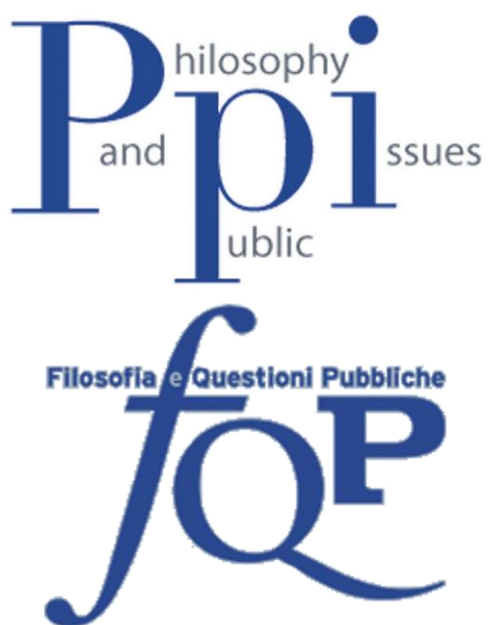


SYMPOSIUM
DEMOCRACY AND LAWMAKING



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

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 even about legislative *power* as such¹. 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 constitutionnalité*). 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 neoliberalism³. 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, *Polizeiwissenschaften*, 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 "*idéisme 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”.

University of Montréal

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