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THE MOST IMPORTANT PROBLEMS OF LEGAL PHILOSOPHY AND THE NATURE OF LAW

The purpose of legal philosophy is frequently defined as the discovery or exploration of the nature of law. The nature of law is usually understood as a set of necessary properties of law. Such an identification of the purpose of legal philosophy raises some doubts. Irrespective of those doubts, I claim that that focusing exclusively on the nature of law may be detrimental to legal philosophy as a whole, as it may be an obstacle to the investigation of certain issues that seem important. Or, at least, not all fundamental problems of legal philosophy may be perceived as pertaining to the nature of the law. Two such problems are briefly discussed: (i) legal pluralism and (ii) certain new categories of non-human legal subjects, such as autonomous machines, environmental legal persons and animals. I argue that focusing on the nature of law does not help the exploration of those important topics.

Key words: *Legal persons. – Legal pluralism. – Nature of law. – Non-state law. – Social ontology.*

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The purpose of legal philosophy is frequently defined as the discovery or exploration of the nature of law (for the sake of simplicity, I will not make a distinction between legal philosophy and general jurisprudence and will use those terms interchangeably). Andrei Marmor (2018, 151) noted a few years ago that 'there is a widespread sentiment that the traditional debates about the nature of law have reached a dead end, not worthy of further investigation'.

Some legal philosophers have expressed the view that legal philosophy is no longer interesting and (probably) should be abandoned (Enoch 2015). Marmor rejects such scepticism and claims that general jurisprudence 'is in no need of reinvention' (Marmor 2018, 151). He endorses the view that the subject matter of general jurisprudence is 'the nature of law'. He claims that there are three main debates about the nature of law that answer three different questions: the question of the ontology of law, the question of the determinants of legal content, and the question of legal normativity (the ability of law to generate reasons for actions).

Such a view on the subject matter of general jurisprudence is shared by many legal philosophers from both the positivistic camp, such as Joseph Raz (2009, 92), Scott Shapiro (2011, 9) and Julie Dickson (2001, 17), and the non-positivistic camp, such as Robert Alexy (2004, 162).

> I am, however, not certain whether the subject matter of legal philosophy can be identified through the exploration of the nature of law. My doubts are based on two major issues. First, the very notion of the 'nature of law' seems to me rather obscure and philosophically dubious. The nature of law is usually understood as a set of necessary properties of law. For example, Raz (2009, 92) writes:

In as much as the general theory of law is about the nature of law, it strives to elucidate law's essential features, i.e. those features which are possessed by every legal system just in virtue of its being legal, by every legislative institution in virtue of its being legislative, by every practice of legal reasoning in virtue of its being a practice of legal reasoning, and so on. A claim to necessity is in the nature of the enterprise.

This view assumes that law has a nature or essence. Even if we leave aside philosophical objections against essentialism, some specific problems related to law remain. Law is a social artefact and, as such, is a free creation of humans. Do human artefacts have natures or essences? Further, law varies in time and space. English law is very different from Chinese law. English law today is very different from English law in the seventeenth century. Do all these laws,

notwithstanding those differences, have a common nature? Second, it is very unclear what 'necessity' means in this context. Legal philosophers tend to avoid answering this question.[1] It is also unclear whether the modal or non-modal conception of essence is adopted, and, therefore, what the relation is between necessary and essential features of law.

Many legal philosophers oppose (for various reasons) the view that the subject matter of general jurisprudence is the elucidation of the nature of law. It is interesting that such legal philosophers come from both positivistic and non-positivistic camps. Let me name just a few of them. Ronald Dworkin famously claimed that the 'nature of law' is a 'mantra' or a 'positivistic phlogiston' (Dworkin 2006, 216). Dennis Patterson argues that the failure of attempts to identify the nature or of law indicates that no such nature exists (Patterson 2016). Brian Tamanaha claims quite radically that the nature of law is that law has no nature at all (Tamanaha 2001, 195).

I am not certain who is right in this dispute, and it is not my aim to answer this question. My claim is much weaker. Namely, I claim that focusing exclusively on the nature of law may be detrimental to legal philosophy as a whole, as it may be an obstacle to the investigation of certain issues that seem important to me. Or, at least, not all fundamental problems of legal philosophy may be perceived as pertaining to the nature of the law.

Before I explain this point, let me make one general remark. The question 'Is legal philosophy interesting?' posed by David Enoch is not equivalent to the question 'Is legal philosophy important?'.

The answer to the former question seems, at first sight, to be a matter of personal taste. Being interesting is not a property of the object in question (say, legal philosophy), but of a relation between it and a person.[2] What is interesting to me can be boring to you. However, as people tend to share tastes, at least to some extent, we can say that something is interesting if enough people find it interesting. Considering the number of participants in world congresses of legal philosophy, journals publishing texts pertaining to legal philosophy, books that appear every year, etc., we may conclude that legal philosophy is interesting in this sense. Enoch (2015, 2) does not go this way (which he calls Millian). Instead, he compares legal philosophy to metaethics and concludes that metaethics is far more interesting than legal philosophy. That is surprising.

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1 Raz (2009, 91) writes, 'I will leave the question of the kind of necessity involved unexplored.' Similarly, Dickson (2001, 17 n. 24).

2 Lesli Green (2012, lV) refers to David Hume, for whom the law was impossibly boring.

The question of importance does not seem to be exclusively a matter of personal taste. Something may be terribly boring, but at the same time important. As I think, no general definition of 'important' may be given, as being important is heavily context dependent. An enquiry is important if its effects successfully satisfy (or at least have a chance to satisfy) certain social needs, either cognitive or practical, provided that such needs are socially shared. What legal philosophers are doing may be important in the sense that the effects of legal-philosophical enquiry may help people understand the social reality in which we all live. We are confronted with certain phenomena in social reality, and we are frequently puzzled. We ask questions such as 'How is it possible that...' and 'What does it mean that...'. It seems to me that, in this sense, legal philosophy is far more important than metaethics. People are more frequently puzzled by legal philosophical and moral questions than by metaethical questions. Questions people are usually puzzled by are first-order questions rather than meta-questions. People ask, 'Is an unjust law a law?', 'Is coercion justified?', 'Do I have a moral obligation to obey the law?'. Typical metaethical questions, such as 'Are moral judgements truth-apt?', are probably very rarely asked by ordinary people.

This assumes that the purpose of legal philosophy is hermeneutic rather than explanatory. What we as legal philosophers strive for is not so much scientific explanation, and in particular, causal explanation. Our aim is rather to understand what is going on in social reality. It is our desire to better understand our position in social reality that drives us into legal-philosophical enquiry. As Raz says (1995, 237):

> Legal theory contributes...to an improved understanding of society. But it would be wrong to conclude, as D. Lyons has done, that one judges the success of an analysis of the concept of law by its theoretical sociological fruitfulness. To do so is to miss the point that, unlike concepts like 'mass' or 'electron', 'the law' is a concept used by people to understand themselves. We are not free to pick on any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves.

The concept of law is a hermeneutic concept; therefore, the main purpose of legal philosophy is hermeneutic. Yet, of course, it is not so simple. Usually, the distinction between the explanatory and hermeneutic purpose of general jurisprudence is linked to the distinction between an empirical or scientific approach and a hermeneutic approach (Bix 1999, 186). However, as I think, opposing an explanatory purpose to a hermeneutical purpose is a sort of

over-simplification, as it assumes that explanation does not contribute to understanding. A lack of space does not allow me to say more about the relationship between explanation and understanding.

My thesis is that if general jurisprudence concentrates its hermeneutical efforts exclusively or almost exclusively on the exploration of the nature of law, it runs the risk of overlooking certain phenomena that trigger important changes in the legal landscape and materially influence the social position of people and their perceptions of law. Such omissions may significantly diminish the social understanding of law. In what follows, I will briefly describe two such phenomena selected from a much longer list. I will try to demonstrate that the analysis and elucidation of these phenomena cannot be reduced to the matter of the nature of law (or, at least, such a reduction does not generate any added value).

The first issue I would like to mention is the problem of legal pluralism. My strong impression is that legal pluralism is underestimated by mainstream jurisprudence. Mainstream jurisprudence focuses on municipal law. This is quite evident in Herbert Hart's writings. His theory is a theory of contemporary municipal law. The same applies to Raz (1995, 116). Of course, neither Hart nor Raz claim that municipal law is the only sort of law that may exist. They are just not interested so much in other types of law, and their ambition is to elaborate a general theory of municipal law. Legal pluralism is simply not their topic.

The phenomenon of non-municipal law may be uninteresting to mainstream legal philosophers, but this does not imply that this phenomenon is not important. Let me briefly explain why I believe that it is one of the most important problems of contemporary law.

I will begin with a few historical remarks. The phenomenon of legal pluralism is by no means new for legal scholars. Let me recall Eugen Ehrlich (1913) and his profound study of two parallel legal orders in Austrian Bukowina (a small territory in the very east of the Austro-Hungarian Empire, now a part of Ukraine) before the First World War. Out of those two legal orders, only one was the product of the state.

Initially, legal pluralism (as studied by Ehrlich and others) was understood as the parallel existence of two legal orders in a certain territory—indigenous law and colonial law imposed by the colonial power on the same territory. Thus, legal pluralism, understood as the co-existence of two legal orders, used to be a rather peripheral phenomenon strongly linked to various forms of colonialism. It may have been interesting from a theoretical perspective, but it had only a minor and purely local practical importance. Non-state law has not been perceived as an important phenomenon occurring in the developed

societies of Europe and North America. Therefore, this phenomenon has long been ignored by mainstream general jurisprudence.[3] However, I do not think that mainstream general jurisprudence can afford to continue ignoring it in light of the development of non-state law in new forms at an extended scope in the last 40 or 50 years. Previously, non-state legal orders derived their strength from ethnic communities. That is not the case with respect to the non-state normative orders we have to do with presently. They are global, not local. As Gunther Teubner says, we have now to do with global Bukowina (1997, 3). New, highly important non-state normative orders have emerged and shape our social life on a global scale, sometimes being more significant than classical municipal laws. Teubner has no doubts that these orders are legal orders. In any case, although these normative orders are not products of any state agencies, they are in some respects similar to municipal laws and very different from morality. They sometimes influence our social behaviour to a greater extent than state law.

The following are some examples:[4]

(i) *Lex mercatoria*, the transnational law of economic transactions rooted in various practices of merchants, corporations, private arbitration tribunals, international business associations, etc., constitutes a powerful instance of global law without a state.

(ii) The internal regulatory regimes of multinational corporations operating worldwide influence the conduct of many people independently of the state law applicable to them. They include *inter alia* rules relating to sexual misconduct in the workplace, whistleblowing, mobbing, etc.

(iii) Labour regulations agreed upon between enterprises and labour unions quite frequently transcend state borders.

(iv) Professional regulations (for example, for auditors, accountants, lawyers, doctors, etc.) are created frequently without any intervention by the state.

(v) Regulations applied in various internet networks and platforms (such as Facebook) influence the social lives of a great many people in our time.

[3] I skip here the matter of customary law, which is in a sense a non-state law (as it has not been created by any state agencies). However, in another sense, it can be perceived as a state law, as it needs to be recognized by the state.

[4] This list is partially based on Teubner (1997, 3).

Of course, this list is by no means exhaustive. What is common to all these types of rules is that (i) they have been created without the intervention of state agencies (or with only minimal intervention), (ii) they relate to important aspects of social life, (iii) they are, to a high degree, formalised (unlike morality or etiquette) and (iv) some of them provide for sanctions and enforcement agencies. The relations between such normative orders and municipal law may take various forms. Sometimes the rules of those orders conflict with municipal law; sometimes they merely supplement the rules of municipal law; and sometimes they refer to matters that are outside the scope of municipal law.

General jurisprudence can adopt various approaches to such normative orders. The simplest approach would be to deny that these orders are legal. One might argue that these normative orders do not fall under the concept of law. Certainly, those normative orders are important and interesting, but they are simply not legal orders and, as such, they remain outside the scope of interest of general jurisprudence and should be studied by other disciplines. I do not, however, think that such an approach should be recommended for at least two reasons. First, such an approach is based on a stipulative definition of law as a normative order created (or at least recognised) by the state. Hart (2012, 13) has demonstrated that the problems of general jurisprudence cannot be solved by adopting a definition of law. The mere fact that those normative orders have peculiar characteristics distinguishing them from the traditional law of the nation states does not mean that they are not fully fledged laws (Teubner 1997, 3). The second reason is more practical: if we deny the legal nature of such normative orders, we imply that general jurisprudence is not interested in certain phenomena that, for many people, are indistinguishable from law.

There are many excellent books and papers on legal pluralism published beginning in the second half of the 20th century: just to name a few, Gunther Teubner (1997), William Twining (2009), and Brian Tamanaha (2001).[5] Generally, however, almost all of these books have been written from a sociological point of view. To my knowledge, there are very few analytical works, so many important questions of analytical jurisprudence relating to those non-state legal orders remain unanswered.[6]

I think that two fundamental questions for general jurisprudence arise here. The first question is whether the diversity of state and non-state legal orders allows us to continue the search for the nature of law as the

[5] See also the *Journal of Legal Pluralism and Unofficial Law*, published since 1969.

[6] One of the few exceptions is Culver, Guidice (2010).

main task of general jurisprudence. Such orders have different features, and the probability that certain of these features do not characterise all instantiations of the law seems to be rather high. Therefore, if general jurisprudence focuses exclusively on the nature of law, it runs the risk of failing to describe certain important features of the various instantiations of law. General jurisprudence, when defining its task as the search for the nature of law, seems to assume that law constitutes a classical category in the Aristotelian sense (all instances of law are characterised by a certain set of common features). This assumption remains unjustified.

The second fundamental question is whether the conceptual apparatus of general jurisprudence is sufficient to deal with non-state law. Can non-state law be explained and understood in terms of the rule of recognition, primary and secondary rules, and pre-emptive or exclusionary reasons? Is the relation between those regulations and morality the same as that between state law and morality? Is the role of coercion the same as in state law? Is non-state law authoritative in the same sense as state law? Culver and Guidice claim that the focus of general jurisprudence on state law '...is simply a symptom of an underlying inability of dominant analytical approaches to capture legal phenomena outside the model of the law-state' (Culver, Guidice 2010, XVI). The question arises as to whether the problems of non-state law can be successfully investigated within the framework of the traditional enquiry into the nature of law. I do not think that is the case.

The second phenomenon that I would like to use for the purpose of supporting my thesis belongs to the realm of the social ontology of law and, in particular, the theory of institutional artefacts. Again, this topic is by no means new. However, in the most recent years, social ontology has gained increasing attention from general jurisprudence. There is a rapidly growing number of publications on law as an artefact. Let me mention only Luka Burazin, Kenneth Einar Himma and Corrado Roversi (2018). Social ontology of law is certainly a fascinating topic. However, I am mentioning it for a specific reason: social ontology of law is not only a purely speculative philosophical discipline, it also has certain practical implications that, in recent years, have become more and more important. The question is whether the social ontology of law may help us deal with certain new legal phenomena. What I have in mind here are certain new categories of non-human legal subjects. I mean here, for example, software agents (or, more generally, autonomous machines), environmental legal persons (such as rivers and mountains), and animals and species in connection with the discussion on animal rights. There are probably more categories. Each of these new categories is very different and triggers quite a few problems. One thing is certain: the traditional juristic theory of legal persons (what we in continental traditions call *juristische*

Person or *personne juridique ou morale*) is not fully applicable to these new types of legal entities. There arises a fundamental question about whether anything can be a legal person or whether there are some conceptual or other limitations that restrict our ability to create still new sorts of legal persons (Kurki 2020; Pietrzykowski 2018).

Such new types of legal persons trigger quite a few difficult problems related to certain fundamental legal concepts, such as liability, action, right, claim, privilege, etc. These concepts, which have a long history and form an important part of the conceptual apparatus of jurisprudence and legal practice, probably require revision, enabling us to face new problems triggered by the development of law. Again, I do not think that framing these problems as pertaining to the nature of the law would bring any progress.

The list of problems of general jurisprudence that seem to exceed the traditional problem formulation is probably quite long. I have mentioned only two of them as examples. Even a superficial examination of these problems leads to the conclusion that they probably cannot be solved in terms of the necessary features of law, a natural essence of law, etc. They rather demonstrate that law is a family of various phenomena, and as such, a cluster concept rather than a classical Aristotelian category.

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