Transsystemic and Multilingual Contexts of Legal Education: *Short Iterations on Two Dogmas of Legal Positivism*

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1 Introduction

As a point of origin of this brief note, be it said that the institution in which the author holds the status of professor, the Faculty of Law of the *Université de Moncton* is host to a variety of—sometimes unique and surprising—events that could be could considered "phenomena" of transystemism in a multilingual context of legal education. The Faculty of Law, which offers a unique training of common law taught exclusively in French, was founded in 1978 in the City of Moncton, in the Province of New-Brunwsick, Canada:

> The University of Moncton was founded by integrating three colleges: College Saint-Louis, College du Sacre-Coeur and College Saint-Joseph. Undergraduate degrees in adult education had been founded by the university in the year 1989. Students get admission in this school on the basis of their extracurricular activities, GPA, letter of reference, as well as interview questionnaire. As all the classes of this school are conducted fully in French, student who are seeking admission must have a strong command on French language. University of Moncton doesn't require its students to take the LSAT (Law School Admission Test) as it considers the score of LSAT, if provided.
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> University of Moncton Faculty of Law offers the basic LL.B. and also the graduate LL.M. Besides this, the university also offers degrees such as: the LLB-MEE (Masters of Environmental Studies), LLB-MAP (Masters in Public Administration) and LLB-MBA (Masters of Business). Moreover, students who have a degree of B.C.L or LL.L. (Civil law degree) from any Canadian school have the permission to enroll their names in the school for two

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semesters and complete a J.D. For international students who are willing to understand the common law tradition, the faculty offers a D.E.C.L (Degree in Common Law) as well.[1]

Transsystemic teaching of law, as is also often found in multilingual contexts of legal education, can and have been celebrated as powerful remedies to the dominant paradigm of legal education, rooted in a legal positivistic ("LP") view. This view is generally accepted[2] as the dominant model of teaching, reasoning, and adjudicating legal matters.[3] The limits of such a model are, perhaps incidentally, made more visible in a transsystemic or multilinguistic contexts of teaching, as those are the conditions in which we train legal minds at the *Université de Moncton*. May these short iterations be of use to many who face the challenges of multilingual, or multisystemic, contexts of legal education.

2 A First Dogma of Legal Positivism: The Rule-Paradigm[4]

Multilingual and transsystemic education, be it through the generally available mean of comparative law, unravel the deeply rooted polysemy inherent to even the most casual legal concepts to be encountered. Multiple explanations to this un-fixedness of the meaning of legal concepts are offered by the legal literature; this polysemy is perhaps one the first "terrors" to be faced by legal students. How tragic it is to be facing norms purporting to be just and universal, which are also modeled using that profoundly imprecise medium of language! This finding, in itself, as stemmed a whole field of legal studies gravitating around the now classic *themata* of the hartian "open texture of the (legal) language".

One of the many consequences of this relative imprecision of legal language, as most eloquently revealed to a lawyer endeavoring a transsystemic reflexion, is to reveal the relative unavailability of the rule-paradigm as the only method of resolving legal matters. The "canonic" syllogism, as a means of resolving legal problems was developed, and possibly meant to be applied, to premises that are fixed, and objective.[5] How can the syllogism as a tool retains its centrality when the major

[1] See the interesting presentation offered by the Canada Law Schools resources, available online at http://www.canadalawschools.ca/atlantic-canada/new-brunswick-universities/13-university-of-moncton-faculty-of-law.

[2] Generally, see: Samuel (2003), p. 30.

[3] This is not to be understood as meaning that the notion of Legal Positivism *itself* is non-contentious. Many myths exist *about* what Legal Positivism is or is not, as suggested by a variety of authors such as Norberto Bobbio and John Gardner. For the finality of this short note, we are concentrating on myths conveyed by LP itself and not the myths *about* LP.

[4] For Samuels, the success of Legal positivism is in part due to two fundamental assumptions: "The first is that legal knowledge consists of legal rules; the second is that these legal rules are identifiable in terms of their particular sources and independent of all other social norms arising from other, non-legal sources". Samuel (2003), p. 22.

[5] Huhn (2002), p. 813.

premise, the enunciation of the Rule, be it enshrined in common law judgments or in a piece of legislation, is often times irremediably mobile?

This perennial problem of legal interpretation, rendered highly vibrant through the problems of transystemism, has guided some legal scholar to offer a variety of means to understand what is *really* happening when one speaks of *legal method* or *legal reasoning*. A now well-documented[6] field of legal research covers the means by which legal solutions take place, especially in the context of transystemism. For a good portion of these scholars, it is unavoidable to take into account the profoundly cultural dimension of legal institutions, as to avoid the risk of "faux amis": similarly phrased concepts buttressed by different cultural context accounts for sometimes very different legal solutions or means of enforcing what seemingly may be the same notions. Recourse to multidisciplinary approaches, such as law and economics, law and literature, law and society, all offer a richer understanding of the true nature of the legal reasoning.

As any fiction, the Rule paradigm has roots in reality and reflects the *habitus* and in many cases the actual practices of legal problem solving. May it be only noted that this method is relative to the complexity of the legal problems at hand, which in some case need to be addressed through a richer matrix, especially in the case of transsystemic or multilinguistic questions of law. In such circumstances, law perhaps cease to be a matter of rules, and students, lawyers and judges alike encounter law-as-a-social-fact, a living, and forever context-bound content-matter that it would be of disservice to treat only through the lens of a rule paradigm meant for much simpler matters. . . . than human ones.

3 A Second Dogma of Legal Positivism: A "Realist" Epistemology

A recent field of legal methodology and legal epistemology covers a ground that remained relatively un-touched up until the recent years: that is, the role of facts in the legal reasoning, as opposed to the role of rules. Likewise to rules, facts themselves have long held a status of undisputable objectivity, but this status has often been put into question through the works of comparative law, and transsystemic contexts.

It may very well, according to prominent legal epistemologists such as Geoffrey Samuel, Christian Atias or Theodor Ivainer, that facts themselves are an object of construction and interpretation and: "the idea that legal science is a discourse that has its objet actual factual situation is to misunderstand, fundamentally, legal thought."[7]

[6] As a seminal source, see: Teubner (1989), p. 727.

[7] Samuel (2004), p. 74.

Legal epistemology's recent findings touches on the mode(s) legal reason uses to constructs the "object-matter"[8] of legal knowledge, and notably how "facts" are received and treated in legal reasoning, Beyond the content of the rules of evidence and of procedure, legal epistemology sheds light on the principles and often unarticulated premises leading to the translation of a "fact" to a "norm" in a judiciary context. For Professor Geoffrey Samuel, the study of the modelization through which norms and fact interact and are construed by legal reasoning is on the first problems of legal science and legal epistemology:

> [Legal science is to be envisaged through a constructive form]. That is to say it has to be envisaged through a structure which mediates between facts and science (law), allowing the legal scientist both to make sense of the facts and to discover solutions from transformation within the structure. Such a structure is what one calls a "model". What, then, is the basis for such a legal model? This, of course, is the fundamental question that should motivate and direct any work on legal epistemology.[9]

Legal epistemology thus underlines that facts are constructs and not "empirical" when seen through the lens of legal reasoning: some facts are chosen (by the trial lawyer, by the judge, etc. . .) as relevant, others are disqualified. In this operation that could be described as the *naturalization*[10] of the "real" to the needs of legal knowledge, facts and norms coalesce to a great extent.

For the author Astolfi, this may also further reveal that what is habitually referred to as "facts" do not have an *a priori* independent existence: facts take on meaning only in relation to a system of thought or a theoretical framework, or in other words, facts exist only when they are seen and recognized through a pre-existing structure. Identifying this underlying structure by which legal reason "constructs" facts could very well reveal incidentally reveal that there is a legal world-conception,[11] a general conceptual foundation to law that guides its relation both to facts and norms, that could be distinguished from other views, such as the scientific world-conception (*wissenschaftlichen Weltauffassung*).[12]

4 Concluding Remarks

What happens next? Facts lose their standing power as neutral, stable and objective anchors against rules, statutes, and cases ever evolving, ever changing. Facts themselves are objects *inside* and not *outside* of legal reasoning: they are themselves

[8] Berthelot (2008), p. 124.

[9] Samuel (2003), p. 19.

[10] Thomas (1973), p. 103. Teubner (1992), p. 1149.

[11] Astolfi and Develay (1996), p. 25. See also: Hanson (1958).

[12] *Schriften zur wissenschaftlichen Weltauffassung. Monographs on the Scientific World-Conception*, ed. by Schlick und Frank, 1928–1937.

mediated, translated, transformed and interpreted through the (meta)methods governing legal reasoning:

> This epistemological thesis is [...] applicable to law since this is a discourse or "science" (*intellectus*) which does not operate directly on the facts (*res*). What the lawyer do is to construct a model of the social world and it is, arguably, this model which acts as the bridge between the social and the legal worlds. That model is both the *res* (object of knowledge) and the *intellectus* (knowing subject).[13]

It is now clear that the way by which law constructs facts is only superficially encompassed by the formal rules and statutes relating to evidence and procedure[14] of a given jurisdiction. For some authors, to access the deeper structure of the legal reasoning one could set aside the usual sources of positive law. The authentic method of a discipline such as law could also be approached by the study of the paradox and controversies in legal knowledge, as opposed to its apparent unity. For Hammer, legal fictions imagined by law can even go so far as to make facts "disappear",[15] or to substitute themselves to reality.[16] As final remarks, uncovering the underlying assumptions of, and shedding light on, the authentic method of legal reasoning is crucial and urgent. Indeed, when fictions defeat facts in a judicial context it is often times to the peril of vulnerable parties from linguistic, sexual or ethnic minorities.[17] The method by which a judge constructs facts, if it is not satisfyingly encompassed by the legal rules or by what is known as "legal methodology", thus chart the course of legal epistemology towards uncovering a "deeper" level or legal reasoning.

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[13] Samuel (2003), p. 2.

[14] For Dubouchet, simple factual and legal situations can be solved by the application of the traditional legal syllogism and the special type of reasoning it involves: (1) the formal reasoning. When faced with complexity, when facts are to a lesser extent isomorphic to applicable case law and statute law, a second type of reasoning, the (2) dialectical reasoning, is put forth. For authors such as Dubouchet and Carl Schmitt, some factual situations may arise that are simply not encompassed by relevant positive law, leading the judge to use (3) rhetorical reasoning in the rendering of an equitable solution. Dubouchet (2008), p. 118.

Précité, note 34, à la p. 118 et suiv.

[15] Hammer (2015), p. 119.

[16] Atias (1994), p. 21. "tendance de toute fiction à se substituer purement et simplement à la réalité".

[17] "Competent judges should be able to prioritize facts over legal fictions. Judges should not be so distracted by difference that they fail to recognize facts. "The politics of control and domination are interrupted when we embrace our own fears and anxieties to transcend them." Competent judges should be able to notice, recognize, acknowledge, evaluate, and then set aside their own discomfort and emotional reactions.' Those reactions are a source of information, but just one of the sources of information available to judges. They are not the guiding principles. Even if courts do not love transgender people, they are tasked with working justice and, at a minimum, tolerating difference. In courts' decisions, love, or the lack of it, should not determine whether the result is justice." Hammer (2015), p. 161.

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