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

BY

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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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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).

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