Baranger is too well versed in the history of twentieth century philosophy to believe that theory could ever leave metaphysics behind. Seen in this light, the option he takes on metaphysics is a defensive move designed to preempt objections that could be made to his theory, without engaging its substance. It is an open question whether this move will ultimately be successful. Does not the intuition of unity that defines the jurist's law depend on the awareness that law is not everywhere unitary; that it is also, indeed for the most part, suspended between opposing poles of human life? If so, embracing metaphysics may not fundamentally change the situation of theory. To be sure, we can no longer tax theory, and the lived experience on which it proceeds, with naïveté for believing that it is untouched by metaphysics. But in positing a specific metaphysics – the last – as (a specific instance of) lived experience, Baranger retains philosophy's traditional mode of seeing the implication of theory and existence. What follows existence like a shadow is no longer *metaphysics*; it is *the other metaphysics*. But lived experience continues to be haunted by another scene where the action plays out according to a different script. In this sense, the re-appropriation of metaphysics as law would be a reenactment of the exit from metaphysics, and of the impasse of that exit. The impossibility of ever escaping metaphysics would be the impossibility of escaping the *duality of metaphysics*.

Baranger is clearly aware that the "last" metaphysics is not the last word on the matter. The misgivings he voices about the implication of judicial review in government by the law shows that what may hold from the vantage point of a specific metaphysics may not provide a full account of the system of government to which this metaphysics is tied, thus opening up his theory to the very objection he makes to philosophical theory of legislation, namely that it lacks purchase on practice. To be sure, judicial

review is necessary to make the machine of government run, but it is as epistemologically unfounded as the legislation to which it provides a corrective. We no more possess a theory (*science*) of adjudication than we do of legislation (*ibid.*, 306).

It is fitting that this book which, underneath its very polished form, is born of an uncompromising commitment to truth, to use an old-fashioned term, should, in its very last lines, throw up a series of questions that are harder than the one it set out to answer. Perhaps the hardest one concerns the relationship of theory to philosophy. Does the ending mark the final parting of the ways of philosophy and public law theory? Or does the incapacity of the last metaphysics to account for the actual practices of government open up a venue for philosophy, traditional philosophy, not the *vera philosophia* of the jurists, to make its return? If so, what form would it take? If the methodology of Baranger's work points in the direction of Hegel, the drift of his analysis points in the direction of Locke, about whom Baranger has written wonderfully incisive pages that show just how far philosophy can go in articulating institutions of law (which may well be why Locke is only discretely present in the chapters of philosophical theory of legislation where he would have offered something like a third way between Montesquieu and Rousseau).[6] Hegel or Locke? What is at stake in

[6] For Baranger's brilliant analysis of the metonymy of powers in the work of Locke, see Baranger 2008, 82-90. To offset the impression that it is all but inevitable that the Lockean impulse in Baranger's work win out, it bears noting that Hegel, as he contemplates the repercussions of the French revolution in contemporary Europe, cannot help but wonder if there is more to the English constitutionalism than he suspected. With disapprobation he notes that, unlike the French, the English have no taste for general constitutional principles like freedom and equality but instead stand on their age-old venerable rights: "Did the culture of the English nation make it too insensitive (*stumpf*) to understand these general principles? But in no other country has freedom been the object

this binary is where, at which level of meaning, law intersects with existence, at the level of the social totality or of the individual. If the fluidity of Baranger's writing will, at times, make us believe that moving between them is always an option, it is the great merit of his work to have shown that we may not be able to have both. In fact, we may not be able to have either. There may not be a philosophy that can span the divide between the levels on which law is supposed to operate. Worse still, law may not intersect with existence on either of these levels. These are the urgent, and deeply uncomfortable, questions about law that Baranger leaves us with.

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References

Baranger, Denis. 2018. *Penser la Loi. Essai sur le législateur des temps modernes*. Paris: Gallimard.

_____. 2008. *Écrire la constitution non écrite. Une introduction au droit politique britannique*. Paris: Presses Universitaires de France.

of so much thinking and public debate. Or was the English constitution already a constitution of liberty, were these principles already effective in the constitution and hence were not met with resistance or indeed with any great interest?" (Hegel 1968, IV, 934).

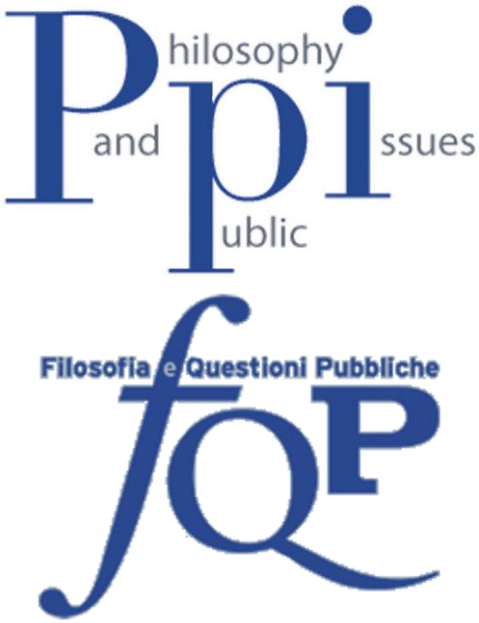
Hegel, Georg Wilhelm Friedrich. 1968. *Vorlesungen über die Philosophie der Weltgeschichte*. Hamburg: Verlag von Felix Meiner.

_____. 1970, *Grundlinien der Philosophie des Rechts* (1821). Frankfurt: Suhrkamp Verlag.

Hobbes, Thomas. 1994. *Leviathan. With selected variants from the Latin edition of 1668*. Edited, with Introduction, by Edwin Curley. Indianapolis: Hackett Publishing Company.

SYMPOSIUM

DEMOCRACY AND LAWMAKING



THE SPIRIT OF LEGISLATION

BY

THOMAS POOLE

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The Spirit of Legislation

Thomas Poole

The tendency to downplay the study of legislation I had thought an Anglo-American disease, the byproduct of our obsession with adjudication in general and the common law in particular. One of the few comforting things about Denis Baranger's elegant, erudite but consistently challenging new book is that it unsettles this assumption. It would appear that devaluing legislation as an object of scholarly enquiry is a more prevalent disease, one apparently immune to the long-established primacy of legislation within political life.

But it is not just the jurists who have a complicated relationship with legislation. The same is true, though for different reasons, of the citizenry at large. Legislation answers the particular needs of modernity for government and self-government. It facilitates the organisation of complex social interactions on the basis of a publicly accessible and presumptively coherent grand plan. In so doing, it can be said to produce order out of what might be chaos. As the primary expression of the body of citizens acting in the interests of the collective, it can also reinforce unity out of what might otherwise be a fragmented plurality. For all this, Baranger is surely right to detect that disenchantment with legislation has become a Europe-wide phenomenon (Baranger 2018, 10-1). We

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recognise the need to enact laws, and in fact do so to an unprecedented degree. And yet it is hard to ignore the sense of diminishing returns from all this activity. We perceive this not just in practical terms, by means of a devaluation of the legislative technique, but more profoundly in cultural terms through a loss of our sense of - even a belief in - the legislative form.

This is no trivial matter. What we might call the spirit of legislation embodies a host of political goals, ideals and desires. "The exercise of legislative power, far from being anodyne, concentrates all our political aspirations." To lose faith in legislation threatens the much broader political project of living in societies capable of governing themselves (*ibid.*, 12). *Penser la Loi* sets out to explain our current dissatisfaction with legislation by means of an intellectual history of the modern legislative form. Though it reaches back to the medieval period, the narrative centres on the eighteenth century, where the author is not alone in detecting a new philosophical project combining a grand political goal (collective autonomy) with the aspiration to reform society by means of the construction of a science of legislation (*ibid.*, 14-5). Among these philosophers of legislation Beccaria and especially Bentham get special billing. Their reform project was made possible by the ground-clearing endeavours of the state theorists of the previous century. Hobbes in particular – 'great gravedigger' of the medieval polity and 'midwife' of the new world order (*ibid.*, 59, 61) – inaugurated a modern worldview in which legislation became the closest thing possible to an act of sovereignty, and where the state itself could be conceived first and foremost as an entity which legislates (*ibid.*, 47).

In case this spare summary gives too stilted an impression of the work as a whole, there are a number of elements and themes that cut across or complicate the analysis in intriguing ways. Baranger pays serious attention, for instance, to what for him are

false starts in the genesis of a science of legislation – Montesquieu and Rousseau. To be sure, this analysis serves a practical function in as much as many today, especially in France, tend to trace the origins of modern legislation to either or both these sources. It is possible to detect in these thinkers large-scale reflections on society and its political and moral resources. But an essential element of the modern account of legislation eludes them. For all their differences, Montesquieu and Rousseau shared a legal epistemology according to which the objective of the legislator was to ensure that the laws that were passed were such as were suited to the basic temper and moral character of a particular political community. They had as such little understanding of the transformative capacity of legislation: a technique for imposing new plans and new orders on society (*ibid.*, 151). To invoke Max Weber's distinction, they both understood 'positivity' of law in its basic sense of the *source* of a law as an expression of the will of the legislator; but had no clear idea of positivity in a second sense, that is, relating to its *function* – "its capacity to place itself at the service of rational projects aimed at altering social reality" (*ibid.*, 92).

While the chapters on Montesquieu and Rousseau represent a detour of sorts, a more substantial theme relates to the interplay between will and reason. This first appears in a stylised jurisprudential rendering of the medieval polity. Here, Baranger juxtaposes voluntarists (or nominalists) like Ockham with rationalists like Aquinas. What initially separated the two schools was their understanding of natural law. The former stressed the centrality of divine will; the latter saw it more in terms of an intellectual act on God's part through which we might comprehend what is right and wrong. These positions clearly have a legislative analogue, however, the former emphasising the essential structure of legislation as a command, the latter insisting that it is also and ultimately a work of reason (*ibid.*, 36-7). It is fascinating to watch Baranger trace the competition between these

two facets of legislation, will and reason, through the development of the modern idea of legislation and right up to the present-day tension between political and juristic conceptions of legislation (*la loi politique* and *la loi juridique*).

There is much to admire in this fine book. My comments relate to a number of its central theses. The work's centre of gravity lies squarely in the late eighteenth century, specifically the period from the 1760s to the 1800s – between the publication of Beccaria's *On Crimes and Punishments* (1764) and Bentham's *Fragment on Government* (1776) to the inauguration of the Civil Code under Napoleon in 1804. Indeed, the entire second half of the book (chapters 8-15) is devoted to that period, which is also where the story it tells effectively ends. My three main reflections target respectively that period's past, present, and future. First, I investigate Baranger's account of the move into modernity, focusing on his reading of Hobbes. My aim is to amplify that account. We can accept that the will (or command) element to law and legislation predominates in Hobbes's theory. But I say more about how reason is not displaced but relocated, assuming a vital structuring role within the interstices of the justice system imagined in *Leviathan*. Second, I argue that Baranger's interpretation of later Enlightenment thought misses a trick. Writers of the period, notably Hume and Smith, integrated the characteristically modern element of 'interest' into the study of politics, complicating in so doing the classic 'will versus reason' debate on law and morals. The implications of this omission are important, not least for understanding Bentham's project, which plays a starring role in the book. Third, I work beyond the book's compass, discussing the way that a Benthamite conception of legislation intersected with the growth of representative democracy, and the changes to the nature of legislation and our expectations of it that were entailed by the advent of the administrative state.

I

Reasoning through Hobbes

The antagonism between will and reason provides an anchor point in the narrative. The solution to that antagonism, in as much as there is one, was to bind the two together within the legislative capacity. In an important passage, Baranger writes that "contemporary legislation is in effect the result of a historical synthesis between a voluntarist recalibration of the idea of law [*loi*] and an internal, unceasing, working out of the rationalist preoccupation." He continues: "Voluntarism and rationalism are no longer in opposition: the same government can be understood simultaneously as a sovereign legislator according to a voluntarist mode of thought and as the leader of a political and moral project of promoting rights and well-being." (*ibid.*, 58)

A key moment concerns the move into the modern world - from the estates of princes to the sovereign state. Baranger is clear that Hobbes, though not the sole inventor of the modern idea of legislation, was transformative. It was he who cut the Gordian knot that tangled legislation up with other feudal techniques of rule (*ibid.*, 59). Hobbes unquestionably took a scythe to medieval forms, eradicating any site of political authority other than the state, whether seigneurial, religious or guild. The only thing left standing was law – or more precisely the artificial (legal) structure of rule, sovereign within its domain, and endowed with sufficient force to sustain it. As a formal entity, its primary mode of expression took the form of a formal, public instruction or command: in other words, a cleaned up and enhanced idea of legislation. And given the absence of much else that might induce subjects to obedience, such legislation naturally becomes the repository of the political ambitious of society and the receptacle of its moral judgements (*ibid.*, 58-9).

Baranger goes on to say that the Hobbesian model of legislation combines will and reason. But he doesn't explain clearly why this is so. The will element is more obvious in the theory. Law, after all, is defined as the *command* of the sovereign. As such, legal obligation is grounded in the will of the sovereign agent – *auctoritas non veritas facit legem*. But we need to be careful when reading Hobbes, who often says something apparently definitive only to claw back some of it later. Now, it is clear enough that Hobbes expects the sovereign to act rationally, most obviously in the exercise of its legislative capacity which, as Baranger notes, is its paradigmatic function. If not, then the theory accommodates the possibility of the arbitrary (unreasoning) exercise of power. And if that's right, we've escaped nothing by entering into the civil condition, but merely jumped out of the frying pan into the fire.

But how is that expectation of rationality reinforced? Hobbes doesn't offer a constitutionalist solution, even though such a response (even before Locke) was available.[1] Baranger identifies where Hobbes's solution is to be found – Chapter 26 of *Leviathan* – but not what it involves. That chapter provides an account of how the expectation that the sovereign acts rationally is reinforced by the judges. There are two noteworthy aspects to this solution, the first relating to *powers* and the second relating to *personnel*. (1) Hobbes is clear that the judges are the sovereign's judges – that is, part of the internal apparatus of the state. On the other hand, he also says that they are to interpret legislation – and he regards legislation as always in need of interpretation – not only with a view to the intention behind the legislation but also to ensure, so far as it is possible, that it is consistent with principles of equity. (Equity being the word he reserves for natural law when discussing its application in the civil condition. And natural law being a series of propositions or 'theorems' of right reason.) Hobbes envisages a

[1] See Loughlin 2007.

system of what we would call judicial review in which judges examine the lawfulness of legislation not just on formal grounds (e.g. publicity) but also on substantive grounds (e.g. equity). It is here where the reason of the law is to be argued over and ascertained.[2] (2) The judges are the sovereign's judges, we know. But that does not make them his minions. Hobbes envisages independent-minded judges. Not that he favoured a professional cadre of judges: he certainly did not want a bench stocked with common lawyers, whom he distrusted. What he envisaged were equity specialists – that is, specifically, those adept in moral reasoning.[3] The rationale must be this: only judges with this profile can make sure that the key task of exposing law to reason is realised.

Now, there are various weaknesses with Hobbes's theory. We are still left with a series of credibility problems at both the macro level – why would the sovereign choose to go through law rather than power, other than it being in its long-term interest to do so? – and the micro – when wouldn't the sovereign just pack the court with those it knows will do its bidding? But that is not our present concern, which relates to the position of Hobbes within Baranger's narrative arc. If Hobbes is the leading architect of the modern conception of legislation and if, as the book also insists, that conception faces a long-term crisis of confidence, instead of extolling Hobbes's contribution perhaps we should be holding him to account. Far from offering a coherent template for the reconciliation of reason and will, perhaps *Leviathan* represents an

[2] For an elaboration of this analysis see Poole 2012.

[3] Hobbes 1994, chapter 26: 'The things that make a good Judge, or good Interpreter of the Lawes, are, first, A right understanding of that principall Law of Nature called Equity; which depending not on the reading of other mens Writings, but on the goodnesse of a mans own naturall Reason, and Meditation, is presumed to be in those most, that have had most leisure, and had the most inclination to meditate thereon.'

elaborate confidence trick or sleight of hand in which the medieval pack is reshuffled but in no way transcended. Maybe our fears about Hobbes, and by extension the sovereign state, are right, and that reason is too precarious, too ephemeral, in this picture and as such always on the verge of being sacrificed to will.

II

Legislating for Interest

A more neutral way of making the preceding point would be to say that the connection Baranger wants to make between Hobbes, so influential in laying the intellectual groundwork of the modern state, and our current dissatisfaction with legislation is unclear. I want to make a similar point now, but from a different perspective, the standpoint being that of the later 18th century, the period in which so much of Baranger's analysis is situated. But whereas the previous observation sought merely to clarify an exegetical point on Hobbes, my objective here is to detect a failure to notice the importance of the concept of 'interest'. That term, as the core concept within a new conception of politics, had its origins in 17th century discourse - where the word interest was taken up in earnest by English political writers at about the time Hobbes was writing *Leviathan,* having had an earlier career among French writers during the wars of religion.[4] But to integrate interest within a developed political philosophy was the achievement of thinkers of the following century, notably Hume and Smith.[5]

[4] See e.g. Gunn 2009.

[5] Hume 1741, 42: "Political writers have established it as a maxim, that, in contriving any system of government, and fixing the several checks and controls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest."

Characteristic to this mode of thought are the propositions that authority is rooted in public opinion and that '*Self-Interest* is the original Motive to the *Establishment* of Justice'. God is absent from this worldview. So too is any semblance of grounding authority on hypothetical contracts.[6] The trick is to identify how we might work out from a basis in self-interest to the world of public interest that justice inhabits - in other words, from rulership based on power to polities framed by law. The collective action problems are particularly substantial, since Hume and Smith take the reason element of the individual left to her own devices as too weak to subdue her self-interested passions. The notion of sympathy offers something of a solution[7] – or rather, sympathy combined with the passage of time (regime stabilisation, the power of convention, inertia). As Hume writes in the same passage from which I just quoted: "This latter Principle of Sympathy is too weak to controul our Passions; but has sufficient Force to influence our Taste, and give us the Sentiments of Approbation or Blame."[8] So, once up and running, a system of justice can be stabilised and enhanced by the sympathy that we are likely to have for it as reflective of the public interest.

Alluding to the omission of interest in a study of late 18th century political thought is not intended as point-scoring. Nor it is simply an injunction to complete the conceptual puzzle. The introduction of interest into the analysis of politics marks a rupture in political thought. Specifically, and in Baranger's terms, it disturbed the classic binary between will and reason by introducing a third component. Interest brings with it an element of active projection and calculation that neither reason nor will naturally possess. Thinking through the lens of interest thus maps directly

[6] Both of these positions were taken in opposition to Locke: see Hume 1748.
[7] The seminal treatment is Smith 1759.
[8] Hume 1738, 3.2.2.24.

onto what Baranger takes to be the distinctive feature of modern legislation: that it provides the vehicle for realising the interest of the political community, projecting its goals, aims, and fears in the hope of mapping out its future.

The essence of the historical project of the science of legislation lies precisely in this concept of interest. This is perhaps most apparent when we turn to Bentham, the central figure within Baranger's study. Though in many respects unique, Bentham can be read as extending the thinking of Hume and Smith, albeit in a certain direction. Though more focused on reforming existing social arrangements, his project was, like theirs, self-consciously modern. Much of his attack on common law jurist Blackstone concerned what he saw as the latter's perpetuation of musty and self-serving half-truths derived from a semi-idealised past. The modern world has no place for such cant: "the season of *Fiction* is now over." (Bentham 1988, 53). The modern Legislator, he tells us, has been steadily engaged with plucking "the mask of Mystery from the face of Jurisprudence." (*ibid.*, 21). In this brave new world, legislation becomes the governance mechanism *par excellence*, vastly to be preferred to the 'dog law' perpetuated by the lawyers. Whereas Hobbes wanted to preserve the play of equity within the interstices of law, Bentham wanted to eradicate it. A well-ordered legal system run on clear legislation has no need of equity (which Bentham understood as rampant judicial discretion). "*Equity*, that capricious and incomprehensible mistress of our fortunes, whose features neither our Author [Blackstone], nor perhaps any one is well able to delineate; – of *Equity*, who having in the beginning been a rib of Law, but since in some dark age plucked from her side, when sleeping, by the hands not so much of God as of enterprizing Judges, now lords it over her parent sister" (*ibid.*, 5-6)

But in a sense this is all for Bentham just superstructure: an assessment of the potential of various techniques of rule to

produce particular results. The whole political and legal edifice is to be put into the service of Utility, the maxim that the greatest happiness of the greatest number is the foundation of morals and legislation. "From *utility* then we may denominate a *principle*, that may serve to preside over and govern, as it were, such arrangement as shall be made of the several institutions or combinations of institutions that compose the matter of this science" (*ibid.*, 26). And what reasons do we adduce to work out what those institutions ought to do? Certainly not technical reasons of the type the lawyer trades in, which "is darkness," but normal reasons to do with calculations of utility. In other words, in working out what we should do, we need do no more (and no less) than assess the mix of pleasure and pain that is expected to accrue from a new law or policy (*ibid.*, 27-8).

This is interest rationalised, turned into a overarching principle and matrix of calculation. Another way of expressing this point is to say that Bentham sought to align reason with utility. Reason is swallowed up by considerations of interest. The extent to which Bentham was prepared to go on this score can be gauged by his account of political authority. Hobbes had a story about that, and so did Hume. Bentham's theory of the foundation of authority is all about utility, as one might expect. We have reason to obey, he argues, if it is in our interest: "taking the whole body together, it is their *duty* to obey, just so long as it is in their *interest*, and no longer." (*ibid.*, 56)[9] There are certain connections here with Hume, to be sure. But Bentham strips past practice out of the equation, at least directly, as he envisages calculations of utility to be future oriented, based on considerations of "future fact – the probability of certain future contingencies" (*ibid.*, 104).

[9] Later in the same work, the story is complicated by the introduction of another definition of duty, this time one that correlates to a legal sanction (Bentham 1988, 109).

Bentham simply doesn't make sense if we come to him with only the classic dyad of reason and will. Interest is utterly pervasive. Interest strips reason out of the equation, or at least denudes it of utility-independent content. (I think the same may well be true of the will component of legislation.) But my point is not primarily an exegetical one. It is rather that to ignore interest in a theoretical inquiry into modern legislation is to miss what is perhaps most characteristically about the phenomenon. Moreover, if our objective is to understand why we may now be dissatisfied with the operation of the legislative capacity, interest simply can't be ignored. I suspect that much of that dissatisfaction, in as much as it exists and in so far as it relates to conceptual matters, is to do with our scepticism about securing the common interest through modern legislative practices – and indeed about the possibility of identifying the common interest in the first place. The danger of an interest-dominated conception of politics is that it produces an entirely functional account of legislation, one that may not allow for the play of other side-constraints – constitutional constraints, for instance, or other juridical concerns such as rights protection - in the elaboration of law and policy.

III

Legislation and Administration

It can be unfair to criticise a book for what it doesn't contain. But not, I think, in this case. *Penser la Loi* aims to explain our current dissatisfaction with legislation by means of a conceptual history of its subject. Given this aim, the problem with the coverage of the book is self-evident. Most of its pages are devoted to a study of Enlightenment thought. Substantive analysis stops with a consideration of Portalis and the Civil Code (chapter 14) - in other words, at the very dawn of the great era of legislation.

Taking Britain as a fairly standard case, the age of statutes is taken to have begun with a series of reforming (and Bentham-influenced) statutes, beginning with the Great Reform Act 1832, the Factory Act 1833 and the Poor Law Amendment Act 1834. Before that time, Acts of Parliament were characterised by their "extreme and verbose particularity" which, as legal historian Frederick Maitland remarked, rarely rose "to the dignity of a general proposition."[10] It is difficult in the extreme to see how we might solve the puzzle of contemporary legislation through a historical inquiry that stops before legislation in a recognisably contemporary form even begins.

If this criticism sounds harsh, it is not intended as such. Given how much I enjoyed the book, it is as much a back-handed compliment - even a plea for a second volume. Were its author's ambition to turn in that direction, I would hope that attention would be given to certain fundamental changes in legislation's subsequent career. Two such developments are especially germane. The first, concerning the post-Bentham success of the idea of interest as a leading conceptual marker for understanding the legislative function, picks up a theme discussed in the previous section. That story is bound up with the growth of representative democracy – another development that occurs after the period covered in the book. The more we think of legislation in terms of the public interest, the more we are likely to be concerned with the identity and incentives of the legislators whose job it is to determine it. And the more we couch the legislative project in transformative terms, as the key means of realising social goals, the more likely it is that there will be demands for more 'voice' in that process through which those goals are determined and given legal instantiation from those with little or none.

[10] Maitland 1910, 605, quoted in Duxbury 2013, 155.

This first development – a widespread acceptance of legislation in its modern sense, grounded in the politics of interest, and the widening of the franchise – is the story of the nineteenth century. The second development, though it had its origins in that period, is more a twentieth century affair. We still tend to operate according to a model derived from the classic age of legislation, correspondingly roughly the period from 1830 to 1900, whereby legislation relating to a general matter of public interest, proposed by the executive but enacted after due deliberation by the legislature, settled the rights and duties of legal subjects, with no doubt some interpretative input from the courts. But in truth that model had by the early years of the twentieth century, and certainly after the end of the Great War, ceased to correspond to political reality. The density and complexity of the 'administrative state' that was the byproduct of the age of reform – as the state took upon itself more and more tasks and sought to implement them more and more effectively – led to a change in the nature of statutes. The practice was now to enact framework or 'skeleton' legislation. As one senior British lawyer observed at the start of the 1920s, a statute was now usually "a kind of preliminary announcement for legislation" indicating that Parliament "has had a legislative idea, has sketched an outline, has laid down a principle – and has left it at that," relying on officials and technical staff to work it up into a functional legal framework.[11]

The growth of the administrative state led to a rebalancing of power between the organs of state – towards the executive, and away from the legislature.[12] (It also led later to an augmented role for the courts. But that is a story for another time.) This rebalancing was reflected in the form that statutes took.[13] The

[11] Carr 1921, 2 and 16.
[12] See e.g. Lindseth 2004, 1341.
[13] See e.g. Rubin 1989, 369.

point is not a dry analytical one. This is a substantial change in the nature of our politics, with important implications not only for the nature of statutes but also and more fundamentally for our ambitions for legislation. As such, it goes to the heart of Baranger's normative project, his concern to understand and ameliorate our conceptual disquiet about the legislative capacity. My suspicion is that we are caught in two paradoxes. The first relates to our sense of instrumental capacity – that is, our ability to get things done to our satisfaction – while the second implicates our sense of political capacity – that is, our ability to choose the things that get done in our name to our satisfaction. We demand that the state does an awful lot, possibly too much; but are unable to cope with the inevitable dissatisfaction with what we see as its continual underperformance. And the more it does in our name, the less it seems to be amenable to our determination. Legislation, still the best hope for realising our myriad political and social objectives, is caught in the middle of this. The danger is that it begins to feel a bit like a fraud - not just a screen for executive power, but disconnected from the people whose voice it is meant to project.

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References

Baranger, Denis. 2018. *Penser la Loi. Essai sur le législateur des temps modernes*. Paris: Gallimard.

Bentham, Jeremy. 1988. *A Fragment on Government* (1776). Edited by Ross Harrison. Cambridge: Cambridge University Press.

Carr, Cecil T. 1921. *Delegated Legislation: Three Lectures*. Cambdrige: Cambridge University Press.

Duxbury, Neil. 2013. *Elements of Legislation*. Cambridge: Cambridge University Press.

Gunn, John A.W. 2009. *Politics and the Public Interest in the Seventeenth Century*. London: Routledge.

Hobbes, Thomas. 1994. *Leviathan. With selected variants from the Latin edition of 1668*. Edited, with Introduction, by Edwin Curley. Indianapolis: Hackett Publishing Company.

Hume, David. 1738. *A Treatise of Human Nature*. [1738]. Edited by David Fate Norton and Mary J. Norton. Oxford: Oxford University Press, 2000.

_____, 1741. "Of the Independency of Parliament," in *Essays, Moral, Political and Literary* [1777]. Edited by Eugene F. Miller. Indianapolis: Liberty Fund, 1987, 41-6.

_____. 1748. "Of the Original Contract.", *ibid.*, 465-87.

Lindseth, Peter L. 2004. "The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s." *Yale Law Journal*, 113: 1341-415.

Loughlin, Martin. 2007. "The Constitutional Thought of the Levellers." *Current Legal Problems*, 60 (1): 1-39.

Maitland, Frederic William. 1910. "English Law," in *Encyclopædia Britannica*. Cambridge, 11th ed., vol. 9: 600-7.

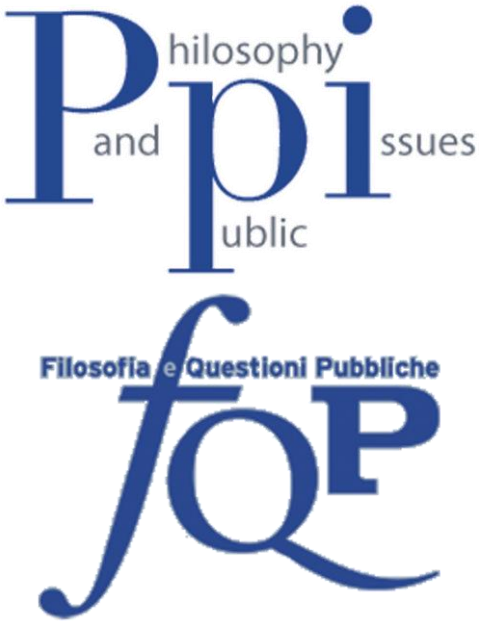
Poole, Thomas. 2012. "Hobbes on Law and Prerogative." In *Hobbes and the Law*. Edited by David Dyzenhaus and Thomas Poole. Cambridge: Cambridge University Press, 68-96.

Rubin, Edward L. 1989. "Law and Legislation in the Administrative State." *Columbia Law Review* 89: 369-426.

Smith, Adam. 1759. *The Theory of Moral Sentiments*. Edited by D.D. Raphael and A.L. Macfie. Indianapolis: Liberty Fund. 1984.

SYMPOSIUM

DEMOCRACY AND LAWMAKING



LEGISLATION AFTER THE FALL

BY

AUGUSTIN SIMARD

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Legislation after the Fall

Augustin Simard

Reading Denis Baranger feels like hearing the stories of a long-distance traveller who, upon his return from a journey, is already looking forward to new departures. Casually exposing the treasures he brought back from his last peregrinations, his mind is restlessly looking for new directions, new paths, and new questions. Contrasting with the overly dry and didactic style of French jurisprudence, his books and articles are dispatches, lively sketches, and travelogues, that catch the fugitive and yet most valuable aspects of their objects. Without doing what is now called "comparative law," Baranger is nevertheless a comparative scholar in the most eminent sense, someone for whom to depict, to explain, and to compare are intrinsically joined operations.

In this sense, it is perfectly normal to be surprised and puzzled by his most recent book, *Penser la loi*. While there seems to be some strong sense of continuity between it and the previous book, *Écrire la constitution* (Baranger 2008), things are not as simple as they first appear. In his 2008 book, Baranger focused on the nature and the basic principles of English public law – or "droit politique," as he preferred to call it. Supported by first-rank legal scholarship, he was asking: what does it mean to have an unwritten constitution in terms of the distinctive quality of the political body? What at first sounded like an elementary question appeared in reality as a radical

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one, since it went straight to the basic divisions and assumptions of both continental and common-law legal cultures. Baranger had to reverse Tocqueville's famous aphorism – "In England, therefore, the constitution can change constantly, or rather it does not exist at all" (Tocqueville 2010, 171) – by showing how a public legal order had resulted precisely from the fact that the constitution is always in the process of being written. In this perspective, the protean nature of legislative activity (or statutory lawmaking) comes immediately to the fore. Especially in an era where legislative bodies live under the antagonistic pressures of international institutions and populist leaders, and under the long-lived suspicion of constitutional courts and legal scholars, one must understand what irreplaceable role they once played (or still play?) in the making of public law's fabric.

Despite what one might have anticipated, that is not what Baranger's new book is about. It is not a book about legislative supremacy and its limits, about the relationship between lawmakers and judges, not event about legislative *power* as such[1]. The *législateur* to whom Baranger refers is not a distinctive "organ of state," it is rather the unspecified subject of a scientific discourse, the *science de la législation*. Distinctively modern in his main tenets (hence the subtitle), the *législation* was a project both politically and intellectually oriented. At the beginning of the eighteenth century, this project became the focus of a wide community of jurists, legal reformists, and philosophers from Western Europe, before fading into oblivion by the middle of nineteenth century. One of the central insights of Baranger's book is that even if this project is barely intelligible for us, it still determines our legal consciousness and must be recovered if we are to understand our contemporary situation.

[1] Compare, for instance, Duxbury 2012.

I

At the beginning of Baranger's investigation stands a commonly shared disquiet in face of the ever-growing amount of statutes and enacted laws. At least since the 1980s, "legislative inflation" has become a buzzword for critical analyses of advanced liberal democracies and welfare policies. Not only has it appeared as an important issue on many neoliberal agendas, it was also consecrated by public lawyers and constitutional courts as an essential component of the "rule of law." One might refer, for instance, to the recognition by the French *Conseil constitutionnel* of the "*accessibilité et intelligibilité de la loi*"[2] as a constitutional imperative which, in this case, justifies a curtailment of the legislative procedure for the sake of preserving the "legibility" of a statute in the making. But more broadly, the "decline" or "crisis" of statute law is a commonplace of jurisprudence since World War II, and it coincides with the growing prevalence of constitutional review (*Verfassungsgerichtbarkeit*, *contrôle de constitutionalité*). As Baranger puts it, "every decision from a constitutional court can be read as a charge against the notion of statute law" (Baranger 2018, 9).

In face of this ubiquitous topos, the role of the legal scholar is unclear: he can either endorse it and join the criticism or try to circumvent the issue by defending the "dignity of legislation" in a more or less republican fashion (à la Waldron). In a very clever move, Baranger proposes to look at it from another perspective: not as an "objective" predicament to be addressed, but as a symptom that must be taken seriously for what it tells of our legal consciousness. In other words, instead of searching for the origins of an alleged legislative crisis in welfare policies and collectivism, partisanship and lobby politics, *hubris* and rationalist arrogance (*ibid.*, 292-5), we must consider why this critical sensibility appeared

[2] Decision 99-421 DC of December 16th 1999, *Loi portant habilitation du gouvernement à procéder, par ordonnances, à l'adoption de la partie législative de certains codes*.

in the very first place. According to Baranger, this sensibility stems from deep-seated tensions within the "divergent intellectual programs" attached to the very idea of legislation, divergent programs that should be historically tracked and identified. To be sure, one must not expect any ready-made normative proposition from this genealogical inquiry: the object of the exercise is rather to take some distance and become aware of what Reinhart Koselleck called "the diachronic depth" within our most basic concepts.

While Baranger doesn't make any explicit reference to Koselleck, a strong conceptualist stream is running through the whole argument. Like every "form of human conduct", says Baranger (*ibid.*, 84), the legislation is "associate to conceptual frames which must have appeared at some place". But here a distinction is drawn between conceptual history and philosophical history, even if it sometime tends to collapse, because "[legal] practices have their own theories" (*ibid.*). "The law has always been permeated by metaphysical ideas, but in the same time it never lets itself be subjugated by them. Not without reason, it always claimed to possess its own theory, or even to be the only proper theory: the 'true philosophy' (*lex est vera philosophia*)" (*ibid.*). Thus, attention must be given to levels of conceptualisation which are more informal and specialized than those of broad philosophical ideas. That is what Baranger evokes when he speaks, in a rather foucauldian way, of the emergence of a new "regime of positivity" (*régime de positivité*) coextensive to modern legislation. Even if it draws extensively on medieval and early modern legal philosophies (Hobbes, Locke), the science of legislation is attached to a new mode of *practicality*, a "government of laws" which connect theory and practice, knowledge and intervention, in a way unknown before. "Modern legislation takes place in the last of those vast systems of positivity—that of sovereign state and modern government. It is supported by changes associated with the rise of

the legislative state and the government of laws. In the background lie both the practical turn taken by philosophers and the orientation of modern individuals towards concreteness" (*ibid.*).

Formulas like these may seem over-ambitious, not to say mysterious, yet they lead us to the heart of Baranger's investigation. Far from assimilating modern legislation to a glorification of the will (following Schmitt, Hayek, or Villey, among others), this explanation in terms of "regime of positivity" avoids the usual dichotomy of *ratio* and *voluntas*. To be more precise, without rejecting it completely, Baranger suggests that underlying each regime of positivity is a distinctive relation between the two terms. There is no doubt that modern legislative power presupposed a new conception of the law as an act of will, as a unilateral "command of the sovereign." But unlike Schmitt or Villey, we should not overstress this "hobbesian" moment: for this conception of enacted law to take its full effect and not to stay a marginal phenomenon (like the edictal law of medieval Europe), it must be part of a new scientific worldview, which Baranger, relying on Alexandre Koyré's seminal book (Koyré 1957), characterizes as the "infinite universe" (Baranger 2018, 201). Not only does this put particular emphasis on the indetermination and lack of any overarching intelligible order, it also highlights the new attributes of scientific laws as "constructions." Both scientific and civil laws embody a pragmatic and experimental attitude towards the outside world. "The modern science of legislation appears then as a knowledge of effects, offering to individuals the possibility of rationally discerning the consequences of their actions. This project is central to the sciences of legislation as it leads them to reject the definition of the law as a 'relation' with the objective nature of things [...] Laws are no longer organized according to their relations with reality, but according their expected effects" (*ibid.*, 207).

In what might be the highest point of his argument, and undoubtedly a most stimulating read, Baranger proposes a reinterpretation of Beccaria, Filangieri, and Bentham, on the basis of this new "regime of positivity," insisting on its break with the early-modern political theory. Bentham, especially, stands out as the most articulated proponent of the science of legislation as a science of the "effects" of civil laws. But at the same time, as the case of Bentham makes it clear, this new legal science is inseparable from a critical stance towards actual laws *hic et nunc*, because they always appear not efficient enough, i.e. not producing their full effects. Actual laws always cry for reforms and interventions, collective experimentations and restless criticism. As Baranger depicts it, the modern legislator stands in the middle of a never-ending process of "creative destruction," in which every norm, judicial standard, and piece of legislation is put to test. As a result, discontentment is raised to the status of a cardinal virtue for both lawmakers and legal scholars. In stark contrast to the caricature of Bentham as a dogmatic and hybristic masterplanner, which was made fashionable by Hayek, Oakeshott and James. C. Scott (Scott 1998), Baranger introduces a more complex and, one could say, dialectical understanding of the rationality of modern legislation. As a matter of fact, as soon as the law appears to have "no intrinsic stability" (Baranger 2018, 241), lawmaking in the form of constant experimentation and design becomes an inescapable necessity, the condemnation of "constructivist rationalism" notwithstanding. Whether we like it or not, "the software we use to produce laws is still nothing but a variant of the utilitarian software" (*ibid.*, 301). The very ideal of a "rule of law" combined with a market society, not to mention liberal democracy, leaves no other choice. From this perspective, in spite of all its sophistication, our contemporary post-enlightenment jurisprudence gives the impression of being both unrealistic and distrustful, desperately looking for comfort in judicial and normative safeguards.

II

Among the many conversations we find in Baranger's latest book, there is one that was least expected: a dialogue with Michel Foucault on how we should understand the "government of laws." To be sure, this conversation is conducted, more often than not, in implicit terms, but it is still significant and challenging.

As it is well known, Foucault has extensively written about "governmentality" at the end of the 1970s, especially in his lectures *Sécurité, territoires, population* (1977-1978) and *Naissance de la biopolitique* (1978-1979), both published for the first time in 2004. Part of Foucault's considerations on governmentality is now discussed in the light of a critical history of neoliberalism. In France (and elsewhere, to a lesser extent), Foucault is suspected of having been seduced or surreptitiously "contaminated" by neoliberal ideas. A surprising amount of ink has been spilled since 2014, in arguing for or against the use of Foucault's insights to critically engage with neoliberalism[3]. While Baranger's argument seems remote from such politically loaded discussions, it nonetheless sheds light on the premises of Foucault's history of "governmentality" by challenging the role played by legislation within his narrative. Simply put, Baranger criticizes the fact that Foucault's notion of governmentality rests on a contradistinction of law and government. As a political technology, law is archaic: it is associated with the image of the medieval king as judge and legislator. Legislation is essentially the power of the sword (Foucault 1978, 133 ff.). Of course, this power did not disappear entirely with the advent of the modern state, but it is supplanted by new forms of power (disciplines and biopolitics), perhaps less flamboyant, but more efficient as they directly aim at "governing human conducts." This analytical framework, first exposed in the

[3] For instance, Zamora 2014 and Audier, 2015.

last chapter of *La volonté de savoir*, was considerably revisited and enlarged by Foucault in his 1977-1979 lectures. There is no point here to deny its heuristic qualities, as it allows for a recontextualization of modern political and legal thought that is more attentive to the articulation between theoretical discourses (reason of state, *Polizeiwissenchaften*, political economy) and practices of government ("*les arts de gouvernement*"), and less obsessed with grand philosophical questions. But, as a consequence, it tends to underplay modern legislation as mere ideological façade, as magnificent as it is deceptive, deflecting attention from the proliferation of governmental tactics and strategies. Broadly speaking, the very term "government of laws" would sound like an oxymoron to a foucauldian ear.

This problem could not be more central to Baranger. By stressing the contrast between legal-sovereign power (essentially negative) and normative bio-power (supported both by local tactics and global strategies), Foucault gave an over-simplistic picture of the "turn" towards the legislative state: if the main trend of modern political technology is the "governmentalization of the state," the legislative state must necessarily appear as "regressive" or as a peripheral development. To the contrary, Baranger insists vigorously on the fact that "to legislate is to govern" (Baranger 2018, 68). Far from being peripheral, legislation "was viewed as the principal vehicle for governing the individual conducts," "as the vector of public policies aiming at directing conducts and imposing disciplined behaviours" (*ibid.*). Without completely rejecting the foucauldian narrative, Baranger presents governmentality as a continuum at the center of which stands the legislation, that plays a unique and architectonic role as regards other political technologies. If we are to understand modern legislation, we must appreciate this unique role and the gap separating it from the archaic notion of law as a strictly negative act of sovereignty – "a deep transformation of the legislative practice." "The ancient law

was corrective. The modern law becomes constructive. It is now concurring to concrete and global changes in the life of human communities. The ancient law was emphatically prohibiting of certain behaviours. Modern legislation doesn't renounce to those prohibitions, but it introduces them in the larger process of social change and reorientation of individual behaviours" (*ibid.*, 78.).

That is perhaps where Baranger's *Penser la loi* diverges the most from the foucauldian genealogy of the state. Even when it is wrapped in the sublime lexicon of sovereignty, exception, and omnipotence (as in Bodin or Hobbes, for instance), modern legislation must be understood first and foremost as a prosaic mode of governmentality, the primary effect of which is to "narrow" the scope of the conducts in need of being shaped by the power (*ibid.*, 67). To put it differently, the government of human conducts by the laws, not unlike foucauldian biopolitics, is productive of subjectivity: but instead of a pliable body or of a population, it engenders a specific public-political subject that is neither the living individual nor the flock of sheeps to be taken care of. Paradoxically, it is this "narrowing" (*resserrement*) of the task of government on the external, visible, and "worldly" actions of subjects that puts legislation at the center of modern state's apparatus, thus giving it a coordinating function that is unique among other political technologies.

III

There is a something unmistakably melancholic in Baranger's portrayal of the science of legislation at its high tide. Even as we are told that the utilitarian mindset of the government of laws (*gouvernement des lois*) is still with us today, it is pretty clear that the original project of the science of legislation as heralded by Filangieri or Bentham has lost its impetus. Even more, it seems to

have become foreign and unintelligible to us, like a lost continent of our legal tradition. Baranger identifies several points of intellectual resistance, each indicating an important weakness in the modern legislation project. The first and most powerful resistance comes from the *juris prudentia* of the law professionals, with its emphasis on practical cases and controversies. It is more a professional know-how, a "law-craft," as Llewellyn would have put it, than a formal body of theories and knowledge (though there is also an immanent "civil science" in the modernized Roman law and the English common-law). Since this professional esoterism was one of the favorite targets of legislation proponents (e.g. Bentham's *Fragment on Government*), it is only natural that the lawyers would deride legislation as naïve, stubborn, and ignorant. As Baranger reminds us, the debate between jurisprudence and legislation is a very old one, and its terms did not change much throughout the centuries. Perhaps their best expression is to be found in the "Prohibitions del Roy" decision of 1607, in which Sir Edward Coke famously opposed to the natural reason of royal legislation the "artificiall reason of law," "which Law is an art which requires long study and experience, before that a man can attain to the cognizance of it."

It may well be that the conflict between these two modes of rationalization of law—substantial versus material—is the inescapable fate of Western legal tradition. But Baranger's argument is more cautious: it merely points at the legislation's blindness to its own conditions of realisation. By rejecting any considerations about law-crafts as irrational superstitions or "frauds," Bentham, Filangieri and consorts betrayed their lack of interest in the "legislative tool" as such (*ibid.*, 165). It is a very worrying paradox: the science of legislation ignores almost everything of the political technology it strives so hard to enthrone. As a consequence, any law reform would stay under dependence of law professionals, judges and professors, who by nature, as

Dicey noted, are natural allies (Dicey 1919, 370, footnote 1). The failure of legislation's grand design is thus pre-programmed, fueling in the same breath a stronger distrust towards judicial "sinister interests."

Everything happened as if the classical science of legislation had dissolved in the air at some point around the middle of the 19th century. Its effects are still felt in penal law and commercial codes, its trace is noticeable in legal education, yet its spiritual body is nowhere to be found. To be true, its intellectual legacy seems strictly negative. Bentham's legislator has become a negative foil for almost any contemporary legal theorist, whatever her ideological underpinning. It is one of the book's most impressive achievements to retrieve what we have lost in terms of legal science, but also to explain how this loss became somehow inevitable. By a strange turn of events, the secular *jurisprudentia* of law practitioners and the new science of political economists – praising ignorance as an inescapable fact of human conduct – have met one another in the celebration of judge-made law. Both theoretical cleverness and legal sophistication are now measured by how far one distances herself from the legislative sovereignty's dogma. But what now looks like a natural alliance between an ever-expansive judicial review and a globalized jurisprudence may reveal itself more fragile in the long run.

Let us return to the air of melancholy which seems to pervade Baranger's general argument. To be sure, we should not take this melancholy for a kind of pessimistic narrative – as a kind of *Verfallsgechichte*, which is in vogue among legal historians. At some point, melancholy appears almost as a consequence of the methodological approach chosen by Baranger, who takes very seriously the ideas at the origins of legal developments (I even remember him declaring once that he believes in the "*idéalisme des forces*"). But one might wonder if, by putting such an emphasis on

conceptual coherence and logic, he did not downplay the complex dialectic underlying the crisis of legislation in which we have been living for the last decades. Everywhere legislative powers seem on life support. Post-totalitarian revolutions have certainly established durable parliamentary democracies, but the constitutional terms in which legislative assemblies were consecrated have deprived them of a large part of their democratic credentials. All around us, we are seeing how the charges against parliaments, once levelled by sophisticated legal scholars and liberal-minded judges, can now serve the populist uprising (however opportunistically deformed). The legislative inflation and the decline in quality of parliamentary law-making may well be impossible to assess objectively, but it nonetheless fuels a powerful skepticism among both jurists and laymen – a skepticism that not only justifies depriving the parliaments of their powers, but also trivializes statute law as a vector of social change.

This dialectical relation between the devaluation of parliamentary-making, the loss of institutional prestige, and the rise of alternative lawmakers is a very intricate one. A genealogical account of the "modern legislator" could shed some light on the conceptual inconsistencies at the heart of the project. It could also show how the "crisis" became an all-pervasive *leitmotiv* of our legal consciousness. But one doubts whether it would by itself succeed in grasping the institutional configuration at the origin of this "crisis".

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References

Audier, Serge. 2015. *Penser le 'néolibéralisme' : Le moment néolibéral, Foucault et la crise du socialisme*. Lormont: Le bord de l'eau.

Baranger, Denis. 2018. *Penser la Loi. Essai sur le législateur des temps modernes*. Paris: Gallimard.

_____. 2008. *Écrire la constitution non écrite. Une introduction au droit politique britannique*. Paris: Presses Universitaires de France.

Dicey, Albert V. 1919. *Lectures on the Relation between Law and Public Opinion*, 2nd ed. London: MacMillan.

Duxbury, Neil. 2012. *Elements of Legislation*. Cambridge: Cambridge University Press.

Foucault, Michel. 1978. *The History of Sexuality*, vol. 1. New York: Random House.

Koyré, Alexandre. 1957. *From the Closed World to the Infinite Universe*. Baltimore: Johns Hopkins University Press.

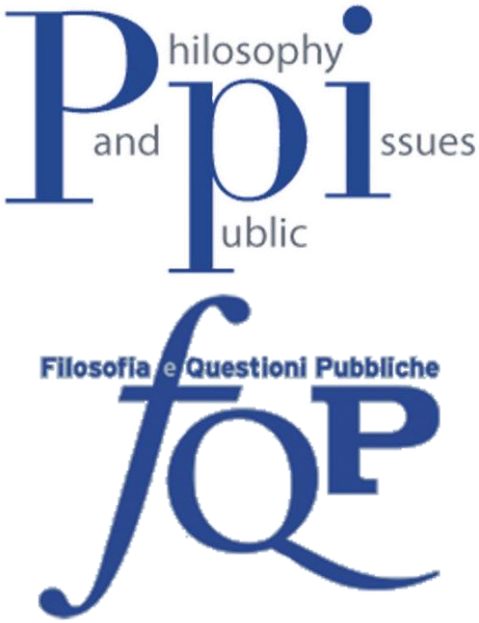
Scott, James C. 1998. *Seeing Like a State. How Certain Schemes to Improve the Human Condition have Failed*. New Haven: Yale University Press.

Tocqueville, Alexis de. 2010. *Democracy in America I*, trans. J. T. Schleiffer. Indianapolis: Liberty Fund.

Zamora, Daniel. 2014 (edited by), *Critiquer Foucault: Les années 80 et la tentation néolibérale*. Bruxelles: Aden.

SYMPOSIUM

DEMOCRACY AND LAWMAKING



PENSER LA LOI
A RESPONSE

BY

DENIS BARANGER

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Penser la Loi
A Response

Denis Baranger

My warmest thanks go to the editors of "Philosophy and Public Issues" and to the three contributors for their comments. There is an inherent strangeness to the business of responding to response articles. I am spared, however, most of the travails pertaining to such an exercise by the intelligent empathy of my three reviewers. Their views on my book are perspicacious and fair. I can only say that they understood me well – possibly better than I can claim to have understood myself.

I

Law, history, metaphysics

Why history? What history?

Augustin Simard quotes me for saying (orally?) that I believe in the "idealism of forces". This puts to test my approach to history in general and the special role that I ascribe to the history of ideas. Let me try to express here some insufficiently elaborated ideas about this matter.

History as an intellectual pursuit is not so much concerned with bare facts as with the signification of the past. It is an investigation of the meaning of things that have happened and are not there anymore. Facts only make their way into our historical

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consciousness when we can attach a meaning to them. History is not a set of events. Rather, it is the name we attach to the meaning of the past, or more precisely to the past as a source of meaning. It becomes *our* past, *our* history. It remains with us because it means something to us. What takes place is a process of transaction between ourselves and what has been. History is the result of this transaction. Every historical event is an artificial construct, first in the mind (and discourses) of the actors, second in the mind (and under the pen) of the historian. The past as a whole, or a certain period or epoch, is the name we attach to a larger concatenation of such meanings. It is a response to a question we ask and to which the past is willing to respond. In fact, as Hans Blumenberg has shown, every age is better understood by the way it has posed certain questions even if – *especially if* – it has proved unable to give a satisfactory answer to these questions.

What is legislation? What is it to us? When it comes to the history of social institutions – and legislation belongs to that sphere – our access to historical meaning is made difficult, almost impossible in some cases, by several obstacles. We do not have access to the thought of all historical actors. Even less do we have documentary access to the collective thought of a certain era, or a certain generation of mankind. And yet this collective thought, this consciousness of an age, exists and deserves to be reconstructed.

In order to do so, the solution is more often than not to revert to the thought of those who have attempted to bring to light the meaning of those social institutions. As a result, history of ideas stands in many cases as our only guide, our only access to this sphere of social significations, intentions, meanings, etc. This has its drawbacks: the thought of a few is not necessarily an appropriate entry point into the thought of the greatest number. But it is at least a reflection of this thought, a "*miroir promené le long du chemin*", as every great philosopher is also a man or woman of

his/her age, especially when he/she struggles against it. It is, in any case, a feature of the history of ideas that it is necessarily incomplete. It cannot exhaust anything. It cannot even properly justify its own existence except by shedding some light on a historical problem that has an interpretative dimension to it.

Another problem pertaining to the method of the history of ideas is that the discussion of great thinkers quickly acquires a certain propensity to become a purely 'ahistorical' and conceptual inquiry. In order to understand Rousseau's general will or Bentham's concept of legislation, one has to confront their ideas as such. There is no other option but that of joining the fray, of entering the theoretical battlefield. Eventually, no amount of contextualization, however useful, will spare us that necessity. There is no hope of achieving anything in the history of ideas without recreating a philosophical discussion of some kind between the author and ourselves – or maybe is it between their *texts* and our own ideas. In the history of ideas, the philosophical and the historical dimensions are inseparable. This is why history of ideas is two things at the same time: a historical undertaking (re-capturing the ideas of the past) and a philosophical investigation in its own right. Certain texts simply *happen* to be the appropriate axiomatic foundations of a certain line of philosophical inquiry. Taking them as the proper starting point appears to be a justifiable philosophical procedure, even for somebody who would be genuinely lacking in any historical interest whatsoever. There are, after all, many problems attached to the opposite method of approaching philosophical problems from a *tabula rasa*.

Metaphysics and law

If history is about meaning, we are bound – in our quest to recover it – to encounter some large-scale artifices, conceptual

structures, men have made for themselves and later perfected, and even later criticized and destroyed only to build new ones in their place. These constructs and artifices are made of ideas and reasonings. Many important moral and political problems are non-contextual, and many non-contextual philosophical debates have had immense repercussions on human affairs. This is the case of many of the founding controversies in the history of metaphysics in the West: rationalism vs voluntarism, inneism vs empiricism; continental idealism vs utilitarianism, etc. That these controversies should appear with some degree of prominence in *Penser la Loi* is far from accidental.

This raises the question, very well perceived by Lev and Simard, of the place of metaphysics in the book. My approach – as stated in the *précis* – was to say that "metaphysics matters", by which I meant that it matters for anyone interested in social and legal history. I have always been struck by Carl Schmitt's' comment – in his *Political Theology* – that the law of an age is clearly reflected in its metaphysics, i.e. that there was some sort of correspondence between actions, men's creations, and their metaphysical constructs. Some key positions in the history of metaphysics appear to have played a significant role in the making of our legal institutions. This is what the book tries to show regarding legislation. For instance, one of the book's claims is that the major shift in the cosmological view of the world that took place at the Renaissance is also one of the main factors explaining the move towards the modern legislative state. Also, one of the book's claims is that our modern understanding of legislation owes a great deal to the decisive changes in the history of moral philosophy that have been recorded under such themes as the "expansion of the moral world" (Reinhart Koselleck), the "government of conducts" (James Tully) or the "morality of daily life" (Charles Taylor).

Penser la Loi is certainly evidence of a desire to bring together these larger metaphysical constructs – as well as the controversies that they have generated - and our social "practices". One of the book's premises is that these practices and these broad metaphysical frameworks are very much connected. To understand the latter is necessary in order to shed some light on the history of the former. This is especially the case with regard to legislation. The kind of law that ends up in our statute book has been shaped in deep connection with the way in which men have envisaged the world as a whole. Should metaphysics and the sphere of human practice be kept entirely separate, neither these broad philosophical projects nor social "concreteness" can effectively be understood. The ongoing controversy between law and philosophy in the battlefield of legislation is ample evidence of this. This "conflict of the faculties" is one of the book's underlying themes.

Jurisprudence?

I have certainly – if altogether implicitly – envisaged *Penser la Loi* as a statement on how best to approach legal philosophy. Many of the strategic moves, conceptual statements, and ensuing controversies that the book envisages can be understood in that perspective. What "happens" in the field of jurisprudence does not only take place inside academic textbooks. It also "happens" in "the life of the law", its experience. As we have just seen, this concrete experience is in itself a philosophical undertaking. The law does not only "work itself pure". There is a constant process within the law of copying from, transferring from, struggling with other disciplines. At the same time law asserts its autonomy and cannot refrain from displaying imperialistic impulses. The same is true of philosophy. The history of legislation is just one example, if maybe a key one, of these phenomena. Law claims that it is a *vera philosophia* while Philosophy aims at legislating and governing men.

This raises the question of what "jurisprudence" is. We need to envisage how the disciplinary field itself is constituted. "Jurisprudence" or "legal philosophy" is not a neutral term describing a given academic discipline. It is a battlefield. Its history is a "*histoire-bataille*" (as the French historians of the *Ecole des Annales* used to say dismissively). A more suitable name for that academic discipline would in fact be "Law *and* Philosophy"[1], instead of "philosophy of law". The contemporary transformation of jurisprudence into what is really a *legal theory* is due to the oblivion of this confrontational nature. Jurisprudence is, above anything else, a *conflict of the faculties*. The essence of the discipline lies in a confrontation between philosophy and legal culture. We do not know what the philosophy of law *is*. In a certain sense, it does not exist, at least as a "positive" and neutral field of knowledge. "Lawyers' law" has its own philosophy and in turn the "philosophy of philosophers" has constantly tried to absorb legal science. History of ideas appears as an adequate procedure in order to understand this long-term altercation between lawyers and philosophers. It does not pass *a priori* judgment on the respective values of the respective claims of Law and Philosophy. It is a clean slate – not perfectly clean of course, but as good as it gets. It is a chessboard on which one is able to lay out the pieces and see how they have interacted over time.

II

Hobbes: *imperium rationis*

Thomas Poole bewails the book's obscurity about several aspects of its treatment of Hobbes. He questions the way in which

[1] Which, by the way, is the name given to the academic journal Olivier Beaud, Mélanie Plouviez and myself have founded at the *Institut Michel Villey*: http://www.droitphilosophie.com/

the Hobbesian model of legislation combines will and reason. He also puts to test my ability to explain in what way the Hobbesian state is rational. He insists on the role of judge's as "equity experts" Finally, Poole says that "the connection Baranger wants to make between Hobbes, so influential in laying the intellectual groundwork of the modern state and our current dissatisfaction with legislation is unclear". I have devoted two pages to Hobbes in the entire book. He was not central to my narrative. Nevertheless, the way in which I have approached him deserves certain clarifications. I am grateful to Thomas Poole for giving me the opportunity to do so. A detailed response to Poole's questions and criticisms would take me beyond the reach of the present article. It would require a discussion of the Hobbesian concept of reason, of his ideas on the relation between divine law and law of nature, and also of his views on the adequate procedures to reach a rational outcome and also of his theory of language, and of the truthfulness thereof. It would also require to pay attention to other central evaluative concepts in his vocabulary, such as equity/iniquity, justice/injustice and prudence. I can only hope to provide a few hypotheses in the following paragraphs.

The few paragraphs devoted to Hobbes in *Penser la Loi* were not meant to fully reconstruct his position on legislation or on law as a whole. My purpose, in the limited space that I could devote to that topic, was to identify the origins of a "public" concept – or maybe should I say, with the inevitable oxymoronic connotation - a "concrete" concept: that of a thing that exists in the practical life that we live in common – what the Greeks called "*ta pragmata*": human affairs. Legislation is one of those concepts that are of use when it comes to acting in the public sphere. As far as our idea of "law" is concerned – I should say "of law *as legislation*" in the modern sense as opposed to the concept of law that was in use at the time of the Twelve Tables, the barbaric laws or even Louis the Fourteenth's ordinances – a clear turn is taken with Hobbes,

whatever else he wrote and in whatever larger framework he has inserted this specific concept. My concern, therefore, was his legacy to our collective understanding of written law. In this regard, I saw Hobbes as more than someone living a mere *vita contemplativa*, if there is such a thing. Maybe this is because a successful political philosopher is never exactly that: she lives at the perilous crossroads between *vita contemplativa* and *vita activa*. She contemplates political action and, based on what she sees, she prescribes certain changes to it. This is, to my mind, the *locus* of political philosophy, which renders inapplicable, in its case, any clear-cut opposition between "describing" and "prescribing", and between "descriptive" theory and "normative" theory. Moreover, Hobbes belongs to the rare category of men who have been able to give shape to the actions of others, to create a certain human practice grounded in a certain conceptual framework. What I have focused on in the book is how he has framed this "public" or "concrete" concept of legislation concept which covers so well our own intuitive understanding of statute law. I have not ventured beyond that point, as my purpose was not to write a chapter on Hobbes' legal philosophy. I may have been wrong and Poole is right to call me to account.

Will and reason

Hobbes' understanding of legislation can certainly be understood in the light of the interaction between will and reason. It is because of a requirement of natural reason that men leave the state of nature and enter civil society. It is a law of nature – that is, according to Hobbes, of natural reason (Hobbes 1991, *De Cive*, XIII, 275) – that enjoins men to have a sovereign. And the same law of nature "commands us to keep all the civil laws" (*ibid.*, 278).

Sovereignty – the first mark and exercise of which being lawmaking, which consists in manifestations of the legislator's will – is thus a requirement of reason. It is reason that makes us conform to a certain political arrangement – civil society - into which we obey the will of the sovereign, as expressed primarily by way of legislation. This arrangement is based on a submission of the subjects' will to the will of the "common power" and "their judgments to his judgment". Therefore "Authorization" requires a process by which certain wills submit to one will only – the sovereign's - and certain private reasons give precedence to the newly established public reason. The scope of this newly formed power extends to "opinions and doctrines", which includes the meaning of civil laws. Law is command. This concept of law as command unites reason and will: "command is where a man saith, Doe this or Doe not this, without expecting other reason than the will of him that sayeth it" (Hobbes 1996, 176). The only reason subjects have for acting in accordance with the law is that to do so is to act in keeping with the sovereign's will.

Reason also plays a decisive role in "government", by which Hobbes means both "the [political] power" as such and the way it is exercised ("the administration" or "the actions and motions of a commonweal"). The state is, in Hobbes' own words, an *imperium rationis* (Hobbes 1983-2004, 171): a "dominion of reason", or maybe a "rational dominion"."[2]. The core of Hobbes' argument seems to be that the stronger and more unified the sovereign's will happens to be, the more rational the government will become.

Therefore, if as Poole says, "Hobbes expects the sovereign to act rationally, most obviously in the exercise of its legislative

[2] One can also perfectly well translate the same Latin expression, as did Samuel Sorbière in his French translation, as "[a state] where reason exercises its empire" (Hobbes 1993, 195).

capacity", this requirement is best satisfied in a State where sovereignty is properly established and where the will of the sovereign prevails (Hobbes 1996, 227-8). Will and reason are not incompatible and they are not even really in tension. The requirement of rationality is not absent in Hobbes' frame of government but it can only be satisfied if and when the sovereign's will has been given pride of place. It is reason itself that prescribes that the sovereign's will be obeyed, and that this will should express itself in the best possible form. The formal requirement that lawmaking is subjected to are, to sum up, those dictated by the need for the sovereign's will to be cognoscible: "by word, writing, or other sufficient sign of the will" (*ibid.*, 183). For instance, as there is only one person in command, "the most absolute monarchy is the best state of government" (Hobbes 1991, 233). Hence the disqualification of deliberation as the preferable mode of identifying "all things conducive to the preservation of a commonweal": in great assemblies men, "though they reason, yet take they not their rise from true principles, but from vulgar received opinions (…)" and they fail to "fit their speech to the nature of the things they speak of". When government is left to such assemblies, the quality of legislation is impaired (*ibid.*, 232).

The sovereign's will and his reason thus tend to converge. They are not far from being one and the same thing. In the *Dialogue of the Common Laws of England*, the philosopher insists that "the King's reason, when it is publicly upon advice, and deliberation declared" that is, when it takes the form of a law, "is (…) *anima legis*" (Hobbes 1997, 17). The philosopher also emphasizes that the king should be both supreme judge and supreme legislator, as otherwise "there would be no congruity of judgments with the laws" (*ibid.*, 28). This convergence of will and reason is not however, perfect, and their conceptual relation is not one of equality or equivalence. Certainly, in the Hobbesian framework, reason is not allowed to reign supreme, either in the form of every subject's natural reason (as

this would entail disobedience and civil war) or in the form of Coke's artificial reason of the law. In the commonwealth, the sovereign's will should prevail, and his natural reason should trump the subjects' "private reason" *because* he acts as the ruler in the kind of arrangement that Hobbes recommends, and not because of some inherent qualities pertaining to his rational faculties: "Law, for Hobbes, provides a *public reason*, authoritative over the private reason of each individual" (Gauthier 1993, 326).

Sovereignty is the political model in which the reason of the ruler prevails absolutely: "it is not that *juris prudentia*, or wisedom of subordinate judges, but the reason of (…) our artificial man the commonwealth, and his command, that makes law" (Hobbes 1996, 187). The very nature of the sovereign is such that his own reason is identified, in the frame of government, as "reason" itself, or "right reason". Individual reason should give way or should aim at understanding what the sovereign meant in his laws. Legal rationality becomes an exercise aiming at clarifying the content of the sovereign's will: "law can never be against reason" so understood (*ibid.*, 186).

This primacy of the sovereign's reason is not entirely separable from the superiority granted to his will because of his being chosen as sovereign. And this is in turn related to the role Hobbes ascribes to rights in his entire system. Hobbes' state is not entirely rational insofar as it is founded on "rights, not reason" (Strauss 1963, 106). The state, as well as law and morality, is based on "a natural claim" and therefore not on a natural (i.e. rational) obligation. There is an inherent limit to the authority of reason, both in the natural and in the civil sphere. Reason cannot govern us entirely, and civil law is something else than right reason or the perfection of reason. It is based on the superiority of the sovereign's rights over that of individuals', on the corresponding superiority of his will over theirs, and thus on the acknowledgment of a certain degree of

arbitrariness. Hobbes' jurisprudence is one that sets out the proper limits of reason in the civil sphere.

Hobbes and modern legislation

This may indicate an important reason why Hobbes was a framer of our formal pattern of legislation but has not influenced, with the egregious exception of the need to legislate for safety and preservation, the *substance* of our legislative agenda. Hobbes was "consciously setting aside the content of religious and political projects" and did not "question the *legibus speciatim* but the *quid sint leges*" namely "not the content of the laws …but their function" (Koselleck 1979, 29). The reason may lie in the way Hobbes envisages law – and more generally "the businesse of a Commonwealth" (Hobbes 1996, 180) – as aiming at "peace, "justice"" and "defence" (Hobbes 1997, 56-7). While he also envisages that laws aim at "safety and well being" and "preservation and improvement" (*ibid.*, 9-10), the weight of the structure he has built leans heavily in the direction of preservation and peace. Hobbes' framework does not appear to be built for a developed elaboration of the relation between the content of the laws and the development of individual and collective well-being. Hobbes' concept of welfare[3], and his correlative idea of government remain in the orbit of his overarching concern for violence, death, and war in the "present world" (*ibid.*, 58).

While England, during Hobbes' lifetime, has known a flurry of legislative innovations in many fields, he seems indifferent to them. This is not to say, however, that there is not already in his writings a lot of what will later give rise to an important theme of *Penser la Loi*: namely, the empirically-based government of conduct by way

[3] Hobbes 1997, 61. "Welfare" means to be "defended from (…) domineering", protected from "destruction" arising from civil wars and factions, etc.

of legislation. Hobbes says important things to this regard, as when he famously states that "the common-people's minds (…) are like clean paper, fit to receive whatsoever by public authority shall be imprinted on them" (Hobbes 1996, ch. XXX, 233). Also, Hobbes makes clear that law, being made of commands and thus relying on obedience, governs outer actions and not conscience: "if the law is declared [the subject] undertakes to obey it [is bound] to obey it, but not bound to believe it". There is at least, thus, to be found in Hobbes the skeleton of the pattern of "government of conduct" that will develop at a later stage (*ibid.*, ch. XXVI, 198). But his insistence on the making and operating of sovereign power severely restricts the possibility for him to anticipate the future of the legislative state.

Judges

Hobbes' expectation that government should be rational, says Poole in his review, "is reinforced by the judges" who act as "independent-minded" interpreters of the sovereign's law, "adept in moral reasoning" and are expected to bring in reason in that process by way of their command of "equity", that is of natural reason". This is absolutely correct. Yet this does not detract from the fact that, in English law, the king is (or, rather, says the *Phylosopher,* "should be") both "sole legislator" and "supreme judge" (Hobbes 1997, 68) while subordinate judges are only "secondary causes" by which he acts indirectly: "all judgments and wars depend upon the will and pleasure of him who bears the supreme authority" (Hobbes 1991, *De Cive*, 238, 258).

As I said earlier, Hobbes' jurisprudence is first and foremost one that sets out the proper limits of reason in the civil sphere. One should not present the judges as guardians of an absolute reason that could have precedence over that of the sovereign.

Hobbes' state is not one where reason *as such* reigns supreme. In his jurisprudence, reason, justice and equity, are redefined in such a way as to prevent this from happening, or else all would be lost: "the king's reason, when it is publickly upon advice, and deliberation declared, is that *Anima Legis*, and that *Summa Ratio*, and that equity which all agree to be the law of reason (…)" (Hobbes 1997, 62). It is central to what Hobbes does in this regard that he retains the concepts of his predecessors and adversaries but redefines them. And he does so in such a way as to make them become nearly synonymous. For instance, Hobbes' 'equity' is not, as it is in English law, a body of rules distinct from the common law. Equity is "the king's reason". And, as far as customs are concerned, "the judgement of what is reasonable (…) belongs to him that maketh the law" (Hobbes 1996, ch. XXVI, 184-5). The existence of the commonwealth transforms the evaluative concepts of moral philosophy ("equity, justice, gratitude, …") into legal concepts of which the scope and content are determined by the sovereign. This is one of the reasons why "the law of nature and the civill law contain each other" (*ibid.*).

The rational structure of the state is, as we have seen, based on the will of the sovereign, and so is civil law. Laws are a "certain rule" by which the sovereign "hath declared (what) he would do" (Hobbes 1991, 246). Civil law is *his* law: "the command *of him* (…) who is endued with supreme power in the city" (*ibid.*, 274). The rationality of law is thus dependent upon the sovereign legislator's will (in lawmaking) and then upon his natural reason: "they seem to have looked very shallowly into the nature of government, who thought that the constraining powers, the interpretation of laws, and the making of laws, all which powers necessarily belonging to government, should be left wholly to the laws themselves" (*ibid.*, 247). A government of law is always a government of *someone's* laws: "When by any law the judges sit upon the life of a subject, the question is not whether the magistrate could by his absolute right

deprive him of his life; but whether by that law his will was that he should be deprived of it (…) However, by the ambition of lawyers, it is so ordered, that the laws to unskillful men seem to not to depend on the authority of the magistrate, but their prudence" (*ibid.*, 247-8). However, as Hobbes also says in the Latin version of the *Leviathan*: "It is not the prudence of subordinate judges, but that of the city, that is of he who has supreme power in the city, that makes the prudence of laws"[4].

Therefore the "prudence of the city" always supersedes that of individual judges, however skilled in equity they may appear to be. And if judges are to interpret laws, they can only do so as "authorized by the sovereign" (Hobbes 1997, 193). In the process of adjudication, the working of reason itself is submitted to the logic of sovereignty. This is clearly laid out in the *Dialogue of the Common laws*: "there is not among men a universal reason agreed upon (…)" besides that of the sovereign, as though "his reason be but the reason of one man, yet it is set up to supply the place of universal reason". And, as a result, "in all controversies, judicature belongeth to the king" who his "supreme judge" (*ibid.*, 67-8, 77). Equity itself is nothing else but "the reason of the sovereign". The subordinate judges' equity is guided by this sovereign reason, as "the intention of the legislator is always supposed to be equity" (*ibid.*, 194). Judges as "equity experts", in the Hobbesian model, are versed into understanding the sovereign's reason and how he has expressed it in the laws he has enacted. They are those who can ascertain "what will be commanded us" (Hobbes 1991, 278).

[4] « *Non ergo judicum subordinatorum, sed civitatis, id est, ejus qui habet in civitate summam potestatem, prudentia prudentiam facit legis".* Hobbes 1966, III, 199.

Legislation and interest

While I do not deny that some of Poole's other criticisms are certainly justified – for instance the insufficient interest I have paid to Victorian legislation[5] – I would wish to enter a plea of not guilty on the charge of failing to "notice the importance of the concept of interest". Poole's paragraph on the role of the concept of interest in the larger history of legislation is very illuminating. Yet I would submit that, while *Penser la loi*'s account of the intellectual history of legislation is indeed not one that is centered on that concept, the book does not fail to take notice of it. In the *Introduction*, I point to the role of legislation as a mediator between diverging interests in modern society (Baranger 2018, 12). The book also refers to the various uses of the concept of interest in the French Enlightenment from "*intérêt commun*" (*ibid.*, 58) to "*intérêt general*" (*ibid.*, 116). Indeed, the chapters on Rousseau insist on his critique of the "*société commerçante*" and its misguided focus on self-interest (see *ibid.*, 129). Conversely, I do not fail to identify the empiricist version of the sciences of legislation as one that is based on self-interest (*ibid.*, 148). This is for instance one of the main themes I identify in the writings of Helvétius (*ibid.*, 190) or Beccaria (*ibid.*, 216). And of course, I have insisted on the role of interest in Bentham's thought. The chapters devoted to Bentham contain a relatively detailed analysis of his concept of interest, as in the expression "duty and interest" that appears frequently in his writings (see *ibid.*, 208 and also 227, 245, etc.). I also analyze the role of interest in the "felicific calculus" (*ibid.*, 223f) and I comment on Bentham's famous phrase that "individual interests are the only real interests" (*ibid.*, 225f and esp. 227), and his concept of "sinister interests" is examined in the following chapter (234f). The book also points to Bentham's approach in terms of an artificial

[5] I might plead that this period was not included in my period of reference, although I acknowledge it would have been justifiable for me to do otherwise.

harmonization of interests, etc. Finally, there is a discussion of the role of interest in Adam Smith's "art of the legislator" in the book's final chapter (see *ibid.*, 292f). There are many more references to interest in the book and it is probably not necessary to take an inventory of all of them. But in any case, I am far from denying, as Poole seems to think, that the concept of interest has played a significant role in the history of legislative ideas.

Yet what *Penser la Loi* does is to incorporate interest in a conceptual framework which, I would hope, better explains the rise of modern legislation. As such, it does not focus on interest in the same way as, for instance, Knud Haakonssen's remarkable *Science of a Legislator* (Haakonssen 1981). The reason is that, however valuable Haakonssen's book was, it was not so much – despite its title – a work on legislation as one concerned with the moral theories and the theories of justice of certain important Enlightenment philosophers such as Hume and Smith. While they insisted on interest and sympathy in their account of justice, one had to explain in what way this account contributed – if at all - to our "public" and "concrete" concept of legislation (to use the two adjectives I have suggested earlier). This is what I have tried to achieve and this is why, inasmuch as I take interest into account, I have incorporated it into a larger theme which is not so much "reason" as *rationality*. Self-interest is a horizon of individual rationality. The sciences of legislation offer a model of legislation that uses our tendency to pursue our own interest with a larger purpose which is to maximize collective utility. In fact, in order to do so, they try to induce men to seek their self-interest. This is what *Penser la Loi*'s chapter 11 on Bentham's "Crusade against the Irrational" has tried to show. The utilitarian model treats men as insufficiently rational agents – that is: agents insufficiently pursuing their self-interest. The utilitarian model of legislation tries to mould individual behavior according to that pattern. This is what Bentham's *Complete Code of Laws* – which breaks down into a myriad

of special codes applicable to certain types of individuals engaged in various activities – achieves. Hence also Bentham's concern with formal values such as the law's "cognoscibility", its previsibility, etc.

This is also what I have tried to show in chapter 15 ("*La Cécité des Libéraux*"). If I blame the classical liberals for a certain degree of "blindness" (*cécité*), this is precisely because they seemed to think that self-interest would be strong enough a force to build the kind of society they supported: an individualistic and commercial one, based on a market economy and a concern for individual liberty. This concern is in a sense misleading as this model – which is also the model of the *homo economicus*, primarily concerned with the fulfillment of his self-interest – requires a great deal of collective management and a substantive law that seems to infringe upon individual liberty in order to encourage the agents' pursuit of their self-interest. If there is one single idea I have tried to emphasize in *Penser la loi*, it is this one: it took a great deal of legislation – and therefore a strong state – to bring about our liberal, capitalist and individualistic society. It took more laws, and not less.

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References

Baranger, Denis. 2018. *Penser la Loi. Essai sur le législateur des temps modernes*. Paris: Gallimard.

_____. 2008. *Écrire la constitution non écrite. Une introduction au droit politique britannique*. Paris: Presses Universitaires de France.

Gauthier, David. 1993. "Constituting Democracy," in *The Idea of Democracy*. Edited by David Copp, et. al. Cambridge: Cambridge University Press.

Haakonssen, Knud. 1981. *The Science of a Legislator: The Natural Jurisprudence of David Hume & Adam Smith*. Cambridge: Cambridge University Press.

Hobbes, Thomas. 1997. *A Dialogue between a Philosopher and a Student of the Common Laws of England*. Edited by Joseph Cropsey. Chicago: University of Chicago Press.

_____. 1996. *Leviathan: Revised student edition*. Edited by R. Tuck. "Cambridge Texts in the History of Political Thought. Cambridge: Cambridge University Press.

_____. 1993, *Le citoyen on les fondements de la politique*. Translation by Samuel Sorbière. Paris: Garnier Flammarion.

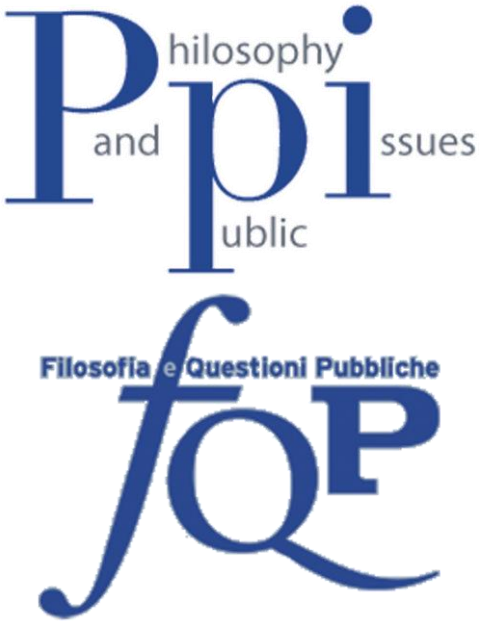
_____. 1991. *Man and Citizen:* De Homine *and* De Cive. Edited by Bernard Gert. Indianapolis: Hackett.

_____. 1983-2004. De Cive, *The Latin Version (…)*. Edited by Howard Warrender. Oxford: Clarendon Press.

_____. 1966. *Opera Philosophica quae latine scripsit omnia in unum corpus nunc primum collecta*. Edited by William Molesworth. Aalen: Scientia.

Koselleck, Reinhart. 1979. *Le Règne de la Critique*, Paris, Éditions de Minuit.

Strauss, Leo. 1963 (1952). *The Political Philosophy of Hobbes, Its Basis and its Genesis*, Chicago: University of Chicago Press.



DIRECT DEMOCRACY AND REPRESENTATIVE DEMOCRACY

BY

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Direct Democracy and Representative Democracy

Paolo Bellini

I

Introduction

Democracy , as a political concept and a form of government, has an ancient history. The term first appeared in Greece in the fifth century BC, where it was used to identify a kind of political regime in which the people, gathered in an assembly, tended to directly exercise the legislative, executive and/or judicial function as much as possible[1].

[1] "For all the citizens to be members of the deliberative body and to decide all these matters is a mark of a popular government, for the common people seek for equality of this nature. But there are several modes of such universal membership. One is for the citizens to serve in rotation and not all in a body …; for there to be joint assemblies only to consider legislation and reforms of the constitution and to hear the reports submitted by the magistrates. Another mode is for all to assemble in a body, but only for the purpose of electing magistrates, enacting laws, considering the declaration of war and the conclusion of peace and holding the audit of magistrates, … Another mode is for the citizens to meet about the magistracies and the audits and in order to deliberate about declaring war and concluding an alliance, … A fourth mode is for all to meet in council about all matters, and for the magistracies to decide about

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In the current political and cultural context, the ancient ideal of direct democracy, which Rousseau had already redefined in *The Social Contract* (Rousseau 1762) during the eighteenth century, appears to be constantly and vigorously put forward. Such a way of interpreting the legitimisation of power and the form of government presents multiple functional singularities and peculiar founding myths upon which it is necessary to reflect in an analytical way, in order to understand the specific nature of such an ideology and its effects at a systemic level.

II

Representative democracy

Technically speaking, the form of government of modern liberal-democratic regimes concerns the relations between the executive and the legislative power, so that a liberal representative democracy can be one of three fundamental types: parliamentary, semi-presidential and presidential. In the first case, the government depends on the parliament, where the sovereign people's representatives, elected by the people themselves, sit; in the second case, the President of the Republic is directly elected by the people and has specific prerogatives related to the exercise of the executive power, but is flanked by a Prime Minister whom, although appointed by the President, needs the support of the majority of the parliament; in the third case, the President, after a direct or indirect election (cf. the US system) governs in a monocratic way (by appointing the ministers) and does not depend on the parliament (the legislative power), which is only in charge

nothing but only to make preliminary decisions; this is the mode in which democracy in its last form is administered at the present day..." (Aristotle 1944, Book IV, 1298a).

of control and carrying out the legislative function (Bonvecchio – Bellini 2017, 157-64).

We consider all these cases an example of representative democracy since the electors never ultimately exercise the legislative action, nor the executive one, directly. As a matter of fact, those powers depend on the representatives of the sovereign people, who can periodically be renewed or replaced through the electoral mechanisms. In a representative democracy, therefore, the political power receives its legitimacy from the people, who are the exclusive holders of sovereignty, but it is subsequently and concretely transferred to a political class who will exercise it. Hence the dual function of the people/nation: they represent the constituent power (as theorised in 1789 by Sieyès 1964) from which the actual political-judicial order derives, but they also subsequently exercise, through elections, their sovereignty within the framework laid down by the system they have chosen for themselves. The people/nation is thus considered both a precursor to the establishment of any political system and the foundation of a representative democracy within the actual political order.

In other words, the people/nation carries out, in modern representative democracies, a dual function: it legitimises the existing political-constitutional order at the origin, while at the same time, through the electoral mechanisms, (directly or indirectly) delegating its representatives to form the government. In this sense, it is the ideological cornerstone on which every democracy stands and constitutes a powerful mythical-symbolic narrative which has the ability to determine the existence of stable systems such as the North-American and European ones.

In the democratic narrative, the people/nation is therefore conceived as a collective subject who expresses its will in a non-unanimous way, so that after every round of elections and in every situation, it always appears divided into two or more groups, each

with their own visions and political opinions. As Canetti has appropriately shown, the electoral mechanism of representation, with its liberal guarantees connected to the respect of fundamental individual rights, makes it possible to defuse, by transferring it onto a symbolic level, the implicit charge of destructive violence that is inevitably generated when a part, the majority of the people, imposes on the other part, the minority, decisions which the latter does not share. Through the elections, however, any potentially violent conflict is exclusively transferred onto a representational level, and the ballots cast in the ballot boxes take on a paradigmatic value in order to ensure social peace. One of the most important aspects of any representative democracy lies, therefore, not only in the fact that voting and ensuing operations take on a sacred character, so that there is "the renunciation of death as an instrument of decision" (Canetti 1984, 190), but also in the possibility, for the minoriti(es), of being represented, through the constitution of parliamentary groups and parties capable of expressing dissent against the majority, of which they control the actions and influence the decisions. Obviously, this symbolic mechanism works correctly only when between the electors and the elected there is a relationship of mutual trust and respect, so that the sovereign people can mimetically identify with their representatives, whom they perceive as the bearers of the collective interests of those who chose them.

Representation obviously needs, in order to ensure this mimetic identification, two fundamental conditions: the electors should feel a form of respect towards the elected, based on a rational examination of their conduct; but they should also feel, at the same time, a symbolic and emotional fascination for them. This means that the mimetic identification with their representatives, for the members of the sovereign people, is located both on a narrative, spectacular and imaginative level and on a level of pure ideological involvement, so that citizens actually believe that the political class

promotes the common good and is the bearer of widely shared values. Precisely these latter aspects seem to have entered a deep, disturbing crisis, in the current operating phase of the most important liberal democracies. Even without considering voting intentions during specific electoral deadlines, there is indeed, within several Western political systems, and with different connotations in different nations, a socially widespread and substantial lack of confidence in the political class, in the governments expressed by it and, sometimes, in the democratic institutions themselves (cf. Zmerli – van der Meer 2017).

This kind of attitude is probably determined by a general perception of a deterioration in public ethics, which is essentially fueled by a subtle interplay of specular references, where an increasingly ignorant and misinformed crowd of citizens tends to identify with and, as a consequence, elect to be represented by, politicians they consider similar. They, in turn, pursue their voters on that very same ground where prejudice prevails, with a lack of strong ethical beliefs and the hope of always being able to individually succeed at all costs and at the expense of others. This also depends, to a certain extent, on the decrease of interest of the institutions and *élites* for the social and political construction of the 'good citizen' (cf. Bellini 2016). Confiding that an ever-increasing economic wellbeing and a substantial virtualization and spectacularization of the real (Debord 1995 and 1990), used, as a form of anaesthesia, to numb all the irrational, violent and rebellious drives present in every society, would have been enough to ensure the established order, it was deemed unnecessary to seriously invest on such a burdensome and expensive task. Hence the temptation, entertained by several parts of the public opinion, and then intercepted by some parties and political movements, and constantly fuelled by the new information technologies that make it viable in practice, to respond to this crisis in political representation with an appeal to the constituent power of the

sovereign people, transforming the current liberal-democratic formula into an order which should contain as much direct democracy as possible.

III

Direct democracy

The ideal of direct democracy is predicated on the type of regime practiced in Athens between the fifth and fourth century B.C., which, within the modern Western civilization, has been the object of a substantial process of idealisation. The democracy of the Athenians has thus soared into the collective imagination as a model of true and complete democracy, and is often described as the only form of government where the people actually exercise their sovereign prerogatives.

With Rousseau's *Social Contract*, it was given a sort of theoretical enshrinement of the modern age; all those who put forward the ideal of direct democracy as a possible response to the crisis in confidence that is currently plaguing liberal democracies, implicitly or explicitly refer to this text.

Authors like Hardt and Negri (2012) and political movements such as the *Five Star Movement* in Italy make an appeal, unsurprisingly, to the thaumaturgical properties of a participatory and direct democracy, evoking its capacity for a palingenesis of the current parliamentary or presidential systems based on the concept of representation. This unmediated form of democracy, therefore, which in its most extreme theorisations directly involves the sovereign people in the exercise of all three powers – legislative, executive and judicial – (*ibid.*), or, as in Rousseau's case, just the

legislative power[2], appears to its proponents as a sort of magical potion, capable of healing the worn-out Western liberal democracies.

However, what is left unsaid about this form of government and power legitimisation is its dark and disturbing side for those who care about individual freedom, the efficiency of political systems and a correct and balanced relation between power and knowledge. If we were to summarise its salient features, it can be said that direct democracy:

1. eliminates the very idea of representation.
2. directly brings the constituent power onto the political scene, threatening the stability of every constituted power.
3. triggers potential totalitarian dynamics.
4. inevitably tends to compress individual freedom.

It is rather evident that, whenever the sovereign people, epitomised by the voters, were called to directly exercise a power, be it only the legislative power, this would *de facto* determine the end of representation, i.e. of the mirror in which the people themselves build their self-images and where their manifold voices reside. In this case, although citizens would be expected to legislate by a majority, not to directly exercise the executive power and to renounce self-government (for instance, by setting up a presidential government without a sovereign parliament), the ruling class would constantly depend, for all its acts, on popular will and its ever-changing whim, which would still be necessary to

[2] "We have seen that the legislative power belongs to the people, and can belong to it alone. It may, on the other hand, readily be seen, from the principles laid down above, that the executive power cannot belong to the generality as legislature or Sovereign, because it consists wholly of particular acts which fall outside the competency of the law, and consequently of the Sovereign, whose acts must always be laws" (Rousseau 1762, 43).

govern in practice. On the other hand, if citizens were directly called to make executive decisions, the political class would be left with the task of instructing a propositional phase before voting on the most significant governmental acts, becoming, *de jure* and *de facto*, a power that would coincide with the ability to manipulate and obtain the majority's consent. In that way, the constituent power (the sovereign people) would always become the protagonist of every significant political decision, so that no stable constitutional order could be invoked before them, as every decision would directly emanate from the very source of power, thus being, in its nature, incontestable. The people would therefore become a sort of empirical absolute that would express itself by a majority. The outcomes of such a system, especially in an industrial and technological society, can only be totalitarian in character or, as Plato had understood, at the very least tyrannical[3]. In other words, every time the citizens are called to legislate on everything, or even make governmental decisions, especially within complex and technologically advanced societies, a dangerous overlap between power and knowledge inevitably occurs. This inevitably leads to the uncontested domination of a majority which is almost always oblivious to the issues on which it should decide. This majority, by its very own nature an easy prey for demagogues and populists of all kind, would then always be ready to release, without any form of control, its prejudices and fantasies. As a result, the voices of the experts would go completely unheard, derided by the

[3] "The teacher in such case fears and fawns upon the pupils, and the pupils pay no heed to the teacher or to their overseers either. And in general the young ape their elders and vie with them in speech and action, while the old, accommodating themselves to the young, are full of pleasantry and graciousness, imitating the young for fear they may be thought disagreeable and authoritative… And so the probable outcome of too much freedom is only too much slavery in the individual and the state. … Probably, then, tyranny develops out of no other constitution than (direct) democracy" (Plato 1969, Book VIII, 563 a-b and 564 a).

interconnected individuals who form the sovereign people. As is already the case on the internet, where on several issues, instead of lending their ear to the most learned in a field, people give credit to those who can better tap into their emotional impulses and collective imagination, the same thing would happen on a much larger scale, in case such a dystopia became reality. Precisely because the people, by a majority, exercise the constituent power, which, in turn, cannot be limited by anything except itself, at least in the mythical-symbolic fiction of popular sovereignty[4], it would

[4] "… the people exist as a community constituted in accordance with *justice* (legal aspect) and *commonality of interests* (economic/utilitarian aspect), within a symbolic and imaginative framework (value-related aspect). It is not possible, therefore, to assign any kind of sovereignty to the people themselves, since, in accordance with the given definition, they depend on power, as power precedes them both logically and ontologically, and cannot therefore belong to them. In other words, it can be said that *the people are not the source of power, but power is the source of the people.* This statement can be easily proven by the fact that *justice* and *commonality of interests* cannot be conceived as independent of power, whereas power, to exist, needs neither *justice* nor *commonality of interests*. As a matter of fact, power can be exercised in its originating aspect, i.e. as force and command, even without the presumption of either *justice* (common law) or *commonality of interests*, as it happens when individuals, groups or entire communities are subdued and, in conditions of subjugation, slavery or simple subjection, cannot share any law nor have a *commonality of interests* with their rulers. On the other hand, it is impossible to exercise any form of *justice* or *commonality of interests* without a structure of power capable of giving effectiveness to these concepts, so that the people themselves can be shaped at an empirical level. Namely, the establishment of those principles that structure the people as an empirical entity always requires a coercive force of some kind (imaginal, material or spiritual), in the absence of which it translates into a simple desire without any effectiveness, a pure being a potential without ever becoming act. Moreover, the very existence of such ideas (*justice* and *commonality of interests*) is often conditional to the education received, which, in turn, depends on the power itself, which socially founds institutions, such as schools, designated to that purpose. Additionally, from a merely logical point of view, a shared law, on which human disputes should be decided, and the construction of what, each time, should be considered as the common good

not be long before they would make decisions, due to a substantial lack of knowledge, that would trigger such a magnitude of social problems as to generate an emergency with apocalyptic connotations (Bellini 2012). Such a situation would induce, in turn, the very same sovereign people to ask a charismatic *leader* or a well-organised group (of the oligarchic kind) to assume full powers, in order to be saved from their own irrational and senseless choices. This would justify, at that point, a full transfer of power to the new sovereign, in order to allow him or her to operate effectively. Therefore, the *de facto* holder of sovereignty would not be the people anymore, since their constituent power would withdraw once again into the chaos from which it came, leaving space for what would be an essentially totalitarian order which would govern with implacable energy. This new holder of power, in turn, if we consider the swift technological evolution to which our contemporary civilisation is subjected, could even have, in a not-so-distant future, the distinctive features of an artificial intelligence or, more likely, those of a (new class of) cybersymbiotic organisms, half humans, half machines. These organisms, as predicted by Harari in a recent essay (Harari 2016), would govern with a systematic use of algorithms, capable of steering the existence of the millions of beings who voluntarily submitted to them.

Such a disturbing scenario would not only inevitably result in a systematic compression of the individual freedom, but would also bring about, during its initial, pre-totalitarian phase, all kinds of conflicts, including violent ones, between an arrogant majority, strongly entrenched in its hegemonic position, and a minority which, left without representation, would soon rebel. As a matter of fact, in such a context, the people's constituent power, emerging from the chaos in which it is usually pushed back by the constituted

are, without power, undecidable in their axioms of reference." (Bellini 2007, 143-4).

power and by the principle of representation, would project its own lack of order within any kind of political system. This instability is indeed integral to the fact that majority and minority would in any case be fluid and unstable, given that each citizen could potentially, and alternatively, be part of either group each time. In that sense, direct democracy can be compared to the monsters against whom the Olympians of the Greek pantheon used to fight to establish an order that, however asymmetric, determined a space in which a peaceful and safe existence was possible. Precisely the wish to be safe and a Hobbesian fear of death[5] push the sovereign people, incapable of governing themselves and fallen, by their own hands, into a state of significant uncertainty, perhaps even of pure anarchy, to surrender their whole power to those who are in the condition of ensuring peace and safety, seeing as how they possess not only the art of politics, but also the opportunity to use, since they have access to it and understand its importance, the necessary knowledge for the survival of the society itself.

It is not difficult to imagine the kind of regime which could arise if this type of constituent power took hold within a technological civilisation, where a mass of ignorant citizens, perpetually connected to a network, manipulated by the groups who control it, oblivious of what actually happens, would essentially be at the mercy of oligarchies capable of easily steering their consent through the display of a reassuring, paternal and redeeming *leadership* (cf. Bellini 2012).

[5] "The passions that incline men to peace are: fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them" (Hobbes 1651, 79).

IV

Conclusion

A technological civilisation, with its ability to interconnect all the citizens, by creating hierarchically ordered networks which are a function of the number of connections that each element possesses plus the ability to voluntarily activate such channels[6], makes direct democracy on a large scale viable. This, however, brings to light all the contradictions related to the authoritative moment that determines every process of power legitimisation, whose bases are of a mythical-symbolic kind, unjustifiable on an empirical and rational level. In fact, by bringing directly onto the political arena, through direct democracy, the sovereign people, as a constituent power to be called upon on any political matter of a certain relevance, both as a principle of legitimisation of the political order and as a form of government, leads *de facto* to a regime where neither an order nor a constituted power can permanently exist, since the constituent power incessantly acts and never retreats to the background. It is as if the God of the Old Testament, after having given Moses the Tablets of Stone, had continued to constantly appear, changing their contents every time. In fact, naive or self-interested considerations on the merits of direct democracy, considered as that form of government where the sovereign people, understood as a sort of political divinity,

[6] "According to network theory, which was developed, in the scientific-experimental field, during the second half of the twentieth century, two fundamental types of network structures are possible: *egalitarian* and *aristocratic*. While the former are characterised by equally-distributed connections among the nodes of a network, the latter are determined by the fact that most existing connections are monopolised by few elements called *hubs*. Just as there is a prevalence, in the economic and technological fields, of network organisations of the second type (aristocratic), of which the internet and the *World Wide Web* are the models *par excellenc*e, the same thing happens in a strictly political dimension." (Bellini 2011, 73).

keeper of justice and goodness, can finally and freely express their will, are nothing but pure and simple falsifications. As a matter of fact, such positions tend to neglect (in good or bad faith) the fact that the power always precedes any justification of its legitimacy, since it exists as an immediate and insuppressible relationship among human beings, deeply intertwined with the very same existence of our species. Any justification on why some people give orders and other people take orders may only happen *ex post* and not *ex ante*. Only after becoming aware of how much power relations deeply belong to human nature and qualify it as such, it is possible to try to justify these phenomena, by representing them within a narrative that evokes such concepts as justice and goodness. This happens, very simply, because the human species, unlike bees and other insects such as ants, is made up of individuals equipped with an autonomous language and a self-conscious ego, who, in order to accept any political and social hierarchy, need it to derive from a founding narrative, created with the purpose of justifying the established order[7]. The idea of a sovereign people, therefore, asserts itself as the most suitable narrative to interpret the need for an empirical correspondence between concepts and reality which is typical of modern culture. The people, in their empirical immanence, are indeed designated as something with which it is possible to concretely interact, since their existences are intimately intertwined with those of the individuals in flesh and bone who form it. However, this people exists *de facto* only by virtue of power, which forges common values and identities; otherwise, there would only be a rabble of individuals, so heterogeneous that

[7] "… ruling classes do not justify their power exclusively by de facto possession of it, but try to find a moral and legal basis for it, representing it as the logical and necessary consequence of doctrines and beliefs that are generally recognized and accepted. So if a society is deeply imbued with the Christian spirit the political class will govern by the will of the sovereign, who, in turn, will reign because he is God's anointed." (Mosca 1939, 70).

they would have no lowest common denominator that would allow them to recognise themselves as a coherent set. There are countless historical examples of this and it is sufficient, for a correct theoretical understanding of the issue, to consider the importance that the modern State has had in determining the concept and the very same existence of a nation (cf. Bellini 2010).

Ultimately, it is impossible not to ascertain the extreme danger, to every established order, which is generated by the direct and constant call into question of the very same foundation on which the entire order stands; in doing so, the narrative and partially fictional nature of every form of power legitimisation is revealed. The sliding of the representative regimes towards direct democracy thus reveals the fact that the people, whenever they find themselves, and in spite of themselves, having to exercise in a total, incessant and unlimited way the sovereignty that is attributed to them on a symbolic level, always risk surrendering to a disturbing totalitarian tyranny.

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References

Aristotle. 1944. *Politics*. Translated by Harris Rackham. Cambridge, Mass: Harvard University Press.

Bellini, Paolo. 2016. "Virtualization of the Real and Citizenship: People, Power, Society and Person," *Philosophy and Public Issues* 6 (3): 79-93.

_____. 2012. *L'immaginario politico del salvatore. Biopotere, sapere e ordine sociale*. Milano: Mimesis.

_____. 2011. *Mitopie tecnopolitiche. Stato-nazione, impero e globalizzazione*. Milano-Udine: Mimesis, 2011.

_____. 2010. *Nation-State, Power and Identity*, in Metabasis.it, V (9). www.Metabasis.it.

_____. 2007. *Cyberfilosofia del potere. Immaginari, idelogie e conflitti della civiltà tecnologica*. Milano: Mimesis.

Bonvecchio, Claudio – Bellini, Paolo. 2017. *Introduzione alla filosofia e teoria politica*. Milano: Wolters Kluver.

Canetti, Elias. 1984. *Crowds and Power*. Translated by Carol Stewart. New York: Viking Press.

Debord, Guy. 1995. *The society of the Spectacle*. New York: Zone Books.

_____. 1990. *Comments on the Society of the Spectacle*. London; New York: Verso.

Harari, Yuval Noah. 2016. *Homo Deus. A Brief History of Tomorrow*. London: Penguin Random House.

Hardt, Michael – Negri, Antonio. 2012. *Declaration*. Allen: Argo-Navis TX, USA.

Hobbes, Thomas. 1651. *Leviathan or the Matter, Forme and Power of a Common-wealth Ecclesiaticall and Civill*. London: Andrew Crooke, at the Green Dragon.

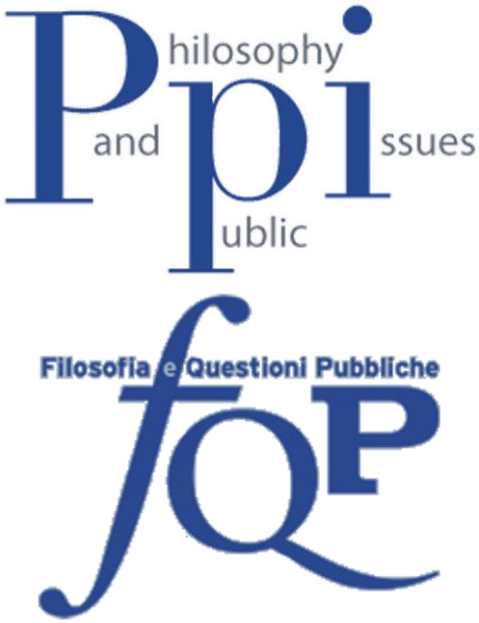
Mosca, Gaetano. 1939. *The Ruling Class*. Translated by Hannah D. Kahn. New York-London: McGraw-Hill.

Plato, 1969. *Republic*. Translated by Paul Shorey. Cambridge, Mass: Harvard University Press.

Rousseau, Jean-Jacques. 1762. *The Social Contract or Principles of Political Right*. Translated by G. D. H. Cole (Public Domain).

Sieyès, Emmanuel Joseph. 1964. *What is the Third Estate?*. Translated by M. Blondel. New York: Praeger.

Zmerli, Sonia – van der Meer, Tom W. G. (eds.). 2017. *Handbook on Political Trust*. Chelthenam Uk – Northampton MA USA: Edward Elgar Publishing.



LAW, MORAL LAW AND POLITICS IN ERIC WEIL

BY

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Law, Moral Law and Politics in Eric Weil

Marco Filoni

The symbolic value of law has lost its power. Law is no longer a stone wall, as Hannah Arendt called it in her reading of the political dimension in the *polis* of ancient Greece (Arendt 1998). Over the centuries, the wall has begun to crumble and, despite efforts to re-build it, higher and stronger, the law conceived as solid, foundational and unmovable has been revealed to be a mere myth, a splendid myth. Plato wrote in the *Laws*: "And let the first of them be the law of Zeus, the god of boundaries. Let no one shift the boundary line either of a fellow-citizen who is a neighbour, or, if he dwells at the extremity of the land, of any stranger who is conterminous with him, considering that this is truly *to move the immovable*" (842).

This is the starting point of Denis Baranger's analysis contained in his latest book: only by making the law sacred again can we also understand its crisis.

This is not a peculiar aspect of our times: many moments in history have experienced the effects of the law's loss of symbolic strength: "Law is devalued. The word *law* does not carry the same symbolic weight it had in different times in history. The law-making and enforcing zeal generally ascribed to the French Revolution or the time of the Napoleonic Codes today appears to

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us as the symptom of a not entirely understandable and somewhat deplorable political delusion. This symbolic devaluation has resulted in a loss of efficacy. The law, therefore, is often seen as ineffective in addressing societal problems and reflecting the preoccupations of its political community. Legislation lends itself […] to be constantly regarded as ineffectual or even of illegitimate" (Baranger 2018, 9ff). It might appear that the two categories, the sphere of the sacred and the essence of crisis, are indissoluble: law, as conceived by Hobbes, cannot exist without its opposite, chaos – in a kind of *indifferentiation,* to use Gadamer's definition, where the acts of investiture and foundation are tied to a sacrificial crisis.[1]

In fairness, the accusation of ineffectiveness is often wielded against constructs other than the law. Democracy, too, is often seen as existing in a perpetual state of crisis. Is it because the democratic order, itself so often sacralised through the ages, has to be cast in the role of the victim, of the scapegoat – for it to function better than before?

I

The value of effectiveness

Despite all the inevitable questioning, the notion of democracy has survived to become a fixture of our age. We export it, we defend it, we fight for it. But are we sure we know what it is? We are often satisfied by simply articulating the word *democracy*, a concept so rich in positive and permanent values, certain that we could not possibly live

[1] Girard 1982; the same author has also examined the paralysing dialectics of sacrifice in Girard 1972. See Alfieri 2003 e Bellei 1999.

without it. But do we truly know what we are talking about? Or is it just what we were told – received wisdom, definitive and not negotiable?

We can improve our understanding by examining Eric Weil's writings on the subject, as a means to assessing the role of the sacralisation/crisis nexus within democracy, as if it were one of its implicit philosophical aspects.

The topic has not been explicitly addressed in Weil's three major works: *Logique de la philosophie* (1950), *Philosophie politique* (1956) and *Philosophie morale* (1961). These writings saw the light in a philosophical context dominated by marxism, existentialism, phenomenology, structuralism, psychoanalysis, but Weil's thinking distrusted all schools and, by refusing to be reduced to any one of them, deliberately ignored them.

Weil debates the problem of "violence", thought and understood as a possible course of action for mankind, as a free act of will that can be made sense of only within the scope of philosophy, which is in essence its exact opposite, the denial of violence.

In 1950, Weil published alongside *Logique de la philosophie* a little golden book dedicated to Hegel (Weil 1950b). Here, in a few clear pages, he dismantles one by one the many fallacies circulating at that time (and not only at the time) within the extensive literature addressing Hegel's philosophy of law. As it was correctly observed, "if Weil's intention is to show how Hegel views politics as the achievement of a philosophical science of reasonable will, and cannot therefore give up reformulating once again the old philosophical concept of *freedom within the situation* (…), it is therefore necessary to emphasize how the will always gives itself a content which is mediated by practical reason: freedom itself. This is only

possible by accepting the existence of 'a reasonable and universal organization of freedom', which is the state, a structure that allows thought to give itself a reality – to be *effective*" (Palma 2017, 111).

In Weil's reading (that owes a lot to the famous lectures of Alexandre Kojève) the declared goal of every kind of conflict is *recognition* (*Anerkennung*), even in the pre-statual sphere which precedes the foundation of a state or a political community. Thus, effectiveness becomes a value, detached from any teleology of reason: effectiveness becomes a "sacred" of our times, indispensable for the enactment of reason.

But how do we ensure such political effectiveness is reasonable (balanced) and usable by and within democracy?

II

Democracy as debate and public reason

We can attempt to answer by looking at another two of Weil's writings: the first appeared in 1950 with the title *Limites de la democratie* (Weil 1950a); the second was published one year later, in English, *Democracy in a World of Tensions* (Weil 1951). Though Weil is well aware that no political system can be entirely described as a democracy, his main concern is to try to define it – the etymology of the term is not helpful in this respect, since the word democracy is meaningless: the people are considered as a mass, and a mass, as Canetti observed (Canetti 1960), is unable to act positively; if on the other hand we consider the people as an organized community, one that is able to take positive action, then the

term 'democracy' comes to define a Constitutional State (Weil 1957).

Defining democracy is far from straightforward: absolute monarchy, tyranny, aristocracy and even dictatorship all present distinctive and recognizable features, thanks to which it is possible to tell whether a certain form of political aggregation corresponds to such a kind of organization or not.

"It is not the same for democracy: do we not sometimes refer to a particular state as being a democratic monarchy, a democratic dictatorship, a democratic aristocracy, and do we not often identify democracy with ochlocracy? Of course, we could solve the problem by formulating a rigid definition. But, however legitimate, this shortcut would still be unsatisfying. Political terms maintain their scientific sense only in science books, while the life of a community does not manifest according to the rules of clear speech, but in words weighed down with positive and negative values, preferences, feelings – and the possible or unavoidable logical consequences that worry theorists do not matter much" (Weil 1950a, 35).

This is why Weil is so cautious when using the term "democracy" in his *Philosophie politique*, compared to these two later essays. He is keen to avoid using terms which are charged with symbolic value, rich in connotation (positive or negative) – this probably explains why in *Philosophie politique* he abstains from using the terms "totalitarianism" and "dictatorship" as well, having nonetheless addressed such concepts in a number of interesting and clear essays (Weil 1991).

Weil is not interested in achieving the logical consistency of the theoretician, to be someone who is satisfied with being right, even if nobody really listens to what he says or finds it

relevant. Weil's ambition is to engage with reasonable political life, he is only interested in elaborations which are truly *effective* (not by chance, one of his favourite thinkers is Machiavelli).

If we want to take as our starting point political reality as experienced in daily life (a concept summarized by Weil with two succinct examples: Lincoln speaking of the "government of the people, by the people, for the people" and the French motto "liberté, egalité, fraternité"), a constitutional state is necessary, as it guarantees freedom of speech to all citizens who have the right to take part in political decisions.

"*Democracy* can be described as based on reasonable and rational discussion" (Weil 1956, 218): such is Weil's premise: among the founding principles of democracy we find not only universality, but also freedom of speech (that is: the right to take part in the public debate assured to all individuals who, for this reason, can and must participate without fear). This is after all, Weil explains, the implicit pre-condition for equality: "Democracy may be said to exist when all members of a community are able to partake, on an equal basis, to the discussion of public affairs" (Weil 1951, 432).

III

The social sphere of democracy

Weil's thinking preceded that of other philosophers such as Hannah Arendt, Jürgen Habermas and John Rawls, who assigned great importance to the public dimension – following in the steps of Hegel and Kant (rooted in Hume): the public sphere allows free and reasonable discussion and, furthermore, recognizes its essential political role.

Every political decision is always subjected to the scrutiny of public opinion: the majority of citizens is not only influential and expresses itself freely, it also asserts direct or indirect control over political action. Citizens choose their representatives to administer public affairs, according to rights guaranteed by a body of rules (a constitution) by which everybody must abide (Weil 1951, 425).

Nevertheless, Weil adds, procedures (laws) can be formulated in ways that render ineffective, illusory, the rights they are meant to protect.

What is more, we cannot take for granted that all citizens will be able and willing to participate in the public debate: they might be uneducated and therefore ill equipped to understand the importance of the issues discussed, or they may have no interested in them. In the end, life conditions are crucial in allowing everybody to take part in democracy: social and financial pressures can determine one's exclusion from active political life.

Thus, Weil connects the political sphere, at least within a democratic regime, to the social sphere – positing the latter as the pre-requisite for the former.

"It would be tempting to believe that in such way we may bridge the apparent contradiction between the neutrality of democracy as posited by classical (meaning ancient Greek) constitutions and the existence of an institutional problem within democracy. But such an issue would simply appear on a different historic level, one consisting of vast states, large populations and a perfected system of material, intellectual and administrative communications – states with a highly centralized government and economy, in which community

members are socially integrated and strongly interdependent" (Weil 1950a, 36).

Weil turns his gaze towards the formal democracies of the XIX century, describing them as characterized by two main features: first of all, juridical and political equality; secondly, social equality – thus identifying the need to guarantee increased wellbeing for an increasing number of people. Such is the material and moral progress of mankind, the result of an essentially negative action: reducing inequality among individuals leads to their liberation. We are all aware that this theory drowned in the sea of revolts and revolutions that marked the XIX century, "a century that believed in the disappearance of the state: mankind, according to this view, is intrinsically reasonable, violence had already been overcome, all there was left to do was to erase its last traces. We can envy such optimism, but we can no longer share it" (Weil 1950a, 28).

Having lost such optimism, our age has come to recognize the need for organized action by the state: "the state, and the democratic state perhaps above all, must consciously seek out the true interest of the citizen, promote material progress by eliminating violence ('social stresses'), and, through material progress, promote moral progress toward the ideal of nonviolence" (Weil 1951, 426).

The fundamental problem with democracy, according to Weil, lies in the fact that it is not only a government system established and controlled by the people, but also a government system in charge of educating people towards the safeguarding of democracy. Man does not inevitably relinquish the use of violence, he is not reasonable by nature – but he *can* and *must* become reasonable. It is all the more interesting to notice that the concept is expressed using very similar, almost

identical words, in the two essays on democracy written by Weil: "We talk about educating the reason through reason, to attain universal reason: we demand that every man is entitled to such education, that nobody is excluded, and that anyone can take part in the elaboration of social projects – but under the condition that everyone renounces violence and is ready to change his mind. Maybe there is nothing less democratic than the introduction of formal democracy, and it does not matter when and in which context: hunger, oppression (not only in terms of oppression by law enforcement), deprivation of dignity and hope do not make perfect citizens. But education must not be misunderstood and cannot be mistaken for tyranny: it is enough to assess if such education is welcomed by those who receive it and is increasingly created with the contribution of those who receive it – or if, on the contrary, suspicion between government and people grows deeper, if the *raison d'état* comes to oppose the reason of individuals; if, in short, citizens participate, in time, more or less, to public affairs" (Weil 1950a, 39).

IV

Democracy and the common good: Weil and Arendt

In this matter, Weil's stance is quite different from Arendt's. According to Weil, the necessary conditions for democracy are: "Equality of all citizens before the law; equal political rights for all adult citizens; the acquisition of these rights by all who reside in the relevant territory, or at least all who are born and habitually reside there; a government elected by and subject to the control of all citizens; eligibility of all citizens for public office; and the protection of citizens against public persecution on grounds of opinion" (Weil 1951,

426). There is a strong reference to the social context here. Social context is what guarantees the formal conditions for democracy. According to Hannah Arendt, on the other hand, politics are bound to fail as soon as they get themselves entangled in the social question. This is one of the key theses of *On Revolution*: political action loses its essential element of freedom when it becomes the administration of social needs (Arendt 1963). As a support for her thesis she recalls the French Revolution, which evolved into a tyranny as soon as the revolutionaries attempted to solve the "problem of bread".

The divergence between Weil and Arendt in the way they articulate the political problem rests on the distinction between *private good* (individual) and *common good* (universal). The classical definition of democracy implies the right of the individual to work in order to fulfil his/her own needs and wishes, to pursue his or her happiness – within the framework of the law, abiding the law. Democracy, however, also recognizes the government's right to pursue the common good, which is defined in social and material terms. In other words, the political order (the state, the government) has to guarantee and respect individual freedoms, but must also intervene and manage personal interests if they risk harming the collective. What is at stake here is the possibility of reconciling the universal and the particular: the pursuit of the common good does not imply an exclusive focus on society's collective life, leaving aside all that is individual and corporative, allowing individuals to fulfil their desires and pursue their own welfare autonomously. As observed by an acute critic, "Hannah Arendt's solution consists in separating the universal of political action of the particular from the sphere of social interests. Conciliation takes place through a separation of spheres. On the one hand, the freedom enjoyed

by individuals within the common action in which their individual personality is revealed; on the other, the sphere in which their needs are fulfilled through work, where natural inequalities and subordination relationships reign" (Canivez 1993, 209-10).

V

The moral foundation of politics

The fact that Weil sees the social context as a necessary pre-condition for democracy stems from his general conception of political philosophy. Political philosophy should be considered only in relation to human action. The concrete understanding of human action is the goal of political philosophy alone. Political science, or any hypothetical-deductive theory, inevitably views political reality from a certain perspective. No matter how objective it tries to be, it is unsatisfactory for a man of action, because it cannot show him how to pursue his end or, most of all, how to provide a (normative and ethical-normative) framework to his pursuit. Action needs criteria, and only political philosophy can conceive such criteria and assist individuals in making their aims and desires come true. We are firmly within the domain of morality. Since people live in communities, only moral criteria will allow them to navigate the world they live in and make sense of it. But this can happen only if they want it: it is a choice that exists in the sphere of the politics-morality nexus. Only by achieving a positive alignment of the two can we solve the problem that action poses. Nevertheless, at any time we can fall into the trap of thinking we must choose *between* politics and morality, acting like a true moralist or a pure politician. We are always in danger of choosing one

over the other. Let history teach us something, Weil suggests. "There is no doubt: to choose is indeed possible. The proof is that men have always chosen, opting for one of the two possibilities and excluding the other; Epicurus and Francis of Assisi refused politics; Gengis Khan and Hitler didn't devote their sleepless nights to the solution of moral problems" (Weil 1962, 241-42). It is possible to choose one domain over the other, but such a choice implies giving up on the possibility of understanding reality, renouncing philosophy.

According to Weil, we need to achieve a satisfactory definition of the relationship between morality and politics. In sum: morality does not exist and does not become a reality outside of the political domain, but (reasonable) politics inevitably exists only for those who posed themselves the moral problem, since only through the position of this problem, can politics give reasonable answers. Only in such way can the idea of political philosophy acquire meaning outside of its historiographic value (Weil 1956, 27-28).

It is morality, therefore, that gives politics a philosophical meaning. But for the man of action, this moral imperative turns into a need for social justice, for education. For the individual in general, this moral necessity is the quest for happiness, for the satisfaction of material and other needs, for a life imbued with sense. This happens because men live together inside a determinate political community. "Moral life cannot be known or achieved outside of a community, a community that is moral, which is to say, capable of a higher form of morality" (Weil 1961, 212). This is the trait of all great political philosophies after Machiavelli: the acknowledgement of political reality and of the necessity of political realism.

Moral necessity is founded in the principle of the formal moral of universality – hence, in the loss (or the refusal, the Hegelian recognition) of the world of concrete morality, the loss of the world of *certainty*. Said loss allows man to understand the world. Only in the state of uncertainty and precariousness in which he dwells will he feel the urge to think. Banished from the realm of certainty, man lives and acts in the world "as a possibility among a theoretically infinite number of others and feels, therefore, compelled to *choose* a way, a goal, a sense, an orientation" (Weil 1956, 24). When he lives within the realm of certainty, every individual has *a morality*. Only when he comes in contact with other communities does talking of (plural) "moralities" make sense. They are still concrete moralities, systems of mores, beliefs and institutions that determine and structure the life of a community. In other terms, the pattern of behaviours and representations (the idea of good and evil, of right and wrong) that all members of the community share. The mere discovery of alternate "concrete (plural) moralities", made when one comes into contact with other communities, is cause for struggle.[2]

Becoming aware of other possibilities is a source of concern, because for the first time one doubts one's own mores and the existence of the principles that form a concrete morality. This state of uncertainty of any system of concrete morality comes to the surface in the relationship with other moralities: "The conflict of moralities, the discovery of contradictions within a morality (which become visible only

[2] See, as for the problem of concrete moralities and, most of all, the conflict they can raise, the debate on multiculturalism that started with Taylor 1994.

after such a conflict has come to life) brings forward a general reflection on morality" (Weil 1961, 13).

VI

The law of politics

The principle of a formal morality of universality, which we briefly considered through the prism of Weil's reflection, provides political action with a choice: the coming of a world where reason may inspire all human beings. It was not easy to get to this point, the philosopher adds. "The combined effort of over twenty centuries was what it took for this principle of morality to be articulated in its purity by Kant" (Weil 1956, 25).

Weil goes further. His entire thinking is assertively Kantian in essence. "The universal problem of a universal moral and of universality has come to dominate speculative thinking (it easy to say when, because it coincides with the Kantian revolution, which had far more radical and far-reaching consequences in the domain of morality than in that of metaphysics – one cannot understand the latter without putting it into a relationship with the former); but what appeared at the time was a *truth*, leaving aside the fact that it had to be discovered" (Weil 1961, 100). Moral philosophy cannot avoid contemplating the problem of the foundation of moral laws, because moral law appears as an enunciation for the philosopher to problematize, it is not a given, a preliminary fact. Moral law has to be considered in Kant's perspective, as it had been developed in the *Grundlegung der Metaphysik der Sittten* and in the *Kritik der praktischen Vernunft*, in other words as a proposition the meaning of which can be found only within the philosophical discourse that we hold as

valid and that questions the validity of any other philosophical discourse.

Weil reinterprets the Kantian imperative: "I must always behave in such way *that I should wish my maxim became a universal law"* (Kant 1785, 401). According to Kant, this is truly the crux of the matter – which he also comes back to elsewhere in his works, as for example in his conception of *Publizität*. Kant defines it as the sphere where "people" can behave as "citizens", where they can emerge from their state of "minority" and *rationally* take part in the life of the state. Law creates this sphere, the domain of the "public", a space of expression where the ethical-political element freely acts in the open. The domain of law is also a place where the juridical postulate can be mediated by the categorical imperative and produce the reconciliation of morality and politics. The imperative comes to be reformulated in the *transcendental formula of law*: "act as if the maxims [of your action] were to become through your will a universal law (whatever the end [of your action] may be)" (Kant 1795, 377). In other words, morality founds politics from a historical and rational perspective; moral imperative becomes politics.

But here is where Weil distances himself from Kant. According to Kant, man is likely to put his individual goals before the universal ones, thereby disobeying the moral imperative in his own conscience. Nevertheless, man always carries the law inside his conscience (the law is inside him, even if he doesn't heed it). Weil, on the other hand, admits the possibility of a rebellion against the law, of refusing to respond to a moral conscience and choosing violence. It is a refusal of morality that corresponds to a refusal of coherent discourse: violence. It is a man's duty to refuse it, and to choose reason. Weil states that "duty is the only fundamental

category of morality." But it is always a duty toward oneself. "The concept of duty toward oneself expresses the fact that, *per se*, the individual is not made of pure reason and cannot be reduced to what tradition calls his reasonable side. He *wants* to be reasonable: he wants to act according to the principle of universality, but he is a finite, passionate being, a subject of needs and desires who is exposed to temptations. In this sense, the individual really becomes an object and a material in himself, the finite being for the reasonable being, and he really wants to become it, because it is his duty" (Weil 1961, 101). Such a duty undergoes a transformation of sorts as soon as it moves from being a duty toward oneself to a duty toward others. This is the way the moral man finds his fulfilment. But how can such a man do his duty toward others? How can he recognize it? Weil has no doubt: "The duties of the moral being toward others stem out of the fundamental duty of justice" (Weil 1961, 110). It is a question of recognizing other individuals as reasonable beings, as equals, and in wanting their dignity. This is how they recognize themselves as reasonable. Justice is to demand that the individual comes to be recognized as reasonable from a political, social and institutional perspective. It means to satisfy the legitimate desires of individuals inside the historical world. That is, desires that can be universalized inside a given society in a given age. This is the way to guarantee a life in which posing oneself moral questions makes sense, because one does not feel the pressure of material needs and the necessity to arrange solutions for them.

Politics are superior to morality as long as politics is founded on morality in an attempt to actualise it within the community. Community makes the moral life of the individual possible.

Only in such way, morality – which serves an end – also finds its end. If morality is understood correctly, as soon as it achieves its goal – satisfying man in his quest for dignity, satisfying the conditions and needs of people, making them happy – it reaches the end of its path. It proves its fulfilment by simply disappearing as a problem (for the reasonable man). It is from here that we must consider politics. "It is not an hyperbole to state that the political, if understood correctly, is morality in progress, or rather, that morality is essentially politics, existing in a strict relationship with a community of individuals searching for personal happiness, if happiness is not sought outside this world" (Weil 1956, 22).

There is an objective primacy of politics. Morality can exist and be achieved only through politics. Here, once more, we see the return of Machiavelli. The Florentine secretary was the first to formulate the line of enquiry that Weil is developing. But it remains a subjective priority – objectively subjective – of morality: politics that aim to be reasonable can only be imposed upon those who address the problem of morality. Otherwise, politics are a mere struggle for power. There is no moral problem of power – in itself, power is neutral as much as passion and life. The problem of power exists only for morality, not the other way around.

"The core of the problem is very simple: there is no moral problem for power, the only problem is that of power for morality. Actually, it is absurd to expect power to be moral, it is as absurd as expecting nature or passion to be moral. It is perfectly legitimate, perfectly natural, to ask morality and reason engage with the problem of how they will become reality on the plan of power" (Weil 1957, 207).

Weil's whole political thought is firmly grounded in Kant. Weil takes from Kant the key traits of his concept of history

and the moral foundations of action. But, as said, it is easy to taste the dash of Machiavelli in his Kant, when it comes to the concept of power developed by the Florentine philosopher in *The Prince*. Weil can be defined as the only philosopher after Kant who re-founded politics and philosophy on morality. But he did add Hegel, specifically his elaboration of history in an absolutely coherent discourse. Also, he moves beyond Hegel, as he does not develop this discourse in an ontology, but into a moral choice that produces a philosophy of sense. One should not forget that moral will and reasonable actions are historically determined: it is in modern society that they must perform and free the individual from immediate needs and from violence.

VII

Educating towards democracy

It is time to point out one more element. According to Weil, the function of politics is essentially educational. The same is true for democracy. According to Weil, education must lead to awareness of the concrete sense, it must improve self-consciousness and reflection, promote the will to understand and understand oneself "in a world where men not only think about the maxims that inspire their own actions, but act in accordance to an existing morality, a world where the education of each and every one to the universality of reasonable freedom is not just a philosopher's dream but, rather, where such an education is real and perceived as real. It is a world that does not have to die so that morality and education can maintain their purity, but it has to live to educate to morality and to freedom in reason. It is only in this light that morality and education, far from being old-

fashioned, can be understood in their positivity, in their meaning for the world and for the man who wants to be reasonable" (Weil 1956, 51).

Not only reason, but democracy as well needs an educative approach. The two texts appear not by chance at the beginning of the nineteen-fifties: no one at the time could fully take for granted, in the years of Europe's post-war reconstruction, that shaking the very notion of democracy to its roots would inevitably give it new strength. However often we take democracy for granted, it is a moving concept, a concept "in progress". It is in essence an education to reason: "Wherever democracy exists, the problems you encounter are quite similar, without being the same: democracy does not necessarily withstand any challenge, any tension, any injustice by virtue of some kind of grace of the state. Any nation can revert to a situation where democracy becomes an impossibility, if an unreasonable and reckless majority exacerbates a minority and instigates it to rebel. Once democracy is established, it is vital that citizens are happy, each his own material and moral situation. Everywhere, democracy is a march toward reason, a perpetual education of man delivered by man himself, so that each man can really and fully be a man. Democracy is nowhere: it is always yet to be achieved" (Weil 1950a, 39).

Here is the problem of morality and politics, the responsibility of which weighs heavy on the shoulders of any democratic order. The democratic state must be committed to safeguarding the existing morality and the interests of society, mediating between individual welfare and the common good. Also, it must reinvent values, protecting them from the dangers of violence and boredom, it has to safeguard the existing morality and yet modify it for it not to clash with

universality. This is the social dynamic which began in the 20th century, its rational organization, a society in which the individual can easily feel dehumanized, bored, and tempted to resort to violence. It is the sort of *disenchantment* articulated by Max Weber, the advent of a technical world devoid of the sacred, which produces nostalgia for a life imbued with meaning.

It is in such a context that the efficiency of a democracy has to be assessed by its limits and the tensions it brings to light, through the hard times when it may appear hopelessly doomed, awaiting sacrifice, and where, instead, it may rise up once again, fortified. It is a march, an education. In Weil's words, it is a *creed*: "The limits of democracy? The limits do exist. Historical limits, limits posed by social conditions, ideological limits. None of them are definite, none are insurmountable by men of good will and – of course – sane reason; but they will not be overcome if one does not recognize and unmask the lack of clarity and the laziness of heart and mind which can exist under the disguise of good intentions. Man is able to create a humane world; this is the *creed* of democracy, and this *creed* distinguishes the democratic person. It is necessary that he learns how to pursue it in a reasonable way, in the conditions the historical reality offers him as the only field of his action" (Weil 1950a, 39).

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References

Alfieri, Luigi. 2003. "Dal conflitto dei doppi alla trascendenza giudiziaria. Il problema politico e giuridico in René Girard," in Luigi Alfieri – Cristiano M. Bellei – Domenico.S. Scalzo, *Figure e simboli dell'ordine violento*. Torino: Giappichelli.

Arendt, Hannah. 1963. *On Revolution*. New York: Viking Press.

_____. 1998. *The Human Condition* (paperback edn). Chicago: University of Chicago Press.

Baranger, Denis. 2018. *Penser la loi. Essai sur le législateur des temps modernes*. Paris: Gallimard.

Bellei, Cristiano M. 1999. *Violenza e ordine nella genesi del politico. Una critica a René Girard*. Trieste: Edizioni Goliardiche

Canetti, Elias. 1960. *Masse und Macht*, Claassen: Hamburg; Translated by Carol Stewart. *Crowds and Power*. New York: Viking Press 1962.

Canivez, Patrice. 1993. *La politique et sa logique dans l'œuvre d'Eric Weil*. Paris: Kimé.

Girard, Réné. 1982. *Le bouc émissaire*. Paris: Grasset.

_____. 1972. *La violence et le sacré*. Paris: Grasset.

Kant, Immanuel. 1785. "Grundlegung zur Metaphysik der Sitten." In *Kants gesammelte Schriften*. Vol. IV. De Gruyter: Berlin.

_____. 1795. "Zum ewigen Frieden." In *Kants gesammelte Schriften*. Bd. VIII. De Gruyter: Berlin.

Palma, Massimo. 2017. *Foto di gruppo con servo e signore. Mitologie hegeliane in Koyré, Strauss, Kojève, Bataille, Weil, Queneau*. Roma: Castelvecchi.

Taylor, Charles. 1994. *Multiculturalism: Examining the Politics of Recognition*. Princeton: Princeton University Press.

Weil, Eric. 1991. *Essais et conférences*. 2 voll.. Paris: Vrin.

_____. 1982. *Philosophie et réalité. Derniers essais et conférences*. Beauchesne: Paris.

_____. 1962. "Politique et morale." In Weil 1982, I: 241-253.

_____. 1961. *Philosophie morale*. Paris: Vrin.

_____. 1957. "Masses et individus historiques". In Weil 1991, II: 255-325.

_____. 1951. "Democracy in a World of Tensions." In *Democracy in a World of Tensions. A Symposium prepared by Unesco*. Edited by R. Mckeon. Chicago: University of Chicago Press.

_____. 1956. *Philosophie politique*. Paris: Vrin.

_____. 1950a. "Limites de la democratie", *Evidences* 13: 35-9.

_____. 1950b. *Hegel et l'État*. Paris: Vrin.

_____. 1950c. *Logique de la philosophie*. Paris: Vrin.