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Philosophy and the lawyer's profession

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Abstract:

Philosophy of law has an impact on the lawyer's profession. Two different ideas of what the law is can lead to two different kind of activity for the lawyer.

The first philosophy of law is inspired by rationalism. It considers law as the set of legislation passed by the legislator, whose goal is to best organize society. The lawyer and the judge are merely seen as technicians. They determine which piece of legislation fits the best to a practical case and establish the settlement of the dispute accordingly. The legislator, on the other hand, is the engineer who constructs and shapes society.

The second philosophy of law is evolutionist. It makes a distinction between law and legislation. The law is defined as the set of rules observed by a community, whether those rules are included in legislation or not. Those rules of conduct are slowly selected by experience according to their efficiency, without men being necessarily aware of the process. Inefficient rules are slowly eliminated because communities who follow them either disappear or adopt better ones. Lawyers and judges are more important in this conception of law. They have to discover which rules are truly followed, and, if necessary, they can suggest new ones more efficient than the older.

In a mixt context, some areas are strictly governed by legislation. In these areas, relationships between individuals are determined in advance and contracts are heavily regulated. In other areas, an evolutionist conception of the law applies. Lawyers look at the adopted practices and at the followed rules, and they can suggest new ones through the creation of new contacts. Through case law and precedent, judges then gradually choose the best rules.

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Two philosophies of law

Plato thought that the ideal legislator would be a philosopher king. In his conception of the world, the philosopher is the one who looks for and holds the truth. He then uses legislation to make the Good happen in human societies. Given Plato's influence on occidental philosophy, it is not surprising that idea that the legislator should organize society is so widespread. In this view, the legislator uses the law as a tool to carefully construct the ideal society. A rationally constructed society is, according to this view, more efficient than a spontaneous, unorganized, society.

> "There is seldom so much perfection in works composed of many separate parts, upon which different hands had been employed, as in those completed by a single master. […] In the same way I fancied that those nations which, starting from a semi-barbarous state and advancing to civilization by slow degrees, have had their laws successively determined, and, as it were, forced upon them simply by experience of the hurtfulness of particular crimes and disputes, would by this process come to be possessed of less perfect institutions than those which, from the commencement of their association as communities, have followed the appointments of some wise legislator"

René Descartes, *A Discourse on Method*

A different philosophy of law stands in contrast to the idea that a single legislator may be able to conduct society. Human reason, according to this school of thought, is not capable of building a stable and efficient social order. Legislation, which is the production of the legislator, is thus separated from the law, which is the set of rules effectively followed by a community.

> "The cultural heritage into which man is born consists of a complex of practices or rules of conduct which have prevailed because they made a group of men successful but which were not adopted because it was known that they would bring about desired effects. […] The mind does not so much make rules as consist of rules of action, a complex of rules that is, which it has not made, but which have come to govern the actions of the individuals because actions in accordance with them have proved more successful than those of competing individuals or groups."

Friedrich A. von Hayek, *Law, Legislation and Liberty*

Law is seen as the set of rules followed by the community, whether they are included in the legislation or not. Efficient rules continue to exist because they spread to the whole community and because those who don't respect them slowly extinguish. Those rules guarantee some stability, since they have been selected through time. In this view, the judge and the legislator should try to understand and codify these rules, which preexist to legislation.

Two missions for the jurist

In a situation where the law is perceived as the will of a legislator who regulates each case, the judge's mission is merely technical. He determines which statute applies to the case he is studying and which procedure the law requires he follows. The lawyer is a kind of auxiliary to the judge. He selects facts and legislation he deems relevant to the case and present them to the judge. He can even content himself with presenting the facts, if one considers that the judge knows the law. Every relationship between individuals being regulated by the legislation, contracts diversity is limited. Only voids in legislation can give birth to some innovations by the judge. The legislator can then incorporate these innovations into legislation or not, since he keeps the priority.

In the evolutionist conception of law, the judge's and the lawyer's mission are more important. The judge, before he applies legislation methodically, has to check its agreement with the law. By doing so, he actually has to discover what the law is. The lawyer also has to know the law as well as the legislation. He can also try to improve the law by suggesting new rules. Judges decisions slowly incorporate the attorney's insights and their own propositions. Innovations stay nonetheless guided by the general principles guiding the ancient rules, since these have been selected because they are efficient.

The current, mixed, legislation context requires the lawyer to be polyvalent. In areas strictly regulated by legislation, he can only help his client by optimizing his situation under the legislation's constraints. Renting and fiscal law, for example, are strongly regulated by the legislator, which prevent legal innovations. Conflicts are mostly resolved a priori by legislation, thus making it impossible for the judge or the lawyer to offer an alternative solution. International private law, on the other hand, is more consistent with the evolutionist view. Clients, helped by their counselors, can choose the jurisdiction whose rules seem the most efficient. These rules gradually become the norm as more and more people obey them. Default rules are an illustration of the tension between the two ideas of law. Those rules are applied by default but can be overridden by a contract. Lawyers writing contracts can therefore eliminated them if they do not think they are efficient, and replace them with improved ones. However, these innovations do not spread to other cases through precedent, because the old rule still applies by default, unless the legislator intervenes.