Introduction

Lawyers philosophise more than they think, though perhaps not when they think they are philosophising. They may make poor philosophers when they indulge in *Reflexion auf eigenes Tun*\(^1\) after office hours, recalling their first year jurisprudence course. But they often demonstrate fascinating wit and, indeed, wisdom in arguing their professional proposals, i.e. when they are doing the job they are trained to do. This book teases out some fundamental questions about law with due regard to what lawyers think. But it does not necessarily frame these questions, nor does it answer them, in terms that lawyers would deem useful for daily practice. Avoiding both philosophical idiolect and dialect, i.e., the idiosyncrasies of a specific author, school or circle, it rephrases them in a language of broader contemplation than the solution of a case. It prefers to ask not only what the law is, but also why it makes sense against a background of sense that we seem to adopt. It thus targets a group of readers different from legal practicians, namely students for whom law is an area of academic research. They are the agents who intertwine deep thinking and practical wisdom. The point is whether this entanglement will usher in confusion or insight. If the latter, both philosophy and law may profit, though not without a number of conceptual translations. If the former, law will continue as just another default institution, philosophy as a set of intellectual puzzles. It should be obvious where I prefer to put my stakes. Let me say something more on this entanglement of law and philosophy, on the setup of the project that follows from it, and on the didactic concerns behind it.

\(^1\) K Larenz (1979 [1960]) XI: ‘Die Methodenlehre einer Wissenschaft ist deren Reflexion auf ihr eigenes Tun.’
1. THINKING LAW

Law is not just an object of thought; it is also, itself, an exercise in thinking. There is no point in denying that there are huge differences between legal and philosophical thinking. One of these is that lawyers are trained to come up with a solution for every problem, where philosophers are passionate about finding a problem for any solution. Another is that lawyers propose their solutions under the pressure of conflicts that should be ended or precluded. Philosophers since Plato, by contrast, explore their problems in the conflict-free environments of a symposion, which could go on forever if the participants would not take this ‘drinking together’ too literally. A third one is that lawyers cast their preferred solutions in the mould of ‘doctrine’ (common law) or ‘dogma’ (civil law), striving for authoritative status. Philosophers, however, appeal to ultimate truth; if need be to truth about whatever is true, good, or beautiful; at the very least to the sceptical truth that there is no ultimate truth.

These differences have a long history, hailing back from Antiquity. In Ancient Greece, real knowledge was to be expected only from philosophy. Philosophy in these days comprised nearly every pursuit of truth, true accounts of the world out there as well as accounts of what is truly the world out there, or what is truly human in that world. But encompassing as it may have been, philosophy did not engage every problem in life. Typically it did not entail practical problem solving pursuits such as medicine and law. There was no point in denying that these were important in their own right, as they dealt with the maladies of the human body and the body politic, respectively. They stored prudent ways of curbing these maladies, generalising over treatments that had turned out to be successful. But, though certainly skilful, such pursuits did not amount to establishing real knowledge. They remained at the level of doxa or dogma, i.e. the level of ‘opinion’ as distinct from knowledge. This, at least, is what philosophers wanted their disciples to believe, and with the rise of doctrine in the Christian religion it became grist to the

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2 Note that ‘doing philosophy’ in Antiquity was part of ‘scholê’, i.e. free time, time not necessary for labour.
mill of the theologians.\(^3\) By the time the first universities in Europe emerged and philosophy had become ancillary to even more reputed knowledge, namely the knowledge of God and salvation, clergymen were not allowed to read either law or medicine. So when you now visit the library of the Strahov monastery near Prague, for instance, you may admire the marvellous Room of Philosophy and the even more splendid Room of Theology. You will see that these two halls of knowledge are linked by a corridor with books on medicine and law on either side, akin in epistemic status as skills geared to practice, and distinct from all endeavour geared to the contemplation of real truth, such as philosophy and theology. But on the other hand, already in those days there must have been more down-to-earth people who saw that medicine and law were the forms of knowledge people would pay for, and that could bring considerable amounts of money to those who mastered them. Or so we may infer from a little poem:

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\begin{align*}
\text{Dat Galienus opes} \\
\text{Et sanctio Iustiniana.} \\
\text{Ex aliis paleas,} \\
\text{Ex istis collige grana.}\footnote{3}
\end{align*}
\]

Yet, in spite of these differences between philosophy and law, historically entrenched and currently sensed, the distance between law and philosophy has never grown so big that law becomes a mere object of philosophical thinking. It harbours itself a form of thinking, like all cultural phenomena do, such as art, or science, or the economy. Surely, therefore, there is philosophy of law in law, as perhaps Charlie Brown would say. Since philosophy itself is nothing more or less than thorough,

\footnote{3 Thus, the words ‘dogma’ in its relation to ecclesiastic ‘orthodoxy’ appears rather late in the history of (Christian) theology. Originally ‘dogma’ in law and medicine meant a thumb rule for practice, put down on the basis of generalised experience.}

\footnote{4 ‘Galenus’ books provide resources; so does Iustinianus’ code of law. From other disciplines you will collect straws, but from these real corn.’ [my translation; BvR] Cf. M Herberger 1981, 161, the book on which the paragraph above is largely based.}
systematic, critical thinking, it should recognise similar efforts of the human mind made elsewhere, even where they are embedded in received methods, established institutions, and political constellations. Indeed the best basis for a philosophy of law is one that is not voiced by philosophers but by legal scholars and practitioners. They sometimes think thoroughly, systematically, and critically when they are doing their jobs as lawyers pushing the limits of their craft. Philosophers should try and rephrase on the larger blackboard of human reason what lawyers do when they do top-law, rather than apply a sort of philosophical savoir critique to whatever they think that lawyers are doing.

In general, philosophy is not there as a supplement to cure and care. As the French philosopher Merleau-Ponty famously said: ‘Philosophy is not a hospital.’ In the case of law it does not contain norms where positive law runs out. It does not provide answers where law has questions. It holds all the questions and answers of law but in a different and more encompassing conceptual framework. Seeing this framework does not make one a better lawyer in the technical sense of the word. It may make one a more prudent lawyer, more prudent than the prudence of law – jurisprudence – usually entails. So relating to philosophy may indeed educate students to become better lawyers in a different sense, the politico-moral sense of the word: less dependent for their thorough thinking on set methods, solid institutions, and powers that be.

2. OUTLINE

The overall structure of these chapters is governed by the answer to one question: what is so compelling about law? What is it about in the end, such that we cannot afford to cut loose from it and say that we can do without it? The answer will be found in the moral core of the concept of justice. Which is not to say that I regard law as a specific part of morality; on the contrary, morality will turn out to require that I do not. I will go on to sort out what follows from there with regard to two

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5 M Merleau-Ponty 2000, 366.
important aspects of law’s appearance in socio-political life, namely (i) that law emerges as positive law, and (ii) that law presents itself as knowledgeable. The former characteristic means, roughly, that law is an artefact made by political authority; the latter that positive law may be scrutinised and challenged as far as its validity is concerned. I will regard these two aspects as constitutive parameters of a legal order claiming bindingness – and being received in its claim.

I start out, in Chapter 1, from a particular pattern of discourse, sometimes even referred to as ‘a theory’ one may find in legal textbooks and other treatises that offer a general introduction to law or some area of law. I call it ‘contractual naturalism’ and reject it for two reasons. One is that it does not explain some facts on the ground about law. Another is that it is conceptually incoherent. Chapter 2 will argue an alternative account by offering two radically oppositional principles, which mutually intercept each other’s weight. True, each of them itself is built on solid ground. But the whole construction of the arch they form is only partly dependent on this solidness. The delicate interception of the two columns as they bend towards each other is far more characteristic of the supportive forces in the arch than the separate basis of the respective columns. In Chapter 2, I will indeed argue that the idea of law involves the irreducible antinomy of two principles of socio-political life, or two ways in which we have to conceive of the relationship between ‘I’ and ‘others’, or ‘we’ and ‘others’, as ‘giving others their due’. Between these two conceptions is a deep chasm. There is no third and higher principle, which can serve as a bridge to connect the two. In fact, it will appear that even the metaphor of the one and only keystone as a distinct entity must break down, as we will discover that the law can only exist in the construction of the arch itself. So we may imagine, pushing the new metaphor to its limits, that the law is not the arch, but the process of constructing the arch.

The way in which law appears in socio-political life will evidence this process in various forms, which we will have to explore. I mentioned the most pertinent ones already very briefly. On the one hand, there is law as the outcome of an authoritative political act by which ‘the law’ is set,
enacted or ‘posited’. On the other, there is law as an object of knowledge that allows judgment concerning the validity of what is posited as law. The former will be dealt with in Chapter 3, where the keyword will be ‘authority’. It will prompt us to a deeper understanding of the rule of law and its basic tenets. The latter is the topic of Chapter 4. The term ‘validity’ will draw centre stage here, after detailed investigations into the relationships between fact and norm in law. These two primary or pertinent forms will manifest the two mutually opposing and intercepting principles already mentioned. That is no doubt the most important thing. But, to make important things a little more complicated, they will turn out to be also interdependent in manifesting this interception. That is what is shown in Chapter 5, when we will address the issue of legal rule-following in a broad sense, encompassing interpretation and decision-making.

3. DIDACTIC CONCERNS

The plan I submitted is rather self-willed. It deviates from what one could call ‘the beaten track’ in the literature and tries to find some less travelled passages. Though this betrays some dissatisfaction with contemporary legal philosophy, it is not a reason for ignoring the great questions, the well-known divides, or the systematic links to other disciplines. Therefore, as we go along, enough famous topics and issues will present themselves for discussion to get reliable knowledge of the field. For the views involved will not remain in the distance, but disclose themselves as real obstacles on our way. It would be foolish to neglect them before we decide in which direction to continue our investigation. This will give us plenty of occasions to get acquainted with the different questions and possible answers in ‘thinking law’, and a few of its neighbouring areas as well. To announce just the main issues: Our initial and most pertinent question about the meaning of law will carry us into the complexities of the conception of man in law, of the ideas of freedom and equality, thus dealing with the relationship between law and morality (Chapters 1 and 2). Then we turn towards law and politics, where we will
meet with the problems of state and society, democracy and authority, statutory law and violence (Chapter 3). The next part concerns the necessary preconditions that allow law to present itself as both the mode and the object of some sort of respectable knowledge (Chapter 4). These preconditions have to do with the notion of validity in general, the intricate interdependencies of facts and norms, the idea of (scientific) knowledge and the relevance of logic to law. The reflections on the structure of legal interpretation in rule-following (Chapter 5) refer to all the above, though coloured by the intriguing relationship of law and language. So, to sum up, law and morality, law and politics, law and science, law and language: these are the links and areas, which our project cannot afford to neglect.

As this book chooses to present radical thinking on law as an actual process of asking, arguing and answering, it will be unsatisfactory in another respect. It is not an encyclopaedia in which one finds basic information about the famous names, the professional jargon, the present debates, the schools of the past, the classifications and the periodisations. What I want to do is to demonstrate how one may think one’s way through law, acknowledging other ways. I even prefer to demonstrate an attitude of ‘never stop asking’ over one of ‘giving information’, although I am ready to admit that you cannot do the former without the latter. So, yes, I will be making a pose. In order to picture what is fascinating in thinking law, I shall almost pretend that I invent the arguments myself while I am in fact pressing the footprints of real masters of thinking. I take the risk that the pose will look spasmodic at times. Those who have already dug deep into some real philosophy will soon discover that I do hardly anything but quoting; so that this book, in the final analysis, is a parade of great philosophers after all.

Be that as it may, it is fair to say that these pages are not an introduction into philosophy of law in the sense of a preliminary exercise. It is already the thing itself: a philosophy of law in the double sense of the little word ‘of’: a philosophy by law as much as a
philosophy on law. Inevitably, then, this book, unlike a computer manual, is in important ways circular. Computer manuals are useless when they presuppose on their first page what they explain on their last. They are algorithmic in that they solve well-defined problems in a finite number of steps to be carried out in a linear order, whatever the number of loops they may contain. This book is different from such a manual, as all philosophical books, as well as all legal books, perhaps even all real books, are. Real books prompt their readers to anticipate the last page when they are reading the first, and to remember the first page when they have arrived at the last one. Ways of thinking are not programmed instructions. They are, in the didactic sense at least, circular, not linear. What is important is to develop some sense of direction, in order to distinguish the vicious from the healthy wanderings.