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WHY STUDY PHILOSOPHY OF LAW: NOTES IN TRIBUTE TO BJARNE MELKEVIK

Para chatear os imbecis
Para não ser aplaudido depois de sequências, dó de peito
Para viver a beira do abismo
(Joaquim Pedro de Andrade)

This article discusses Bjarne Melkevik's advocacy for the importance of studying the philosophy of law. Rather than striving for exhaustive coverage of the author's extensive contributions, the intention is to craft specific notes that navigate the intricate and demanding reflective landscape of Melkevik's works. These notes seek to tackle the fundamental question of why the study of philosophy of law is imperative. To commence, I will share personal insights and perspectives from a Brazilian standpoint on this subject.

For the epigraph of this study, I have chosen the response given by a Brazilian filmmaker to a question posed by the French newspaper Libération in 1987. The newspaper inquired about the reasons behind his filmmaking. The beginning of his response, in verse, was, "Para chatear os imbecis/Para não ser aplaudido depois de sequências dó-de-peito /Para viver à beira do abismo" (To annoy the fools/To not be applauded after chest voice high notes sequences/To live on the edge of the abyss). This ironic response, later set to music by Adriana Calcanhoto, has become a kind of anthem for questions that are hardly answered, encapsulating a vital substratum for those who create a work.

How can a philosopher respond to such a question? Why study the subject to which they dedicate their life, their career, the subject that consumes their sleep and waking hours?

In the Brazilian context, the philosopher or legal theorist (here, I use both terms interchangeably) is often regarded with suspicion by their peers. Either they are deemed

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not juristic enough by legal professionals, or not rigorously philosophical by philosophers. In academic settings, courses dedicated to philosophical-legal reflection are typically offered in the early years of students' studies. Given the common characteristic of immaturity in youth, students often wish to quickly rid themselves of the aridity of abstract reflection to focus on what they consider more pertinent: positive norms, judicial decisions, practical-professional life.

In this scenario, the legal philosopher is compelled to justify why their study is important and necessary. It is within this framework that I have found indispensable support in the work of Bjarne Melkevik to substantiate, particularly to my students, the reasons why we should approach the study of law philosophically.

It is precisely my investigative journey and exposition of the reasons why we should study the philosophy of law, based on the work of Bjarne Melkevik, that I will delineate below.

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Answering the question "why should one study the philosophy of law" necessarily depends on responding to the question of what this object is that we will delve into studying. Therefore, it is essential to begin by interrogating the work of Bjarne

Melkevik in order to address this question. With this purpose, I will follow Melkevik's argumentation in the text titled "The concept of law and contemporary philosophical reflection."[1] Let us examine.

Does the notion of "philosophy of law" correspond to "law" itself as an object?, begins the author. Melkevik surprises us by stating, "as for the very notion of 'philosophy of law,' this does not have 'law' itself as its proper object."[2] What then is the object of this study? The study of the philosophy of law "is linked, in a general and indirect way, to reflections related to the notion of law."[3] For the author, the task that the philosophy of law undertakes is not to analyze and clarify the legal rules of an existing system. Nor is it to take law or the legal phenomenon as a scientific object (here, he includes reflections from legal anthropology, sociology of law, legal history, etc.). The problem with all these forms of approaching the world of law is the manner in which they take law as given in the factual world. Philosophy does not consider law as a phenomenon to describe but as a domain to be inquired into, questioned, and reflected upon: "elle le dessine dans 'la pensée," that is, he paints it in "thought."[4]

From this approach, according to Melkevik, the philosophy of law is divided into two forms: the so-called philosophy of law by philosophers and the philosophy of law by jurists. It is worth noting that this distinction between two different forms in the elaboration of philosophical legal thought is a feature in Francophone literature on the philosophy of law,

[1] "The original title is 'The Concept of Law and Contemporary Philosophical Reflection.'"
[2] Bjarne Melkevik, *Introducion à la philosophie du droit* (Paris: Bueno Books, 2016), 53.
[3] Ibid.
[4] Ibid, 54.

and the author seems not to adhere to them. While one, adopted by philosophers, is characterized by the "philosophical investigation of the object of law from a previous philosophical position"[5] which can be a school, a system, a method, etc., the other, adopted by jurists seeking an approach closer to what they feel as law, relies on legal experience that serves as a constraint on philosophical reflection.

Both approaches are restrictive and only yield a superficial analysis of law. In other words, the study of the philosophy of law without "philosophy" or the study of the philosophy of law without "law" only betrays what philosophical-legal study should accomplish. According to the author, this division within the discipline should eventually enable the development of reflection between philosophical reasoning and legal experience.

Therefore, Bjarne Melkevik aims to position himself in a prudent middle ground that ultimately recognizes the philosophy of law for both its philosophical and legal dimensions. He demonstrates this through four questions (the ontological question, the epistemological question, the question of "ought to be," and the question of ethics and law) to finally reach the current horizon of the philosophy of law.

I will not extensively address all these questions, as it would deviate from the scope of the present study. Therefore, I will provide a brief overview.

The ontological question is the question that deals with what law is. The classic question that, in ancient Greek, was expressed as *τί ἐστι*. Now, to inquire about the essence of law outside the ordinary notion of legal positivism, according to Melkevik, requires an incursion – even if brief – into the history of the philosophy of law.[6] Historically, law has been conceived as something present in "things" or in "spirits." Similarly to ideas, the Ancients posited a conception of law as "verb," while the Moderns conceived it as a "subject." Aristotle, an Ancient philosopher, envisioned it as an art synonymous with commutative or distributive justice. Nevertheless, Melkevik considers this Aristotelian law as a "Law-Verb," just as for other ancient philosophers, the characteristic of this law as a verb, instead of pertaining to the city, would remain in the cosmos or the world of ideas.

The moderns, in turn, conceive a "law-subject," for example, one that links law to the subject and its intrinsic qualities: autonomy, dignity, will, among others. The foremost modern thinker, formulator of the most perfect system of modern law, was the philosopher from Königsberg, Immanuel Kant. In Kant, according to the author, "the ontology of law merges with the metaphysics of subjects."[7]

To this day, the controversy between "law-subject" and "law-verb" persists, but it shares the spaces of ontological legal reflection with empirical theories of law. The empirical theories, whose followers can be considered Herbert Hart and Alf Ross, "place the question of the ontology of law in the predictability of the individuals who have the competence

[5] Melkevik, *Introducion à la philosophie du droit*, 55.
[6] Ibid, 58.
[7] Ibid, 59.

to enunciate the law."[8] The problem with this empiricist approach is that it introduces important themes of the philosophy of law into the science of law, which deals with the ontological question simply through commonly accepted definitions – namely, that law "is" a set of rules or norms.

Melkevik does not find it relevant to revive contemporary attempts to rekindle the dispute between the Ancients and the Moderns.[9] The approach that appears most fruitful to the author is that arising from the "pragmatic-linguistic turn," which directs the ontological question of law toward an ontology of the "sujet-langagier" (Derived from Karl-Otto Apel or Jean-Marc Ferry.) or an agency contributing to the intersubjective meaning of language (e.g., the role of the agent in the construction and interpretation of meaning in communication).

The legal epistemological question is fundamentally the elucidation of the relationship between the specificity of law and the possibility of knowledge as developed by a specific epistemological theory. Here too, there are two currents of epistemology: the epistemology of the observer and that of the participant. The observer's epistemology is developed from the theoretical observation of an individual about their object, which, following some pre-established scientific rules, explains the object.[10] It is the approach that regards law as the object of scientific knowledge. On the other hand, there is the epistemology of participation. It considers that law cannot be observed because it finds its meaning in a context that is also the one that defines us. "The law is not nature, but culture, and it must be acknowledged as such," writes Melkevik.[11] This is the hermeneutical approach to law.

Both approaches have a precondition: legal rationality. The philosophy of law, in this context, must address the question of the possible discourses of legal rationality. According to Melkevik, it was Max Weber who identified legal rationality as rational activity in view of an end; for him, this is the conceptual key to understanding law as a phenomenon. However, also observing as a legal philosopher, such an approach restricts the understanding of law to a single path of rationalization. Weber's success is what motivates many contemporary legal theories to delve into questions of rationality, as seen in the work of Habermas, for example.

The question concerning the "ought to be" is the third aspect of the concept of law. This question addresses what law ought to be instead of what it currently is. It is concerned with the investigation of *lege ferenda* and normative evaluation of the law. Presently, there is a division between those who aim to develop a total and comprehensive theory about legal "ought to be" and those who seek only specific points of support. The former advocate a return to natural law thinking, embodying the perspective of "Idéo-Droit"[12] the ideal law

[8] Melkevik, *Introducion à la philosophie du droit*, 60.
[9] Cf. Ferry, Luc, and Alain Renaut. *Philosophie politique* (Paris: PUF, 2007).
[10] Melkevik, *Introducion à la philosophie du droit*, 61.
[11] Ibid.
[12] Ibid, 64.

that serves to precisely evaluate and judge the currently existing law. The latter argue for the existence of an ideal of law but without creating an "Idéo-Droit;" that is, they seek to reflect on partial realities to suggest improvements, solutions to make the precisely existing law more rational, just, egalitarian, etc. This question of the "ought to be" of law is linked to law as an institution, as *Πολιτεία*, to use a Greek term. Ultimately, the question is whether law can be conceived as a good institution, whether it is just or unjust.

Finally, there is the question of ethics in relation to law, the question that seeks to understand law as a regulator of behaviors we ought to do or acts we should avoid (positivists, at some points, identify it with the question of the "ought to be" of law). For example, Kelsen completely dissociates ethics and law, while Hart considers that there is an essential ethical minimum in positive law for it to be considered law. In defining ethics, Melkevik states that ethics is "imposing a rational justification for our individual and collective choices."[13] However, it is clear that as legal actors, we are always called upon to justify our actions in a rational manner. Therefore, the difficulty of distinguishing between law and ethics remains. The classic way of distinguishing between the two is to consider that ethics pertains to consciousness and interiority, while law pertains to social acts or social exteriority. This form is widely contested in our days, as Melkevik points out, and alternative proposals are suggested (in the Habermasian model, for example). The current and most pressing problem related to action in the philosophy of law, according to the author, concerns the foundation of legal norms: "the idea is to create a theoretical figure called a 'norm' acting as an abstract intermediary between theory in the strict sense and the writing of legal doctrine."[14] There are those who wish to ground norms in ultimate foundations. And there are those who oppose the discourse that aims to ultimately ground norms. What is interesting for the philosopher of law observing *frappé* philosopher of law is that opposing philosophical programs broaden the reflective horizon of law, which increasingly faces ethical challenges, just think of bioethical issues, for example.[15]

Having traversed this path, Bjarne Melkevik concludes by affirming that the philosophical work of the legal philosopher is oriented towards the legal culture prevalent in a society that has chosen law as its horizon for decisions and actions. In a Habermasian terminology, its function is to "identify and preserve < … > the places potentially occupied by legal practices and theories in this culture."[16]

Ultimately, therefore, the philosophy of law allows us, above all, to reflect on the world and the surrounding culture in which the legal sphere frequents social debates.[17] Its function is not to prescribe, like a doctor, potentially dubious remedies, a social chloroquine. No. It is a participant in public reflection that leads to good deliberation. Philosophy of law cannot

[13] Melkevik, *Introducion à la philosophie du droit*, 66.
[14] Ibid, 67.
[15] Ibid, 68.
[16] Ibid, 59.
[17] Ibid, 30.

be conceived as the "mother science" of law, nor can we read Grotius, Hegel, or, more recently, Dworkin, just because they are Grotius, Hegel, and Dworkin, and suggest their application as is without assessing the relevant arguments. In the Brazilian reality, for example, the application of Dworkin and Alexy without contextual or conceptual concern in higher courts currently generates a series of significant problems, after all, we are not the United States of America or Germany.

So, what can philosophy of law do? Accordingly Melkevik, "it can be nothing but an argumentative activity and, consequently, it can only be an accompanying force in the process of developing good arguments and reasons."[18]

The risk is that a definition of this kind reduces the impact of philosophy of law on law itself. And, correspondingly, the interest of law students in philosophy of law courses. In Brazil, there is not much choice, as most law schools require at least one semester of philosophy of law. However, in many countries, students have the option to choose a philosophy of law course. Bjarne Melkevik then proposes an imaginative scenario: a student consulting the list of courses finds a philosophy of law course; now, what could he find in this course, and why might he be interested in it?[19]

There are three aspects that philosophy of law can contribute to law. Firstly, reflective distancing from positivism. According to the author, there is a reductionism in reducing law to positivism, as it is especially a matter of responding to the "what to do" in eminently practical-legal questions: "The questions of law concern concretely the law that we must mutually give to ourselves."[20] The question "what to do" raises the problem of the reasons and arguments that precisely guide the choice of assertions considered valid, given that law is practical.

Furthermore, the question "what to do" is a shared question in a public space according to common and rational discourse rules. It is a philosophical question, then, an exploration of something that arises in the face of a legal problem, both abstract and concrete. It leads us to seek the foundation hidden behind, for example, the epistemological project of legal positivism.

The search for the hidden leads us to the second aspect: ensuring a reflection on legal rationality. According to Melkevik, within the philosophy of law, there is a primacy of practical rationality, "communicative" rationality, over theoretical rationality.[21] Theoretical rationality is the one that aims for an absolutely coherent and rational exposition of "objective" or "in force" law. It can rely on an axiomatic discourse or a nomothetic discourse. The first relies on "truths that can be considered true in themselves or by any rational person;" the second "relies on 'experience' as the foundation criterion of a discourse."[22] These are the

[18] Melkevik, *Introducion à la philosophie du droit*, 33.
[19] Ibid, 36.
[20] Ibid, 38.
[21] Ibid, 39.
[22] Ibid, 40.

rationalities behind normativist positivism and sociopositivism. Discovering the underlying assumptions behind them, according to Melkevik, means precisely reflecting on the discourse of legal rationality. The author rejects this form of rationality because he believes it restricts itself to "a discourse of legal foundation closed in the monologue of the true."[23] For Melkevik, the philosophy of law he advocates demonstrates that practical rationality aimed at the law is realized in discourse. And discourse is seen as a practice among legal subjects who produce reasons and arguments, proposing them to the population for evaluation and validation. This approach is very close to that advocated by Jürgen Habermas, which was explored by Melkevik in a specific work on this author.

Finally, the third contribution relates to the concept and requirement of autonomy. According to the author, the philosophy of law has as one of its main roles to examine the role that the concept and requirement of autonomy play in society. It must take on the role of enabling students of the discipline to perceive themselves as authors and recipients of the law.[24]

Therefore, the philosophy of law has a role as a reflective companion to legal and social actors. It allows for a reflective distance, including when we learn in its courses about the history of what philosophers of the past thought regarding law and the culture that surrounds it.Despite not being explicitly stated by Melkevik, I believe he would not disagree with my following statement: the philosophy of law has a role of *ἀγωγός*, an accompaniment, precisely one that would lead to *παιδᾰγωγῐ̄ᾱ*: the companion of reflection and of a reflective and collective knowledge.

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In this text, I started from the Brazilian context. I want to return to it to conclude. In Brazil, there is also a great distrust regarding the philosophy of law and philosophers. And the reasons are those identified by Melkevik.

Part of the unpopularity among practical jurists stems from the dogmatic idea that the philosophy of law was a substitute for law, that is, a law crafted by intellectual elites inaccessible to the modest practical subjects. It was an inheritance from modern natural law systems, beautiful axiomatic and ordered systems, but ones that grounded law in philosophical truth, forgetting precisely the practical legal aspect in the philosophy of law.[25] On the other hand, there are those who simply deem the philosophy of law useless and philosophers also useless. The science of law or non-philosophical legal theory would suffice for the practical problems of law. The inaccessible to them is irrelevant, metaphysical (in its metaphorical sense), a thing of *Νεφελοκοκκυγία* …

[23] Melkevik, *Introducion à la philosophie du droit*, 41.
[24] Ibid, 42.
[25] Ibid, 14. Melkevik reflects and expressly cites Michel Villey on this point (Bjarne Melkevik, *Philosophie du Droit* (Laval: Presses Universitaires de Laval, 2010), 248).

Melkevik's proposal counters these criticisms with a philosophy of law that is useful and not intended to be a substitute for law. It is a public argumentative activity that serves not the so-called "positive" law, but rather the modern legal project as a whole.[26] Now, if the law is what is done in and with the law, the philosophy of law is related to this practical understanding with the function of accompanying and guiding the good argumentative and interindividual socio-legal discussion for a democratic understanding of the legal.

Concluding with the Brazilian filmmaker, quoted in the epigraph, but paraphrasing for the context of legal philosophy and the significance of its study elaborated so far: Why study the philosophy of law, according to Melkevik? Philosophizing the legal, to not be applauded by shallowness, to live on the edge of the abyss of understanding, legal philosophy is summoned to challenge the foolish, to question common sense, to dive into the complexity of thought. It is an anthem to the questions that are hardly answered, but when faced, illuminate the paths of legal culture. Thus, legal philosophy, in its tireless quest for understanding and reflection, becomes the path to a true democratic understanding of the legal, and as such, deserves to be studied and celebrated.

Bibliography

Ferry, Luc, and Alain Renaut. *Philosophie politique*. Paris: PUF, 2007.

Melkevik, Bjarne. *Habermas, légalité et légitimité*. Laval: Presses Universitaires de Laval, 2011.

Melkevik, Bjarne. *Introducion à la philosophie du droit*. Paris: Bueno Books, 2016.

Melkevik, Bjarne. *Philosophie du Droit*. Laval: Presses Universitaires de Laval, 2010.

Рафаель Тубоне Магдалено. Навіщо вивчати філософію права: Нотатки на честь Б'ярна Мелкевіка

Анотація. У цій статті розглядаються аргументи Б'ярна Мелкевіка щодо важливості вивчення філософії права. Автор має на меті розглянути, по-перше, що означає філософський погляд на право, а по-друге, основні питання сучасної правової думки. Визначено такі ключові проблеми: онтологічна проблема, епістемологічна проблема, проблема належного та проблема етики і права. У роботі Б'ярна Мелкевіка право зображується як "колективний та індивідуальний процес формування волі та поглядів, процес безперервний і постійний." У контексті правової сучасності роль філософської думки полягає в тому, щоб бути супутником, *ἀγωγός*, спрямовувати людей у цьому процесі.

Ключові слова: Б'ярн Мелкевік; філософія права; сучасна правова думка.

Rafael Tubone Magdaleno. Why Study Philosophy of Law: Notes in Tribute to Bjarne Melkevik

Abstract. This article delves into Bjarne Melkevik's arguments about the significance of studying the philosophy of law. It aims to address, first, what it means to philosophically consider the law and, second, the pivotal issues in contemporary legal thought. The key issues identified are the ontological

[26] Melkevik, *Introducion à la philosophie du droit*, 21.

question, the epistemological question, the issue of "ought to be," and the question of Ethics and Law. In Bjarne Melkevik's work, law is portrayed as "a collective and individual process of shaping wills and opinions, a process that is continuous and permanent." In the context of legal modernity, the role of philosophical thought is to be a Companion, a *ἀγωγός*, guiding individuals through this process.

Keywords: Bjarne Melkevik; philosophy of law; contemporary legal thought.

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