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'*Le concept de droit* Hart and the French Legal Theory'

'*Le concept de droit* Hart and the French Legal Theory' project sponsored by the Ecole Normale Supérieure's Translitterae Scheme hosts Herbert Hart's best experts from Canada and the United Kingdom in the framework of the Legal Theory Master Class series.

For almost half a century now, lawyers in France have been loath to use *Le concept de droit*; meanwhile, for almost six decades their British counterparts have considered the original book, Herbert Hart's *The Concept of Law*, to be almost a gospel. As everyone in this room knows, the original book was published in 1961. Probably less well known is that, thanks to Swiss and Belgian philosophers, its first French translation appeared a decade later, in 1971. In 2005, the second French edition was published, again in Brussels. This included the famous, posthumously added Postscript to the English second edition. Unfortunately, one of the two Belgian professors who led the translation team for both editions, Michel van de Kerchove, passed away a couple of years ago.

In the contemporary French context, it is plausible to suggest that legal theory books have overwhelmingly been replaced by *Introduction au droit* for a number of essentially non-academic reasons such as the profit expectations of the publishing companies. From the perspective of legal theory, this change is quite unfortunate. This is because the explication of legal concepts, the richness of the vocabulary used and the important details in describing the institutional background of the theory are vastly inferior in these introductions to law. Surprisingly enough, Hart's *Concept of Law* was also primarily intended to present a fresh general, descriptive legal theory or jurisprudence to the students of law at Oxford without any justificatory purpose. (In contrast to Hart, according to Dworkin "legal theory is best understood in terms of the interpretation of a particular claim about the conditions under which the use of collective force in society is justified".)

Hart successfully introduced a brand-new way of speaking philosophically about legal discourse. His Concept of Law concisely encapsulates both a theory of legal positivism and Weberian sociology. Hart's methodology allows one to comprehend the legal system as a union of primary and secondary rules. Legal rules are to be viewed from an internal point of view. Although legal positivist, Hart's approach lets that certain moral concerns be part of the legal discussion.

In turn, continental positivist legal theorists base their position on the positivist idea of science. For them this particular meta-theoretical choice of empirical science implies the claim of ethical neutrality and political amorality of the legal science as if the positivistic concept of the science were the unique call of our times. But Hart's conceptualization of law requires his readers to ignore that approach.

The project attempts to scrutinize Hart's jurisprudential views, in order to delimit the general scope of his *Concept of Law* – that is to say, when all is said and done, to determine whether or not his legal theory is a general theory of law. At the same time, we are reluctant to conceal our view that the theoretical tenets of French legal positivism are also based on overwhelmingly unsustainable assumptions. And so, by viewing these legal theories together – Hart's *Concept of Law* on the one hand, and French legal theory on the other – we have a great opportunity to grasp the problem of the generality of any legal theory that is claimed to be general. Thus, we seek to test those accounts that plausibly invite us to accommodate Hartian soft, inclusive or moderate legal positivism into the French context. Again, according to our hypothesis at the outset, there is no real chance to perform a transnational methodological translation of Hart's jurisprudence from the British to the French context. But the hope is that this scepticism concerning untranslatability will be eroded by the end of the project. That is not the goal of the project, though. Our goal is rather to see the road that may lead towards such an erosion of scepticism.

One of the cornerstones of the project is to describe adequately "French legal theory" as an imagined discursive partner with which Hart's *Concept of law* – if it is really a general theory of law – willing to dialogue. In the broadest possible terms, one may describe French legal theory as the discourse of French academic lawyers, which takes place almost always inside legal positivism, plus Michel Villey's doctrine of natural law, on the one hand, and critical legal scholars, on the other.

Let us briefly grasp the concept of French legal theory right now, because sn important part of our research is to provide an adequate definition of this very broad category – one that is seemingly historical, but in fact is analytical or conceptual. Now we are trying to identify three main claims stemming from the purely artificial category of "French legal theory": first, the need for anti-cognitivist metaethics; second, the number of potential legal meanings is beyond measure; and third, normativity is not a scientific issue.

These claims revolve around a more fundamental and robust recommendation to do empirical legal science, instead of allowing ourselves to be tempted by normative political philosophy in the sense of Dworkin when doing legal theory. Notwithstanding, discovering conceptual links between them does not put any particular intellectual strain on the scholar. Let's take, for instance, the conceptual interplay between claims one and three:

> "Given that the scientific character of 'legal science' requires us to reject any moral theory that is compatible with the presumption of the intelligibility of moral concepts e.g. justice, fairness, rule of law, in the field of legal science we cannot ask or answer the normative question of why people should be morally obliged to follow legal rules."

We can discover a similar interplay between claims two and three:

> "If legal rules have a countable number of meanings, then the judge is obliged to give the right answer in any given legal case."

By the way, as far as the often axiomatically accepted tenet number one is concerned, it is worth referring to Herbert Hart's caveat, as formulated in the Postscript against Dworkin, that "legal theory should avoid commitment to controversial philosophical theories of the general status of moral judgements". If Hart's contention is sound vis-à-vis Dworkin, I cannot see why a rejoinder should not be made to the French legal positivists' commitment to anti-cognitivist meta-ethics, given that anti-cognitivist meta-ethics is also a controversial philosophical doctrine as the endorsement of objective moral values.

Now, once these claims of legal theory are translated into appropriate terms of Anglo-Saxon legal discourse, one may discern a natural convergence between American legal realism and the category I have called "French legal theory". Therefore, the main question that might now arise is how to defend the idea of inclusive legal positivism against the idea of French realist legal theory based on empirical science, implying the complete emptiness of normative concepts and the meaninglessness of the moral discourse. So, Wil, such a debate – does it make any sense? If not, should we rather focus on other debates on positivism within the positivist school? But if that latter suggestion is better – that is, not to pay any attention to the realists – can we transfer this debate between methodological, conceptual or descriptive positivism and soft or inclusive positivism to any context other than the British one? And if so, how?

In British academic circles, until the advent of Hart, criticism of legal positivism came essentially from outside the positivist camp. British legal theory describes a beautifully straight line from its beginnings until the publication of *The Concept of Law*: Hobbes developed Ockham's nominalist philosophy into a legal theory; Austin and Bentham adapted Hobbes' utilitarian moral theory; Hart edited Bentham's complete works and criticized Austin's jurisprudence; and finally there is Joseph Raz, whose theory of authority is based entirely on Hart's theoretical legacy. This straightforward chain from Ockham to Raz that linked legal theorists within the legal positivist school was suddenly broken by Hart's posthumously published Postscript to the *Concept of Law*. The Postscript tried to defend legal

positivism against Hart's *enfant terrible* Ronald Dworkin's wholesale critique of legal positivism. In an excellent collective volume on Hart's Postscript, Jeremy Waldron nevertheless admits that the line between Finnis's natural law and normative positivism has become blurred, and that the opposition between natural law and legal positivism is *passé*.

Compared to Dworkin, the early works of another of Hart's students namely, our distinguished guest today issued a clear invitation to return to the original path of British legal theory, by treating the methodological requirements of soft or inclusive legal positivism. Wil sought to remain inside the legal positivist tradition, whereas Dworkin, in attempting to launch a general attack on legal positivism, definitively stepped outside this school of legal thought. Not surprisingly, all the most important books on legal theory or jurisprudence published since the second edition of the *Concept of Law* and its Postscript have referred to Professor Wil Waluchow's doctoral research on inclusive legal positivism. This was supervised by Hart himself, and was finally published by Clarendon Press in 1994.

Our first guest, Professor Wil Waluchow, delivers the inaugural lecture. Wil Waluchow's inclusive legal positivism is seamlessly compatible with and committed to the judicial review of legislation. His constitutional theory easily garners support from Hart's *Concept of Law*, for example when he treats the question of law application in his *Common Law Theory of Judicial Review*. Much to his readers' astonishment, Wil Waluchow is equally emphatic in using Dworkin's normative theory to justify judicial review. His book nevertheless remains an example of how to integrate legal theory into constitutional theory. Finally, we would just like to mention that Wil Waluchow recently edited an excellent book on Dworkin's jurisprudential legacy.