Philosophy of Law.
Basic elements – Methods – Currents of Thought
[Φιλοσοφία Δικαίου.
Στοιχεία – Μέθοδοι – Ρεύματα Σκέψης]

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The famous remark of that judge who, a few decades back, had confided that 'books on legal interpretation and spirituality' are the two types of publications he insisted *not to read*[1] ,seems to apply still today (at least for the former, dare we say, of the two book genres). Philosophical readings of law are anything but attractive for quite a few legal practitioners, who tend to profess instead a 'straightforward engagement' with –or a 'pragmatic approach' of– the field; in fact, ignoring that such a choice implies *already* some sort of theoretical stance. Whether, for instance, our practical-minded lawyer favors the idea that each applicable legal rule in a case has a 'straightforward', ready-made content (either drawn upon its textual semantics or the, so-called, legislator's intent), or whether he/she proclaims that the law is nothing more 'in practice' than what the courts mean to apply, in both cases he/she adheres, however unconsciously, to a certain school of thought *within philosophy of law*; albeit, in our view, among the least philosophically interesting and sound, i.e. *legal positivism* (in both its versions: textualist and originalist) in the first case, *legal realism* in the latter.

Now, while encountering the indifference of the general legal audience,[2] philoso-

[1] James M. Landis, 'A Note on "Statutory Interpretation"' (1930) 43 (6) *Harvard Law Review* 886.

[2] Philosophy of law, needless to say, meets a fortiori with the indifference of the general, *non-legal*, public: the field is, after all, presumed to combine the technicalities of law with the –even more complex– philosophical jargon. From another point of view however, the case could very well be the inverse. Though a specialised law book obviously does not enlist non-specialists to its potential readers, the case might differ with a philosophy of law oeuvre: Such a work is not confined to just theorize upon the relevant problems of legal science, legal practice and procedures, but inevitably poses *the very question of justice as a philosophical problem*. It can serve therefore as an ideal point of entrance for a critical acquaintance with the field, appealing to the informed, even if not legally trained, reader. After all, no other socio-cultural area than the law actually concerns us all, directly affects each and every one of us in our everyday life, see what the lawyers call 'normative effect'/'regulatory power' of the law. (Quite not surprisingly, the above remark, *sound to the core in any case*, serves as a famous opening line –and

phy of law scholarship is being normally carried out itself in a manner of somehow parallel theoretical soliloquies (on behalf of its community members). As it has rightly been pointed out,[3] while other law field academics teach or write upon a, more or less, *commonly shared scientific scope and subject matter*, it is rare that two philosophy of law papers or teaching syllabi *do seem alike*. Not only concerning the areas and key-subjects they touch upon, but also their theorising approach. A certain distinction, moreover, which is often being used in the field,[4] i.e. the '*jurists'* legal philosophy' vs '*philosophers'* legal philosophy', in other words the philosophical explorations having to do with the underlying problems of law and legal science (such as the truth-value of legal propositions, methodology of legal reasoning, foundations of the normativity of law etc.), as –supposedly– distinct from the broader philosophical questions concerning law and justice (see *what is a just society*, *how can a polity be legitimate* etc.), obscures rather than clears up the whole matter –especially if being put, in absolute terms, as a clear cut dividing-line.

Without a doubt, we are truly dealing here with an area of –radically– competing argumentations, methodologies, standpoints; regarding in any case debatable concepts and elusive values (justice, freedom, equality, interpretation, science, rights, political society, etc.); invoking after all a long history of thought that actually precedes its own history: human Reason got into reflecting upon law and justice many centuries before the philosophy-of-law field acquired its own discipline and name, which happened not before the late 18th/early 19th century. While the discipline's own boundaries, in addition, need always to be defined and redefined (intersections with political and moral philosophy, contemporary theory etc.). In the meantime, we cannot simply undertake the work of recapturing, commenting on, or conversing with the above discourses and debates, *without doing philosophy on our own* (let us recall the famous Kantian line, according to which we cannot *learn philosophy*, but only *learn to philosophise*).

The book under review has the actual intent and proper resources to tackle the above issues, aiming to *address itself directly,* on one hand, to the *general legal audi-*

a successful, after all, *pen strategy* in order to capture the reader's interest– for quite a few classical juridico-philosophical first pages, see inter alia Ronald Dworkin's *Law's Empire* and Karl Engisch's *Einführung in das juristische Denken,* to cite but a couple of authoritative examples).

[3] Raymond Wacks, *Understanding Jurisprudence. An Introduction to Legal Theory* (3rd edition, Oxford University Press, 2012) 2.

[4] A distinction initially posed by the Italian philosopher Norberto Bobbio; it is used, nowadays, in most cases out of Bobbio's context, having resulted in a rather uncritical obfuscation.

ence: it covers thoroughly, in a clear and systematic manner, all the 'textbook topics' and questions of the field (e.g. 'natural law vs positive law'), along with 'newer' and rather cutting-edge approaches (e.g. legal feminism, psychoanalysis, etc.). The book truly serves, in this case, its own primary intention (as expressly stated by the author, p. 11), that is to fill a certain gap in the literature, actually, presenting a concise Greek-speaking *introductory work* to philosophy of law.

At the same time, on the other hand, the book makes an original, as we will try to show on the following lines, contribution to the specialised philosophy-of-law debates. The author proves first of all to be fully aware of the academic literature of the field (general, systematic or thematic-oriented), both international and Greek-speaking. The author is not only engaging critically with all the different approaches and lines of thought, but also never actually shows reluctance to debate them. He does so, adhering to certain *theses* and broader lines of *argument* that pervade the book, along the conversations, and adding a certain philosophical signature, which we will try to indicate and comment on. This contribution is *especially welcome* on behalf of everyone, within the legal philosophy community, who favours a critical theoretical approach in regards to law and justice (see –inter alia– *reflecting substantially on their very historical and social conditionalities*); whether or not they share entirely the philosophy standpoints of the author. We intend not to proceed with a chapter by chapter presentation. We basically aim at capturing the aforementioned broader lines and signature-marks.[5]

From the very first pages already, while exploring definitional, introductory and field-delineating issues of the discipline (i.e. what is philosophy of law and why it matters, as distinct from the science and theory of law, history of law, sociology of law et al.), the author comes to grips with the issue of the *law-and-morality relations*, a theme that keeps recurring in various lines along the book. Let us broadly recall that the 'natural law/positive law' debate, which is one of the age-old instances of the above relation problem, is not at all about defining the law in abstract; properly understood, it has to do with the core-problem of legal philosophy, regarding the values that come into question when dealing with the issue of human coexistence under general laws and legal institutions. As the author vividly states (p. 20), no matter if goddess Athena had initially commanded the cycle of private violence and unilateral claims of justice to end *in favor of a public legal system,* Antigone steadily comes

[5] In any case, we will refrain from touching upon lines of thought and references of the author, with which we have not but minimal theoretical acquaintance (as in the cases of Heidegger and Deleuze).

reinstating the radical *demand for critique of the legal establishment* (see references to Aeschylus' *Oresteia* and Sophocles' *Antigone,* respectively). No wonder, then, that this issue comes reemerging implicitly to our everyday life, in the form of (political) critique of social injustices and arbitrary rule.

Papacharalambous proceeds in the book with a concise and handy reconstruction of the basic 20th century philosophical currents in law and legal thought: the resurgence of natural law theories, contemporary legal positivism and its variants, attempts for a *post-positivist* theoretical stance such as the 'legal interpretivism' of Dworkin et al. (ch. 5-6). All the above theories, more or less, notwithstanding legal positivism (which tends to present itself as rather *agnostic* in regards to values-discourse), touch upon the background matter that has to do with the normative grounds for living under a –coercive– legal and political system. The specific problem with legal positivism is not that it fails, contrary to its own proclamations, to cast all values-discourse and normative reasoning aside (e.g. professing social and legal stability). What is alarming, as Papacharalambous lucidly observes (see pp. 17-19, 100-105), is that the particular *normative thesis* legal positivism (wittingly or not) actually endorses, i.e. *the need for social stability and legal certainty*, ends up equating –due to its self-referring structure and its radical 'ethical indifference'– to a blind affirmation of *any political will in power* (as in the classical, Austin-type legal positivism), or *any legal functioning of just a competent body* (see the *legal voluntarism of* modern-day positivist theories).

Papacharalambous equally deals, in other chapters, with the methodological and epistemological aspects of law, i.e. the concept and sources of legal rule, legal interpretation and methods, the epistemological status of legal science, etc. (mostly on chapters 2-4). The problem areas that stand out here as of particular importance concern, a. the matter of the *truth-value of legal propositions* (pp. 50 ff.) and, b. the question *whether the law is 'science or art'* (71 ff.). Those problem areas are certainly interconnected, since they deal with the very nature –and *possibility*– of *knowledge about law* and *in law*.

The author rightly points out that the propositions about law are not subject to a (Popperian) falsification scheme, a truth-ascribing enterprise that *befits, strictly, the natural sciences* (p. 50). On the other hand, as the author insists throughout the pages, 'rightly thinking' about the law, whether it refers to dealing with particular legal issues, whether it relates to acquire certain knowledge about the legal system as a whole, does not depend at the end upon some sort of 'proper legal methodology' (e.g. inferring validly in terms of formal logic, recapturing the actual legislator's intentions,

or reconstructing the basic legal system's evaluations and principles –as suggested by various legal-method schools and viewpoints). It does not depend either, according to the author, upon a background theory of an 'ideal normativity', such as Habermas' 'communicative ethics', Rawls' 'theory of justice' or Dworkin's 'law as integrity' (see reconstruction and critique of the above theories in pp. 50 ff., 143 ff., 120 ff.).

The error the above approaches actually commit, according to Charis Papacharalambous, is that they build upon a *deontologically tainted* standpoint, that abstracts from the actual injustices of present social arrangements; a key point which the author in various lines reverts to. Legal positivism, along with all 'legalist' theories after all, remain blind to radical 'demands of justice', ending up being no more no less than just as an *instrument for the reproduction of systemic injustices*. Ideal theories of justice, on the other hand, address normative values that turn out to *generate false consciousness* (in fact idealising the actual legal institutions or masquerading real-life social conflicts). As the author remarks at this point, critical jurisprudence is expected nowadays to be self-reflective, engaging not exactly in, and no more than, just a philosophical normative endeavor, but –somehow inversely– into a *critique of normative ideology* itself (p. 71 and passim). Professor Papacharalambous steadily concludes throughout the pages (echoing in the case a *Frankfurtian critical theory* leitmotif) that the conventional representations of law are nothing but a 'false totality', maintained just by the exercise of power. The author is driven, therefore, to integrate substantially in his whole critical project: 1. a thorough examination of, what is famously called after Foucault, the 'micro-physics' of *power* (ch. 8-9); and 2. a certain philosophical treatment of justice that 'puts actual injustices and cruelty first' (ch. 10-11).

Legal philosophy, as the author argues, cannot properly theorise on law without dealing with *the problem of power and subtle power relations, political, economic, societal etc.* Little wonder then that the author deals at length on chapter 8 with: 1. Carl Schmitt's theory (pp. 178 ff.), whose 'political existentialism' keeps, for certain, addressing a thought-provoking challenge, regardless of whether we sympathise critically, we stand in radical rivalry, or whatever; 2. the American Critical Legal Studies movement, a school of thought that eminently rejects 'autonomous legal reasoning' and opts, instead, for grasping the *power politics beneath and within* the law, legal processes, interpretation etc. (pp. 163 ff); 3. Marxist readings, that unravel the law as consolidation of a certain balance of power (and class struggle) within capitalism, e.g. the brilliant analysis of Nicos Poulantzas, on whom the author insists (pp. 155 ff.).

Against this backdrop exactly, chapter 9 undertakes a critical examination of the

unequal relations of power *in the field of gender* (see patriarchy, gender violence, etc.). The author covers the whole range of basic feminist tenets and schools (i.e., *equality feminism, difference feminism, postmodern feminism*), leading skillfully to the current debates about *intersectionality/intersectional inequalities*; that is, the analytical framework that examines the way various forms of power and discrimination, based on gender, class, ethnicity, sexual orientation or gender identity, disability, etc., *intersect each other* and basically *compound themselves*.

Charis Papacharalambous has steadily remarked throughout the chapters that the philosophical study of justice is not at all some kind of a mere *philosophia contemplativa* project. Nor can we bet over the path, to his understanding, on some sort of 'ultimate foundations of justice', 'essentialist moral criteria' or an alleged 'objective metatheory' (pp. 71, 106, 131, 208-218). So, what are we left with, to be critically oriented in our philosophical reflection? The author appears to echo, once again, certain Frankfurtian theses, looking in the case for a broader 'rationality', rooted rather in the *nonconceptual* and the *experience of human suffering*. Already from the introduction of the book, he has preached for a 'historically informed' philosophy of law (p. 13), that treats and reconstructs its very subject-matter as a 'palimpsest manuscript, engraved by the traces of history and the scars of human suffering' (op. cit.).

Now, the philosophical direction –standing also as some sort of concluding thesis– that the author paves the way for at the final chapters (10-11) is the following (see pp. 213-218, 224-233, 247-254 and passim): Scars of human suffering and –past and present– wounds are the *ultimate material stands for the imperatives of justice*. Justice is therefore set as *infinite*, unattainable indeed; yet at the same time as *clear-cut commanding*. It turns out to be nothing else but our 'infinite responsibility towards the Other' (an idea drawn upon Levinas) –the other person being actually understood in his/her radical physicality (fragility, ability of suffering, etc.). Justice appears then to be a *spectre*: It keeps coming again, continually haunting law, while not being able to be brought into full presence. *Justice, at the end, reclaims itself only through active fighting against widespread evil and social falsehood* –as some kind of a debt fulfillment vis-à-vis the recurring Spectre (a clear reference, in the case, to the 'philosophical hauntology' Derrida employs in *Spectres de Marx*). While at the same time, philosophy of law justifies itself actually not, and no more, as a positive truth-acquiring path, but rather (à la manière de Frankfurt's critical theory) as an *intellectual resistance act, distancing from and negating all forms of social negativity, false rationalisations, authority-serving patterns of thinking*.

Apart from its other qualities, the present work of Charis Papacharalambous is,

no doubt, theoretically challenging and thought-provoking. It constitutes besides, as we have already noted, a valuable contribution for the philosophical research-plan of those who, in the field of law, are struggling for a *contemporary critical theory of justice*. We stand fully in line with the view that philosophical reflection on justice, if it is not to be just defensive of the existing social arrangements, should not be carried out *in vacuo,* without deep considerations of its own sociohistorical correlatives; it needs instead to link in with an enlarged social theory standpoint, drawn on multiple disciplines and findings (see critique of political economy, social anthropology, psychoanalysis, critique of discourses and culture et al.), aiming exactly at comprehending the deep structure of human social coexistence, in its entirety of determinations and within historical dimensions. In our view actually, this is not a *second-step –or externally-related– move* regarding the philosophical foundation movement, but a crucial part of its own advancement (to be noted, from a philosophical point of view: *the postulate of freedom,* after all, *is inconceivable without, and inseparable from, the actual freedom-establishing conditions*).[6]

What we cannot however accept is that the field in question is *simply and in toto* reconstructible by mere reference to mechanisms of violence and power (as implied in many pages of the book, in line with Schmittian, Frankfurtian or American 'Critical Legal Studies' themes and points). A critical theory of justice must be able to study and reconstruct its subject matter as a field where *values are being socially advanced or –on the contrary– obstructed, perversely implemented, lifted and (potentially) restored*.[7] Philosophising along a route of exploration of past injustices and suffering is not sound and successful, after all, if not being part of a broader *evaluative-normative* –and let us add, after all, *rational*– argumentation development: regarding *what is worth and what is not* in social relations and institutions (of the past, the present, and actually *in the making*). That is why, besides, we remain still in need, contrary to what certain modern-day postmodernist approaches submit, of meta-ethical credentials: we are talking about a necessary *background theory of moral objectivity*, no matter how arduous or philosophically demanding.[8]

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[6] See the lines of argument in this direction in Constantin Stamatis, *Justifying Principles of Justice from a Post-Kantian Standpoint* (2013) 99 (4) *Archiv für Rechts– und Sozialphilosophie 452-453,* 461.

[7] Following in the case the *critical-normative* philosophical paradigm of Kosmas Psychopedis, see among others Kosmas Psychopedis, 'Emancipating Explanation', in Werner Bonefeld et al. (eds.), *Open Marxism vol. III. Emancipating Marx* (Pluto Press, 1995) 17-39.

[8] The basic idea here is rather simple, yet utterly valid: *practical-moral commitment and normative correctness are substantially interrelated, since once we remove the one, the other gets lifted as well*. What is interesting is that the author, although appearing sympathetic in general to postmodernist ideas

It is evident that solely a *cognitivist* philosophical standpoint is capable of providing the *background essentials* that enable a unified, well-structured treatment –as a whole– of the *basic legal philosophy* (plus *methodology*) *field questions*: What is of actual interest here is not *just* the formal validity of legal reasoning and argumentation, but its very substantial correctness, in terms of advancing fundamental legal principles and values (: *equality, basic freedoms, substantial rule of law,* etc.). But the outmost pivotal question has to do with the practical-political implications which are at stake. A critical normative theory of the above sort can only, in our view: 1. construct a philosophically sound opposition-argument against social relations of *unfreedom, inequality* and *mutual indifference*; 2. prove able to assess positively, to the appropriate extent, the actually existing institutions of modern societies (arguing, e.g., in favor of *fundamental liberties, social justice* policies and *democratic rule*); while at the same time 3. reflect on how and why the above principles and institutions may be *undermined by the actual deep economic structure* of modern societies, or even serve, to a certain degree, as *a juridico-political and ideological condition perpetuating social relations of power, exploitation and injustice*.

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and contributions (see chapter 10), favors as well some aspects of the above criticism: He states that the 'standard objection', according to which the postmodernist discourse, as long as it lacks normative criteria, fails to construct an efficient philosophical and political argument *contra* present injustices, 'although remaining a rather school-type objection', *contains a grain of truth*, see p. 218.