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Paul AMSELEK (2012) *Cheminements philosophiques dans le monde du droit et des règles en général* [Philosophical Excursions in the World of Law and of Rules in General]. Paris: Armand Colin, 647 pages

The title for Paul Amselek's work is admirably well chosen. These 'philosophical excursions', far removed from those paths of Heidegger which lead nowhere, are constantly going down byways and taking paths that are unexpected, all the better to stimulate reflection in a manner that is always original at the crossroads of the theory of law and of philosophy. For Paul Amselek is a philosopher as much as he is a jurist, and if he defends the philosophy of law as 'a branch of philosophy in its own right' (p. 11), it is no doubt in his opinion more reasonable to entrust that reflection to the jurists, since those philosophers who have given consideration to law have paradoxically 'contributed particularly to discrediting philosophical reflection on law by developing this thought from the outside, without trying truly to take cognizance of the specific realities of the legal experience, integrating the idea of law into their thought systems in an artificial and very approximate manner, by vaguely identifying it with the concept of justice' (p. 10). If this casual perspective was explicitly assumed by Hegel, Kant does not get off any more lightly in Paul Amselek's eyes, confirming the severe judgement already reached in his time by Michel Villey (1971) on the *Doctrine of Law*. Rich and bounteously packed, this book will not fail to surprise the academic reader, used to meaty footnotes at the bottom of the page; from the very start Paul Amselek warns the reader about his approach – it is in fact a compilation of sets of lectures delivered over twenty years by the author, augmented by the results of his research published elsewhere. This book corresponds to 'the present state of his thought' (p. 13). These 'excursions' thus successively journey into the ontology of law, the pragmatics of juridical language and the hermeneutics of legal speech acts.

The plan for 'Excursion 1', *What is Law? A Phenomenological Investigation*, aligns itself with the phenomenological method of Husserl. Amselek explains that 'the typical structure of things classified under the concept of law comprises three great series of constituent elements' (p. 47): 'generic elements', 'specific elements' and 'particular elements'. The 'things' in question pass under the category of a rule; they are specified as rules of behaviour, among which they are distinguished from ethical rules by 'ultimate typical traits' which make them what they are, that is, rules derived of law (p. 48). But an ontology of law cannot limit itself to the elucidation of these 'ultimate typical traits', since 'a general theory of rules has not yet seen the light of day', with the consequence that one must first proceed by an elucidation of the mode of being of a rule itself. Herein lies the sheer ambition of the project. The first journey will thus initially go by way of a phenomenology of the rule in general before passing on to the rules for behaviour and finally the rules of law. The stuff of which rules are made belongs to the dimension off the ideal: 'They have no grounding in the world of the senses' (p. 65). Paraphrasing Milan Kundera, Paul Amselek talks of 'the unbearable lightness of the being of law' (p. 60).

When he calls into question the reality of this world of rules, deprived of phenomenality, Amselek appears closer to those disciples of Brentano who were Twardowski (1993) and Meinong

(1999) than to Popper, to whom he also refers. Thus, when he writes that 'certain commentators have taxed [him] with contradiction and incoherence for having declared that the rules of law were real after having said that they did not exist, that they were non-existent' (p. 78), whereas, as Amselek explains, reality and existence are not at all synonymous, one thinks of Meinong, who posed the question of the ontological status of the object of a representation, and who was seeking to frame a general theory of the object which exceeded and enveloped general ontology, since it incorporated what he called the 'outside-being' (*Aussersein*). As Jean-François Courtine and Marc de Launay write, in a formula which applies well to Paul Amselek's project aiming at determining the ontological status of the rules of law, 'the theory of the object must for example take in ideal objects which have a certain consistency, or better, substance (*bestehen*), but which do not exist, which are not effective, like number, equality, difference etc…' (Meinong, 1999: 29). Thereby, 'a rule is a *res*, a reality, a *Dasein* constituted by thought, but which is there according to a specific mode of presence: a rule of law is present in our consciousness in the particular mode of the tool, and more precisely the tool of direction for human behaviour constituted and mobilized in a certain socio-historical context by public authorities' (p. 79).

As often in this work, which is first and foremost, it should not be forgotten, a course of lectures, Paul Amselek then devotes himself to the critical examination of theses formulated before his. Among the 'reductionisms' that he objects to is first of all that of Michel Villey, who reduced the true vocation of law, which according to him was obscured by the modern and subjectivist confusion with morality, to the fact of attributing to each his own desert, in the manner of Roman law which is not deontic, but which states what is or will be: *suum cuique tribuere*. Amselek equally rejects the American juridical realism derived from Charles S. Peirce, William James and John Dewey, for which the obligation of law is no more than the prediction of such or other punishment to be inflicted on an individual by virtue of court judgement. He equally distances himself from Bentham's theory of fictions, for 'even if the modal categories of the juridical rules have no referent in the outside world, they are not for that matter fictive' (p. 111): they 'intervene on the level of the operations of the mind and of the tools constructed and employed by it, in particular the rules of conduct' (p. 112). Finally, Amselek finds fault with the logical positivism of the Vienna circle for having reduced ethical propositions to a particular class of non-significant pronouncements, having 'the nature of manifestations of emotion, expressions of feelings internal to the speaker' (p. 113). The definition of rules proposed by the author, of which he takes the opportunity to offer a new formulation according to which they are 'mental tools providing a measure of the possibility of the taking-place of things', allows him to retrieve the famous distinction made by Hans Kelsen, who drew his inspiration from Kant, between *Sein* and *Sollen* [between the Is and the Ought]: 'It is this base-standard function that Kelsen tried to express by linking to ethical norms the idea of *sollen*, of the ought-to-be' (p. 119).

The definition of the rule adopted by Amselek provides him with the opportunity to bring back into perspective the notions of autonomy and heteronomy through which modern philosophy envisages the control of behaviours. Now the experience of legal processes is the experience of a heteronomous control of behaviours, including in democracy (p. 154). Indeed, even in a system of direct democracy, the minority would always be subject to the government of the majority, and even where unanimity was demanded for a decision to be taken, those who wished for a change of legislation would by constrained by those – in the final instance by a single person – who refused it. What the experience of law shows is thus that all life in society supposes an element of constraint, and the law, as a set of rules determining potential ways of acting, is what organizes this constraint. But it remains nevertheless that there is still a composite association between heteronomy and autonomy: the control of behaviours is only possible if those controlled contribute to it. Although Foucault, of whom the idea of the control of behaviours already makes one think, is not quoted by

Amselek, the latter is here not far removed from him: it will be recalled that Foucault was already making the 'game', in the sense of the space defining a margin for manoeuvre, a condition for the possibility of being able to act (1994: 267).

This first excursion concludes with the specific delineation of the rules of law with respect to other rules – even if, in fact, the general definition of the rule that the first part was to provide had already been rounded off on a characterization of the juridical rule (p. 79). The undertaking to 'uncover the essence of the juridical' (p. 258) begins by examining the classical approaches, and in particular that which makes constraint the distinctive element of the rules of law, as retained by Carbonnier or Burdeau. On this point, the refutation made by Amselek is not entirely convincing; for if one may allow the argument that juridical rules are not always constraining (p. 230), it does not seem very judicious to advance that this criterion leads to their being assimilated to ethical rules (p. 229): moral rules project obligation but they do not constrain, since they do not come with any form of sanction other than psychological. Amselek evokes moreover, as another distinctive criterion of the juridical rule, the element of the external forum (*for externe*), retained by Thomas Aquinas and Kant, only to reject it through two arguments: the first, that boundary between the external and internal forum is 'illusory', while the second argument points out that the penal law punishes premeditation. But Kant, far from ignoring it, saw in any premeditated character an essential element of the penal definition of crime, at the same time as he made the separation between the external and internal forum the criterion of distinction between the spheres of law and morality. Paul Amselek's critique of the criterion of the public court of judgement confuses in our view the question of motives with that of the sphere of action of the sanction: motives, which belong to the internal forum (*for interne*), certainly define, in Kant, the morality of the action, but it in no way follows that the realm of law, in case of an infringement of the established law, does not have to take cognizance of them; the sphere of action of the sanction, on the other hand, is, for the realm of law, the external forum, since punishment cannot bear on the internal life of the criminal, whereas, in the moral domain, the sanction's sphere of action is exclusively the internal forum, or conscience, since that is clearly where remorse becomes felt. That is besides why Kant associated the criterion of the external forum and the element of constraint as defining elements of law. Whatever the case, it does not seem to us that the definition of the rules of law proposed by the author, a definition which in passing is very interesting, according to which the rules of law are tools for the public direction of human behaviours (p. 261), is incompatible with the criterion of the external forum. This definition moreover allows Amselek explicitly to retrieve certain aspects of the preceding definitions while correcting them: 'juridical norms do not necessarily aim at regulating the behaviour of one person with respect to another; it is more exact to say that their function is to regulate the behaviours of both the one and the other'; law 'determines, within an overall perspective, the margins of the potential action of each' (p. 263). Even though Amselek does not quote Hobbes in this respect, this definition could well be aligned with the one put forward on laws by the latter: 'laws were not invented to take away, but to direct men's actions, even as nature ordained the banks, not to stay, but to guide the course of the stream' (*De Cive*, XIII, 15).

The second 'excursion', *What do you call 'laying down juridical rules'?* is a theory of legal language acts. Amselek applies to law the distinction between the locutory and illocutory dimensions of language acts, that is to say, the distinction between what is said and what is done through the act of speaking. From this, his intention is to show 'the impasses of the classical ontologies of law which hold to the locutory dimension alone' and consequently to demonstrate 'the necessity of taking the illocutory into consideration and to attain the perspective of the speech acts of those who are speaking the law' (*iurisdicentes*) (p. 302). Just as 'Heidegger criticized the neglect by Western philosophy of the dimension of being in which the things of the world present themselves', one can similarly criticize the neglect, by the philosophy of law, of the pragmatic dimension in which the

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rules of law present themselves' (p. 314). Now 'the acts of laying down law are explicit performatives, to use the terminology of [J. L.] Austin, and even performatives that are rendered explicit in particularly detailed and edifying form' (p. 317). With the result that the application of speech act theory to law, particularly the notion of the illocutory act, recalls that plain truth that we always already know that we are dealing with law when we come across a legal text, without having to wait to study its contents. It was the ignorance of this 'pragmatic dimension of the speech acts of the *iurisdicentes*' which led Kelsen to make the order of the Ought (*sollen*) a world apart, and to put it therefrom that a norm cannot be created by a fact but only by another norm. However, this conception necessarily poses the question of the juridicity of the initial act, which obliged Kelsen to seek an 'extravagant solution' in a claimed 'suppositional fundamental norm'. In reality, Amselek notes, originating acts 'are quite simply, by their very definition, non-juridically governed acts of laying down juridical norms', 'acts of fact', then, which relate to juridical science 'to the extent that they lay out law, but not such that they are governed by law' (p. 347). Astonishingly, Amselek does not reference here Carré de Malberg (1920), who specifically characterized as a 'pure fact', one thus necessarily outside of the science of law, the originating constituent act. It is thus the merit of speech act theory that it dissuades similar, in some sense Platonic, constructions, of ideal worlds; it shows that juridical dispositions 'are simply *logos* or non-independent locutory acts, being in reality part of social acts of authority that are accomplished through these' (p. 391).

Finally, Excursion III, *Interpreting law is not legislating – fundamental problems of interpretation in the legal field*, puts forward a hermeneutics of law through comparison with other texts. In the case of literary texts, Amselek points out that there is a fundamental difference between a language act which commands something and a narrative. Neither could one compare the interpretation of legal texts with that of a play of the theatre: 'This kind of comparison is too superficial and syncretic to be fruitful and to shed genuine light' (p. 470). Section III of the first chapter devotes itself to a very interesting comparison with sacred texts. Three differences, however, contrast the interpretation of legal texts with those of sacred texts: 'The closed nature of the sacred texts to be interpreted; the radical distancing of the interpreters with respect to these texts; the specific attributes that its sacred nature attaches to the word to be interpreted' (p. 476). Relating to the closed nature of the meaning, Amselek notes however that constitutional texts are those which most closely resemble sacred texts. But no legal text is untouchable by a constituent authority, not even those which proclaim their untouchability (p. 483). As for distancing, legal texts belong to the same world as the interpreter; the constituent authority and the judge operate 'in proximity', whereas the interpreter of the sacred text is 'in complete solitude' with respect to the text (p. 485). Finally, concerning the 'specific attributes that the sacred nature' of the text attaches to the word to be interpreted, one could be tempted to compare the infallibility of the divine with that rationality that the interpreter must suppose in the legislator; but the doctrine does not hesitate to formulate some 'negative appreciative comments' with respect to this (p. 490).

Relating to the freedom of the interpreter, two major viewpoints stand in opposition to one another: one which claims that 'the interpreter is in no way free' (p. 507) and another which asserts that it is the interpreter who creates law. The first draws from Montesquieu and his conception of the judge as 'mouthpiece of the law'; Robespierre said in the same vein that 'the word jurisprudence should be removed from our language' (p. 512). The subjectivist viewpoint, for its part, is inspired by Derridian deconstruction: 'The written text appears to reduce to free-floating signifiers ('graphemes'), without any attachment to a meaning'. Quoting this affirmation of Derrida, which became 'the slogan of deconstruction', Amselek cheerfully points up the contradiction of Derrida who 'in no way envisages that what he says should be variable in form at the whim of the interpreting reader' (p. 534). Among the combined viewpoints, according to which the interpreter is sometimes free and sometimes not free, he cites Hart and his theory of the 'open tex-

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ture' of law. For Amselek, clarity or obscurity are not 'objective properties inherent in texts of law'; they are generated by the interpretation itself (p. 558). Proposing a third way leading off from the 'recentring' of the objectivist and subjectivist viewpoints, Amselek has recourse once again to the illocutory function of juridical texts: the meaning of the text depends upon the context of its enunciation (p. 583). As a consequence, 'the weakness of the objectivist viewpoint' consists in failing to recognize that the literal sense is only 'a basis for starting', (p. 585), whereas to the upholders of the view affirming the interpreter's freedom, Amselek retorts that the interpreter is subject to a certain number of constraints which limit his freedom of manoeuvre, such as those which legal texts themselves bring to bear, but also those, linguistic and social, imposed by the communicating community: 'Legal texts encompass a play of communicational usages inherited from tradition as much by the legislator as by the interpreters of these texts' (p. 603).

As will have been understood by now, any attempt to summarize a book such as this is a daunting challenge. Suffice it to hope that we have given some small idea of the wealth of its contents, and in particular to have imparted a conviction of the importance of the philosophical approach to law. For, as the 'macrocosm of the ethical experience' (p. 48), law is at heart that which reveals the antinomy of the social condition of man, that of the government of oneself and of life in one's society: 'It is because man is thus a creature who governs himself by himself that he is at the same time a creature susceptible of being directed or shaped in his conduct by the other external to him, and that ethical experience on the grand scale of which the juridical experience consists is possible' (p. 618).

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