PHILOSOPHY IN LAW? A LEGAL PHILOSOPHICAL INQUIRY

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By

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Introduction

The question of whether there is philosophy in law—whether any part of what we take as being within the subject matter of philosophy can also form part of the subject matter of law—is a difficult and contentious one. First of all, it is not obvious what the question itself means. One may think that the question is the one that figures at the base of the traditional debate between positivists and natural law proponents. Or, one may think that the question is whether certain legal issues are indistinguishable from certain corresponding philosophical ones, such that there is an overlap between law and philosophy. For example, what constitutes justice, equality and proportionality is a traditional philosophical question going at least as far back as Aristotle, but it is also a legal question in at least certain contexts, such as the adjudication of constitutional equality claims. Or else, one may think that the question is whether law must necessarily derive from philosophy as Dworkin has asserted, arguing that constitutional law cannot make sense unless it is understood in terms of a particular political philosophy. Finally, the question may also be whether law is ultimately a branch of practical or applied philosophy. Does, for instance, legal pragmatism boil down to a practical application of philosophical pragmatism in the context of legal relationships?

The question that this essay sets out to explore is, however, a somewhat different one: does or can philosophy inhere in law? Or, in other words, could or should philosophy, in at least certain cases, figure in the very mechanics, structuring or functioning of law? For example, do legal determinations

1 Justice Sydney L. Robins Professor of Human Rights, Benjamin N. Cardozo School of Law, New York City, USA.
2 Compare, H.L.A. Hart, The Concept of Law (1961) (law, as such, is independent from morality) to Ronald Dworkin, Taking Rights Seriously (1978) (law is inextricably linked to morality).
3 See Aristotle, The Nichomachean Ethics, Bk V.
4 To cite but one case, whether affirmative action based on gender or minority status is consistent with constitutional equality depends to a large extent on whether it can be defended as being in conformity with the dictates of justice, equality and proportionality. See generally, Michel Rosenfeld, Affirmative Action and Justice: A Philosophical and Constitutional Inquiry (1991).
5 See, Dworkin, note 2, supra.
6 See Richard Posner’s elaboration of a pragmatic jurisprudence in his The Problems of Jurisprudence (1990) and Richard Rorty, “The Banality of Pragmatism and the Poetry of Justice” in Michael Brint and William Weaver, eds., Pragmatism in Law and Society 89, 92 (1991) (asserting that “judges will... not find pragmatist philosophers...useful”). See also, Michel Rosenfeld, Just Interpretations: Law Between Ethics and Politics, Ch.6 (1998) (providing a critical assessment of the relationship between pragmatism in philosophy and pragmatism in law).
concerning equality or proportionality depend for their legal validity on the performance of some operation that fits squarely within the domain of philosophy, or that qualifies as “doing” philosophy? In this context, the focus is not on overlap, but rather on incorporation of a philosophical task within the carrying out of a legal operation. If indeed such incorporation were possible and appropriate, then it would be analogous to the need to have recourse to the laws of physics in the course of carrying out an engineering project. Moreover, if the question regarding philosophy in law can be answered in the affirmative—and I will argue below that it can—then the next key question, which will also be addressed in what follows, concerns the implications of the answer to the first question for law and for legal validity.

In order to address these two questions systematically, this essay will proceed as follows: Part I will attempt in very broad terms to put the question of philosophy in law in proper context in relation to certain familiar debates in legal philosophy; Part II will make the case for philosophy in law; and, Part III will lay out some of the principal implications of philosophy in law from the standpoint of legal validity.

I. Placing Philosophy in Law in the Context of Legal Philosophy

Legal philosophical inquiry ultimately boils down to two questions: What is law? And, what are the proper criteria of legal validity?

Law carves out a normative order that is coercive in nature. Law, in Dworkin’s words, is a social practice providing for justified uses of “collective power against individual citizens or groups”.7 Moreover, what makes coercion through law “justified” depends on one’s legal philosophy. In the broadest terms, legal philosophers who address this question can be divided into two principal schools: positivists who rely ultimately on “justice according to law”; and natural law proponents who appeal to “justice beyond law”.8

For positivists, what counts as “law” boils down to a matter of pedigree. Thus, if in a democracy the constitution empowers the national parliament to enact laws by a simple majority vote of its duly elected members, then any norm enacted accordingly is both “law” and “legally valid”. And this is the case regardless of whether the legal norm in question is moral or immoral or just or unjust according to the political philosophy of John Rawls or of any other respectable political philosopher. Hence, positivists subscribe to “justice according to law” and sever legal validity from moral validity or validity in the realm of political philosophy.9

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8 For an elaboration of this distinction, see Michel Rosenfeld, Just Interpretations: Law between Ethics and Politics 89-90, 95-100 (1998).
9 This is but a crude characterization as positivism certainly does not exclude incorporation of moral precepts such as “thou shall not kill” into law. For a nuanced positivist account that indicates how moral precepts may be made part of the content of law from a positivist standpoint, see Joseph Raz, Legal Principles and the Limits of Law , 81
For natural law proponents, on the other hand, law and morals are inextricably bound together such that immoral “laws” (in the positivist sense of the term)—or at least laws that do not have a certain minimum of moral content\(^\text{10}\)—are not “law” and \textit{a fortiori} have no “legal validity”. Consistent with this, for natural law proponents, law and legal validity depend ultimately on morals or criteria of justice pursuant to political philosophy, or, in other words, on “justice beyond law”.

In the end, the debate between positivists and natural law proponents looms above all as a metaphysical one that is of limited use. This seems particularly true in the current era of legal pluralism yielding a diverse array of distinct legal norms that hardly fit within the paradigm circumscribed by pedigree and coercive enforcement or within that based on grounding in a commonly shared conception of morals or criterion of justice.\(^\text{11}\) It matters little, for example, whether a properly pedigreed law imposing racial “apartheid” is deemed a law in form but not in substance or a genuine law that is unjust and immoral. Indeed, this latter distinction pales from the standpoint of one’s responsibility as a decent citizen, legal practitioner or judge who cannot avoid confronting the “apartheid” prescription in question. On the one hand, given the relevant plural sources of law, including international covenants, \textit{jus cogens},\(^\text{12}\) and constitutional principles that may be plausibly incorporated through interpretation in the relevant domestic constitution, arguably the “apartheid” prescription may end up lacking legal validity. On the other hand, whether or not the state’s coercive “apartheid” prescription is deemed to have the “force of law” or lawless tyrannical force, it must be equally fought and deemed an illegitimate use of state coercive power whatever its ontological status.

Leaving aside metaphysics, in certain instances there appears to be an overlap between the treatment of legal and philosophical issues. As already mentioned, this comes up in the handling of claims arising in the context of constitutional equality.\(^\text{13}\) The Equal Protection Clause of the United States Constitution\(^\text{14}\) furnishes a good example of this as it constitutionalizes the concept of equality\(^\text{15}\).

\(^{10}\) See Lon Fuller, \textit{The Morality of Law} 33-41 (1964).

\(^{11}\) If one adds “soft law” to “hard law”, judicial made law and administrative made law to private arbitrator made law; national law to transnational one based on treaty, customary norms, and non-governmental based law such as that emanating from \textit{lex mercatoria}; and if one accounts for the fact that even norms accepted as universal in scope such as international human rights have led to conflicts of interpretation emanating from clashing conceptions of the good as evinced by the controversy over “Asian values”; then it becomes apparent that accounts of law assuming a single unified set of sources or a commonly shared vision of morals or justice are insufficient if not downright misleading. For a discussion of the changes produced by the interplay between the proliferation of legal pluralism and increases in ideological diversity, see Michel Rosenfeld, \textit{Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism}, 6 International Journal of Constitutional Law (I. CON) 415 (2008).

\(^{12}\) “\textit{jus cogens}” comprises a set of preemptory norms that have a character of supreme law in international law regardless of treaties, ordinary customary law or state consent. See Louis Henkin, et al., \textit{Human Rights} 355 (1999).

\(^{13}\) See note 4, supra.

\(^{14}\) U.S. Const., Amend. XIV (1868).

and often requires courts to determine whether equal treatment or equality of result is mandated in a particular case. This determination is moreover crucial and frequently determinative in affirmative action cases. Is preferential treatment in university admissions or public employment sometimes justified in spite of general adherence to the principle of equality of opportunity? Do considerations of corrective or distributive justice legitimate certain departures from equality of opportunity in pursuit of equality of result?

In searching for answers to these questions, judges operating under as broad and open-ended a constitutional provision as the American Equal Protection Clause—“No state shall deny... any person within its jurisdiction the equal protection of the laws”—must in substance engage, at least in part, in the same kind of reasoning as would philosophers considering the same questions. Although the vocabularies used by judges and philosophers may differ to a certain extent, they would both have to explore the arguments for and against overriding or limiting equality of opportunity to compensate for past wrongs or to mitigate disadvantages traceable to past unjust deprivations in the competition for scarce goods, in the context of adherence to the postulate that all persons within the polity must be deemed to be inherently equal. How much of an overlap may be possible in any given set of circumstances would differ and would be contingent on the particular legal norms in play. Thus, for example, if the relevant constitution were to explicitly prohibit all affirmative action or affirmative action on a particular well settled ground, then judges operating thereunder would be barred from relying on sound philosophical arguments to the contrary.

Whatever the overlap may happen to be, law and philosophy constitute different practices or, to use Wittgenstein’s concept, different “language games”. Even if the same argument is made in a philosophy class and in oral argument in a courtroom, the context and consequences of the argument in question vary greatly depending on whether it is made in the former venue or the latter. For example, a judge’s conclusions may be proven to be philosophically unwarranted and yet they would be legally binding and they would provide a legitimate legal basis for apportioning rights and duties. Or a judge may have to disregard a sound and prima facie pertinent philosophical argument, because in the “language game” of law, precedents and acceptable interpretations of statutes or constitutional provisions would trump all inconsistent philosophical arguments. In short, the uses and connotations of the same argument are bound to vary depending on the particular “language game” into which the said argument is introduced. Much like the two different games of chess and checkers can be played on the same board, notwithstanding that each makes different uses of that board consistent with its own distinct game rules, so too the same argument may be used in diverse language games such as law and

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16 See, Michel Rosenfeld, Affirmative Action and Justice, supra note 4, at Ch. 7.
17 In the landmark US Supreme Court decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) the justices on the Court articulated two positions that have framed the closely divided decisions that would span the next several decades. The first of these announced by Justice Powell stipulates that the Equal Protection Clause requires equal treatment regardless of race, thus rejecting the legitimacy of most corrective justice based arguments for preferential treatment to redress past racial injustices. In contrast, the second position is perhaps best captured in Justice Blackmun’s statement that “in order to treat some persons equally, we must treat them differently”. Bakke, at 407. Contrary to Powell’s position, Blackmun stresses the appropriateness of equality of result to correct for the injustices caused by past state sanctioned racial discrimination.
18 See, e.g., State of Uttar Pradesh v. Pradip Tandon, (1975) 1S.C.C. 267 (Supreme Court of India) (affirmative action on the basis of caste prohibited under that country’s constitution).
19 See Ludwig Wittgenstein, Philosophical Investigations Paras. 7 & 23 (1953).
philosophy, but its place, import and scope is bound to differ in proportion to the discontinuities that set apart each language game involved from the others.

The conception of law as a distinct language game meshes well with Luhmann’s autopoeitic theory of law. For Luhmann, law is a self-referential systematic process that sets up a network of communications, and that interacts as one subsystem among many—including the economic and the political—within the realm of social relations. Each of these subsystems, including law, is, according to Luhmann normatively closed while remaining cognitively open. In other words, the economic and political subsystems cannot partake or influence the production and application of legal norms, but they do relate to the legal subsystem by constituting its environment. Accordingly, the legal subsystem, which is cognitively open, can process material coming from its economic or political environment, but can only do so by incorporating it within its own normative system. Moreover, as morals and at least certain philosophical concerns, such as the questions surrounding equality and proportionality, also form part of the social environment of the legal subsystem, they too are susceptible of being processed within the unique normative ambit circumscribed by autopoeitic law.

Luhmann’s account of law’s autopoeitic self-enclosed normative system is very elusive and highly abstract. In the broadest terms, the core function of legal communications, under Luhmann’s theory, is to provide information concerning the meaning of events and, in particular, actions in relation to the binary code legal/illegal. What is crucial in terms of the current inquiry, however, is to get a sense of the systematic process whereby a self-enclosed normative system can appropriate and redefine that which comes from its environment into its own language according to the rules of its own language-game. In this respect, Luhmann’s autopoeitic account of the economic subsystem, which he characterizes as operating analogously to its legal counterpart, seems quite illuminating.

In essence, according to Luhmann, self-regulation of the economic system is based on the connection between needs (which fluctuate depending on factors located in the economic system’s environment) and a closed monetarized exchange process that systematically mediates the complex interrelationship between the totality of existing needs and the network of products and services susceptible of contribution to satisfying those needs. Thus, in the context of a free market economy under conditions of moderate scarcity, the monetarization of all exchange relationships provides a self-regulating system that structures an operating order best suited to meet existing needs.

Assuming the analogy between economics and law holds (whatever the actual configuration of the legal normative self-referential system may turn out to be), then the system whereby needs, desires, projects and aspirations are translated into exchange values that cohere into a single integrated communicative code delimited by the process of monetarization does suggest a potentially productive conception of the place of philosophy in law. Philosophy would thus emerge as a relevant part of the

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21 Id., at 176-178.
22 Id., at 229.
23 Id., at 176-178.
24 See, Michel Rosenfeld, Just Interpretations, supra, at 93.
25 See Niklas Luhmann, Essays on Self-Reference, supra, at 229-232. Luhmann’s reliance on the binary code legal/illegal has been widely criticized as inadequate and overly reductionist. See, e.g., Hubert Rottleutner, A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System, 23 Law and Society Review 779, 792 (1989). For present purposes, however, it is unnecessary to address this issue further.
26 See Niklas Luhmann, Essays on Self-Reference, supra, at 230-231.
environment of law, and philosophic concerns, such as those typically associated with the concepts of justice, equality and proportionality, would translate into vehicles incorporated into the language of law through systematic processing in terms of the latter’s closed self-referential normative apparatus. I now turn to examining whether the analogy holds, and how it might be conceived in terms that are less abstract and less artificial than those advanced by Luhmann.

II. Philosophy in Law: Transformation or Incorporation?

Before tackling the above mentioned analogy, two brief clarifications are in order. The first concerns philosophy; the second, law as a language game.

It is important not to conflate morals or politics with philosophy. Whereas moral and political philosophy deal respectively with morals and politics (in the broad sense of the pursuit of what is good for the polity), moral and political norms do not necessarily derive from philosophy. “Thou shalt not kill” is a moral precept that may derive from religion or the established mores of a community and, as such, it may be defended or promoted without reference or recourse to the language game of philosophy. In this context, the precept in question comes within the purview of moral discourse and philosophical analysis of such precept or of its place within morals figures as a distinct metadiscourse on morals. Consistent with this, integration of the prohibition against killing within the realm of law (either through a positive act of lawmaking or through extrapolation from a list of precepts and prohibitions believed to be inextricably embedded in what is constitutive of law’s very normativity)27) does not involve any incorporation or application of philosophy within the realm of law. In short moral and political theory come within the purview of philosophical metadiscourse, but morals or politics as such do not.

There can be cases, however, where a moral or political precept can only be derived from moral or political theory respectively. For example, to borrow Dworkin’s terminology, does treatment as an equal entail equal treatment?28 Suppose there is a consensus that all persons should be treated as equals, but a dispute as to whether that automatically entails equal treatment or whether it is sometimes morally necessary or desirable to depart from equal treatment to better vindicate treatment as an equal. In such a case, it seems that recourse to moral theory, and hence to philosophy, would be necessary in order to sort out plausible answers from inconsistent ones, if not to find the right answer.29

In light of the preceding discussion, what I understand by “philosophy in law” is those instances, if any, in which recourse to philosophical discourse, either within the ambit of moral or political philosophy is either necessary or desirable to settle or advance an issue that has a bearing on law as a normative practice. It is clear that pursuant to Luhmann’s conception of law as a self-referential normatively closed system, there is no room for philosophy in law. But is contemporary law in all its

27 Whereas the theoretical debate pitting positivism against natural law is a philosophical one, the embrace of either of these two positions within the practice of law does not necessarily entail reference to philosophical metadiscourse. Thus, for example, a judge may interpret the law in a narrow positivistic fashion or a more expansive natural law inspired way because she feels to do so is “right” or consistent with her polity’s judicial traditions. In such case, the judge is not “philosophizing”, but rather engaging in the language game of law and perhaps also that of morals.
29 See id., at 228ff. Dworkin does believe that philosophy can lead to the right answer, and thus concludes, for instance, that affirmative action is justified in certain sets of circumstances.
manifold diversity best characterized as normatively closed? To be in a better position to shed some light on this question, it is first necessary to take a closer look at law as a distinct language game.

In Luhmann’s autopoeitic vision, law’s function is to simplify and rationalize the extremely complex universe of social relations characteristic of the contemporary polity. Law’s function as a normatively closed subsystem is to provide order and insurance through the stabilization of the expectation of expectations. Thus, for instance, if I enter into a contract that requires some future performance with a stranger at market, I risk non-performance and face uncertain expectations. By making contracts binding, law provides me with a certain kind of insurance and justifies my expectation that either I will obtain the future performance that I have bargained for or a legal remedy of comparable value to me in the event of failure of performance. Accordingly, whatever factual uncertainties may be genuinely at play, my normative expectations would be stabilized. Moreover, if contractual relations are set as a paradigm, the actual content of law looms much less important than legal predictability. Thus, if the law provides that the seller bears the responsibility to insure sold goods in transit against damage or loss unless specifically provided otherwise in the relevant contract of sale, then that law is bound to reduce unpredictability and allows for contractors to face fewer complexities when setting out to arrange for a future exchange.

Luhmann’s focus on insurance and stabilization of expectations leaves out much that occupies a prominent place in the complex contemporary setting carved out by the interplay between national, transnational, and international legal regimes. Thus, the processes of juridification of human rights and of proliferation of broadly conceived constitutional rights, such as liberty, equality, privacy or due process of law, and of constitutional values or principles such as those centering on human dignity, clearly seem to exceed the bounds set by Luhmann’s conception of law. On the one hand, legal implementation of human rights and constitutional norms often require subordinating predictability to equity or fairness. For example, should traditional understanding of marriage as being exclusively between a man and a woman factor decisively in adjudication of claims for recognition of same sex marriage on constitutional liberty, equality, and privacy and dignity grounds? Or should long entrenched precedents declaring constitutional equality and racial “apartheid” to be mutually compatible stand in the way of changing course in the wake of a major moral outcry more than a half century later?

On the other hand, beyond juridification of moral precepts such as respect for the inherent dignity of every human being, the proliferation of human and constitutional rights often calls for reference to contested conceptions of justice in the course of adjudicating legal claims. Thus, in handling claims to constitutional equality, courts may well have to choose among contrasting views arising respectively under a libertarian conception of justice and under an egalitarian one. Assuming a relevant constitution

30 See Niklas Luhmann, A Sociological Theory of Law 31-40 (1985). The brief discussion and critique of Luhmann’s theory provided here is based on the more extensive one found in Michel Rosenfeld, Just Interpretations, supra, at 104-113.
31 See, e.g., Minister of Home Affairs v. Fourie, 2006 (1) SA 524 (CC) (Constitutional Court, South Africa) (considerations of dignity, equality and moral citizenship lead Court to recognize constitutional right to same-sex marriage and to instruct Parliament to enact legislation that would place same sex marriage on same footing as heterosexual marriage).
is not explicit on the issue, should it be understood as merely requiring formal equality or as also demanding some measure of material equality?

As this last question can only be answered properly through recourse to philosophical reasoning or through engaging in applied philosophy, it strongly suggests that contemporary law cannot be completely normatively closed to philosophy. In other words, philosophy cannot in all cases where relevant merely figure as part of the environment of law as does occur in some cases. For example, it may well be that notions of fairness would lack cogent meaning absent recourse to the language game of philosophy and that yet at the same time law could appropriate the concept of fairness developed in its philosophical environment and subsume it exhaustively within its own normative language game. Legal fairness would thus be distinguishable from its philosophical counterpart. There are bound to be other cases in any complex, multilayered, contemporary legal setting, however, where such exhaustive wholesale transposition into the normative language game of law would not be workable, and where any attempt to exhaustively confine all normativity to the realm of law would be both impractical and undesirable. Thus, if dignity were enshrined as an essential constitutional value, then openness to philosophical clarification and elaboration of the concept would be bound to enrich law in at least certain settings and in certain circumstances. To be sure, “legal” dignity could be exhaustively circumscribed within the language game of law as fairness was assumed to be in the preceding example. Nevertheless, in as much as law would be impoverished by doing so, it would be better for law to become open to incorporating some norms as processed through the language game of philosophy.

There are many concepts that lend themselves to the same positioning involving a normative opening of law towards philosophy as does dignity in the preceding example. Actually, for those concepts that are thus amenable whether or not recourse should be had to normative openness would ultimately be a complex contextual matter involving the nature of the legal system and of the philosophical discourse at stake. Accordingly, in the abstract, the concept of fairness is not inherently different from that of dignity in the context of the present discussion. Indeed, one could even imagine confining fairness exclusively to the language game of law in one legal context, such as corporate law, while at the same time keeping it open to the language of philosophy, in another context, such as constitutional law.

Given that in some cases law must remain normatively open to philosophy at least to a certain extent, how does that impact on the appropriateness of any analogy between law and Luhmann’s autopoetic conception of the economy as driven by monetarization? There is no simple answer to this question as in one important sense the analogy holds, and in another it does not. Moreover, to further complicate matters, appearances seem bound to shift depending on whether one places oneself within the perspective of law or within that of the web of socio-political intersubjective relationships taken as a whole.

The analogy holds in so far as the ultimate determination as to whether, and to what extent, a particular philosophical handling of an issue may be legally relevant depends on law as a normative system taken as a whole. Luhmann’s overly simplistic binary code legal/illegal can be replaced by the

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33 See, e.g., Michel Rosenfeld, *Affirmative Action and Justice*, supra, for a discussion of the contrasts between libertarian, contractarian, utilitarian and egalitarian justifications for and against affirmative action and their respective constitutional implications in the context of the U.S. Equal Protection Clause.

34 For example, in the context of corporate transactions, “fairness” could be confined to full disclosure of relevant information and non-coercion whereas in the constitutional context, “fairness” would be left open ended to be determined so as to preserve and promote the equal dignity of all individuals within the polity.
code legally relevant/legally irrelevant, and, consistent with this, philosophy can be incorporated within law if proven to be legally relevant. For example, if as determined within the language game of philosophy corrective justice calls for affirmative action under a particular set of circumstances, then that may be determinative under a constitution that leaves the matter open, but irrelevant under another that explicitly forbids affirmative action under all circumstances.

On the other hand, the analogy does not hold to the extent that the code legally relevant/legally irrelevant lacks the systematically transformative capacity inherent to monetarization. Monetarization systematically quantifies everything that comes within the purview of the economy as a language game by ascribing to it an exchange value in a monetary amount. Thus, even my “priceless” (to me) family heirloom has a price within the economy, and if I were forced to sell it to feed my children, presumably I would not be able to do so above its established market price regardless of my special attachment to it. In contrast, in cases in which determination within the language game of philosophy is deemed legally relevant, inclusion within the language game of law would involve incorporation rather than transformation. If a constitution enshrines the principle of equal dignity and leaves open the question of affirmative action, then the philosophical reasoning that would lead from the premise of equal dignity to the conclusion that corrective justice warrants the use of affirmative action could be incorporated without transformation into legal discourse. There may be differences of vocabulary coupled with need to address the issue of legal relevance, but in substance there would be no difference between the philosophical and the legal argument. In short, in the last example there would be nothing akin to the transformation necessarily triggered by the process of monetarization in the context of economic relationships.

Within the strict confines of the inner perspective within the realm of law, arguably the decisive normative step is the determination of legal relevance. From this perspective, what is decisive is not any philosophical conclusion as such, but assessment of the latter in terms of the code legally relevant/legally irrelevant. Within the broader perspective carved out by reference to the entire web of socio-political intersubjective relationships, however, from a functional or an operative standpoint, there do not appear to be any firm impermeable boundaries between law, morals and politics. In a world in which a domestic legal system, even if confined to the scale of the traditional nation-state, is obligated to incorporate what is prescribed by jus cogens, and to align the interpretation of its constitution and of its laws with the dictates of universal human rights, what is deemed morally imperative to prevent crimes against humanity or to sustain an acceptable minimum of human dignity must be factored in the determination of domestic legal relevance. In other words, from this broader perspective, determinations pursuant to the code legally relevant/legally irrelevant are neither purely internal to the traditional nation-state nor entirely severable from morals or politics. Unlike in Luhmann’s conception confining the role of law to insurance and the stabilization of expectations, under any plausible contemporary conception, the determination of legal relevance cannot stand alone, severed from all other normative specifications. Instead, as captured within the broader perspective within which it is embedded, contemporary determination of legal relevance must derive from a dynamic confrontation between internal and external sources of legal legitimation that are, at least in part, inextricably linked to other sources of normative validation, such as morals and politics.

Consistent with the preceding analysis, leaving aside questions of metaphysics, philosophy can, and does in any viable contemporary setting to some degree, inhere in law. Philosophy and law are thus at
least partially normatively open to one another, and therefore some of what originates in the language
game of philosophy can be incorporated in substance without transformation into the language game of
law. This leads to the following question: what relevant consequences for law and legal validity are likely
to emerge based on the above conclusion?

III. Philosophy in Law and Legal Legitimacy

The place of philosophy in law as understood here is likely to be interstitial in the case of most
existing complex legal systems. Indeed, a particular legal system could constitutionally enshrine the
principle of equal dignity, which would profit from philosophical elucidation in the course of its
implementation, and at the same time contain certain specific constitutional prohibitions, such as one
against affirmative action, with the consequence that the latter prohibition would trump any support
based on a philosophical elaboration of equal dignity —no matter how strong—for affirmative action. In
other words, incorporation of philosophy in law is likely to be rather narrow in scope, and because of
that the impact of such incorporation on the legitimacy of law is likely to be relatively limited. It is
important to distinguish in this connection between a philosophical legitimation of a legal system as a
whole or in part (e.g., contract law or constitutional law) and the legal legitimacy of the incorporation of
any particular fragment of philosophical discourse within the normative discourse of law.

Dworkin, who, as already mentioned, argues that constitutional law cannot make sense unless
understood in terms of a particular political philosophy, does not appear to address this latter
distinction. As I understand him, Dworkin makes two key assertions that seem relevant in connection
with the distinction I am drawing: First, Dworkin claims that constitutional law makes no sense unless it
can be interpreted as deriving from a particular political philosophy; and, second, based on this latter
claim, he asserts that there is one right answer to every hard case. Whatever may be the merit of the
first of these two assertions, it ultimately only makes sense as a counterfactual. As a matter of historical
fact, it would be a hard to fathom coincidence if an actual constitution were to be subsumed in toto
under a particular political philosophy. One can imagine as a purely theoretical matter that a constituent
assembly would put forth a constitutional scheme meant to conform to John Rawls’s A Theory of Justice,
and then draw on that work to draft actual constitutional provisions and to anchor constitutional
interpretation. As no actual constitution comes close to this, however, reference to Rawls would best be
understood as having counterfactual import, in the sense of suggesting how an existing constitution may
be perfected or on what basis it ought to be viewed critically as falling far short of the desired Rawlsian
ideal. Furthermore, Dworkin’s second assertion is even more implausible as it could only be vindicated,
if at all, by taking sides within philosophical discourse regarding particular highly contested concrete

35 It may be objected that proper use of the language game of philosophy should be limited to analytic discourse,
and that, accordingly, recourse to philosophy for normative purposes would be unwarranted. Without entering
into debates relating to differing conceptions of philosophy, suffice it for now to point out that at least under some
plausible conceptions, philosophical discourse may be legitimately regarded as encompassing normative as well as
analytic determinations. Thus, for example, philosophical derivation of the categorical imperative and examination
of its moral implications naturally leads to the philosophical grounding of certain moral precepts, such as the
absolute prohibition against lying.
36 See note 5, supra.
37 For an extended critique of Dworkin’s interpretive theory and of his “one right answer thesis”, see Michel
Rosenfeld, Dworkin and the One Law Principle: A Pluralist Critique, 59 Revue Internationale de Philosophie 363
(2005). In what follows, I draw in part, on that earlier work.
issues that remain open to considerable philosophical disagreement. Thus, for example, if a constitution purports to seek conformity with liberalism, how can one reach the one correct answer in a hard case involving the constitutionality of affirmative action (where the constitution protects equality but is silent on affirmative action) if libertarian liberalism leads to a conclusion that is opposite to that reached in accordance with egalitarian liberalism? And, what if one subsumes the constitution under libertarian liberalism, and libertarian philosophers disagree among themselves concerning the normative acceptability of affirmative action?  

Keeping in mind the above distinction, it is important to elucidate the nature of the relationship, if any, between critical counterfactual philosophical assessment of law and the legal legitimacy of philosophy incorporated into law. As the above discussion indicates, the two are logically distinct, but there may nonetheless be factual or ideological affinities or even mutual dependence between them, contingent upon the particulars involved. This is perhaps most obvious in cases in which positions emerging within the language game of philosophy—or, which is for this purpose equivalent, within the language game of morals or politics—prompt calls for legal reform. For example, if liberal philosophers were to reach a broad based consensus that equal dignity requires legalization of same sex marriage and that were used to urge legalization in a polity where such marriages happened to be illegal, then a philosophical critique of the law could lead to a change within the latter. Moreover, such change would result in an alignment between the normative discourse of philosophy and that of law and it may, though it need not, result in one more discrete instance of philosophy in law.

The mutual dependence at stake above can also occur within the ongoing workings of an established legal system as exemplified by the need to implement the norms deriving from *jus cogens*, applicable human rights regimes, and broadly phrased constitutional rights. Thus, for instance, *jus cogens* imposes an absolute prohibition against torture and other cruel and inhuman treatment which binds under international law even a country that is not a signatory to the UN Convention Against Torture (CAT). Although CAT defines torture, that definition leaves much open in terms of the boundaries of cruel and inhuman treatment—a subject that could benefit from elucidation within the language game of philosophy. Under these circumstances, at least in the case of a country that is not a signatory to CAT, the critical philosophical assessment of practices that may be plausibly characterized as cruel and inhuman and yet legal within the relevant country’s domestic legal system would be relevant and should inform any appropriate philosophy in law upon which the country’s legal language game could or should count on to determine how to conform to the dictates of *jus cogens*.

There are also other cases, of course, in which no direct connection could be drawn between critical philosophy and philosophy in law. If one concludes, for example, as does Derrida that law and justice are ultimately mutually incompatible because all law generalizes whereas justice calls for simultaneous

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38 See Michel Rosenfeld, *Affirmative Action and Justice*, supra, at 52-60 (detailing the libertarian argument against affirmative action) and, at 63-64 (detailing the libertarian argument in favor of affirmative action).
39 If the philosophically prompted reform results in adoption of a new law legalizing same sex marriage by the legislature, then no philosophy in law would be in play. But if such reform were pursued through judicial reinterpretation of a constitutionally established equal dignity principle, then there would be an area carved out for philosophy in law.
41 See CAT, Article 1.
then that critical insight could not conceivably figure directly in any legitimate use of philosophy in law. Indeed, a judge who would have to decide whether affirmative action would be consistent with corrective justice in a particular set of circumstances would not have a legitimate choice, siding with Derrida, to refuse to decide the question based on her conviction that justice is impossible. Since that judge is compelled to decide the case, either she avoids philosophy in law and turns to other sources for support for her decision; or, she invokes elements of philosophy in law that are squarely inconsistent with the critical philosophy that she endorses within the confines of the language game of philosophy.

Given the complexities identified in the course of the preceding discussion, there can be no single answer to the question of the legal validity of any actual or contemplated use of philosophy in law. Some cases are easy either because there is no room for philosophy in law or because there clearly is, but recourse to it ought to be completely uncontroversial. Where the constitution forbids affirmative action and no supranational applicable norms require it, philosophical arguments in favor of it are not legally relevant and hence not legally valid. On the other hand, if a constitution extends freedom of religion to all religions and a court must decide whether such freedom already granted to Christians and Jews ought to be extended to Muslims, then, to the extent that philosophy in law may be appropriate under the circumstances, the only plausible answer that it could provide would be in the affirmative.

Leaving aside the threshold question concerning the appropriateness of turning to philosophy in a particular situation, this leaves basically three different categories of harder cases. These are in increasing order of difficulty from the standpoint of legal legitimacy: First, cases in which the conclusions within philosophical discourse to be incorporated into law happen to be unwarranted; second, cases involving essentially contested philosophical concepts over which there is widespread disagreement within the polity; and third, similar cases to those in the second category, with the difference that the disagreement extends beyond the polity as it concerns supranational or international norms applicable within the polity’s legal system. Moreover, as between these three categories, the difference between the first and the remaining two is one of kind whereas that between the second and the third is one of degree.

Cases falling in the first of these categories present more of a practical than a theoretical problem. They involve an error in philosophical reasoning or in the application of a philosophical proposition that becomes incorporated into law. Were the unwarranted step confined to the language game of philosophy, it could eventually be straightened out through further engagement in philosophical discourse. Once incorporated in law, however, it becomes legally binding and may be difficult to dislodge as when it becomes embedded in a judicial precedent within a common law jurisdiction.


43 This would depend, for instance, on whether or not there were legally binding precedents on the definition of a religion. In the absence of such precedents, it would seem entirely appropriate to inquire within the language game of philosophy concerning what ought to count as a religion.

44 The threshold question can certainly be hard as it may turn on contested views of whether there ought to be room for recourse to philosophy in law in a particular case. To the extent that the answer turns on whether the relevant factors within the language game of law preclude or not an opening to philosophy in law, the task is no different than that involved in any other interpretive controversy within the language game of law. On the other hand, if the answer depends on a choice among two or more contested propositions of philosophy in law, then the challenge is akin to those encountered in the hard cases posed by controversy over contested propositions of philosophy in law.
From a theoretical standpoint, the philosophical error that has now become incorporated in law can be easily dealt with through further argumentation within philosophical discourse coupled with a convincing argument as to why the correct philosophical conclusion should replace the erroneous one currently incorporated into the law. This can be illustrated through an analogy with economics in law. Suppose a country’s antitrust law is aimed at prohibiting all significant anti-competitive conduct, and that a judge accordingly decrees a particular business practice to be illegal upon concluding erroneously that it is anti-competitive. Suppose further, that a consensus among economists develops leading to the conclusion that the prohibition of the practice at stake will thwart competition rather than help it. It seems clear in that case both that economic analysis is relevant to law and that the law ought to be changed to conform to what economic analysis properly conducted actually prescribes.

From a practical standpoint, a philosophical error should not be much more difficult to correct than one involving legal doctrine or the application of legal standards. An erroneous judicial inference in the application of norms that are wholly encompassed in the language game of law, such as an applicable doctrine in contract or tort law, does lead to a binding legal result, which can be overturned on appeal or subsequently through repudiation of precedents based on the error at stake or through corrective legislation. Correction of a philosophical error would seem amenable to a similar process, with the one difference that it would require a dialogue between practitioners of the two different language games involved in contrast to cases entirely confined within the language game of law. To return to the analogy above, just as an economist’s analysis of anti-competitiveness may be readily “translated” for use in antitrust law, so too could a philosopher’s conclusion relevant in law.

The question of philosophical error is likely to be relatively minor and to pale in comparison with the problems raised by the incorporation within law of normative content originating in philosophical discourse regarding essentially contested concepts over which there is widespread disagreement within philosophy. Furthermore, the reason for dividing reliance on contested philosophical concepts into two separate categories is predicated on the intuition that, all else being equal, one would more strenuously object on legitimacy grounds to being subjected to a supranational norm with which one strongly disagrees than to a comparable norm originating within the confines of one’s own polity.

Vigorously contested norms are common both within the confines of law to the extent that it can be conceived as a separate self-enclosed normative system and within other relevant normative systems to which law is normatively open, such as morals, politics and philosophy. This leads to two key questions: To what extent do contested norms affect legal legitimacy? And, what difference does it make, if any, whether the contested norm is within the law as narrowly conceived as opposed to within an external normative order which is interstitially incorporated within law?

In a nutshell, reliance on contested norms does affect legal legitimacy and the challenge to the latter increases as one moves farther away from law as narrowly conceived and from the boundaries of one’s community and of one’s country. Before proceeding to detail this conclusion, one caveat is in order. For analytical purposes, each normative system involved and each source of law, national and supranational, will be taken separately. In reality, however, any complex contemporary legal regime depends on a cobbled together of elements from each of the normative systems discussed above (and undoubtedly others) and on integrating legal norms issuing from a plurality of sources. Consistent with this, to avoid distortion, the analytic conclusions drawn below will be supplemented by a brief synthetic account designed to suggest how the parts may fit within the whole.
Contested norms within law as narrowly conceived seem both inevitable and highly unlikely to have a significant impact on legal validity. For example, in a legal regime where it is clearly up to the legislator to determine whether to impose a minimum wage law, adoption of such a law by a very narrow parliamentary majority in the face of a vigorous debate among an evenly divided citizenry, might not lessen divisions over the fairness or usefulness of the new law. But that would not have any significant effect on the law’s legal legitimacy as a positivist pedigree theory of legal validity would appear to be largely sufficient. As we move away from the production of legal norms, and focus on their interpretation and application, greater challenges to legal validity could arise to the extent that pedigree issues may become open to greater challenges. Nevertheless, overall, short of attacking the legal regime as such, challenges to legal legitimacy in the context of regular production, interpretation and application of legal norms ought to remain minimal.

Contested norms in the other normative systems that have an impact on law, on the other hand, are likely to have an altogether different effect on legal validity. Take for example the moral debate over abortion in the context of a constitution that is silent on the subject but that enshrines individual liberty, equality and privacy rights. Assume further that the polity in question is fairly evenly divided among those who based on their most deeply held moral and religious convictions deem abortion to amount to infanticide and those who are morally persuaded that a woman’s moral worth as a free and equal person requires her to have full control over her own body and that prohibiting her from having an abortion would be an affront to her moral worth. If under such circumstances a constitutional court must adjudicate whether a law criminalizing abortion is constitutional, it cannot avoid the contested moral issue, and it will inevitably antagonize one camp or the other, if not both.45

Where, like in the above example concerning abortion, the relevant moral and legal norms are inextricably intertwined and the moral norms remain highly contested and deeply divisive, any legal determination would seem subject to serious challenges regarding legal validity. In this respect, it is not surprising that the US Supreme Court’s recognition of a constitutional right to abortion in Roe v. Wade46 has been one of its most contested decisions, prompting a massive assault on the legitimacy of its role as constitutional interpreter.47 Moreover, the same applies in cases where the divide is over politics—in the sense of what is good for the polity—or over philosophy. The only significant likely difference between philosophy, on the one hand, and morals and politics, on the other, in the present context, is that to the extent that the former is more abstract and more prone to being inaccessible to the citizenry at large, recourse to it may produce increases in alienation. And greater alienation may often translate into more extensive questioning of legal legitimacy.

45 The judges charged with deciding the constitutionality of the law banning abortion cannot avoid the contested moral issues by seeking refuge in the realm of law as narrowly defined, by invoking, for example, textualism as a their chosen criterion of constitutional interpretation. A narrow textualist approach based on the lack of explicit constitutional provision addressing abortion would not deprive the consequent decision of moral effect and would lead at least implicitly to a morally charged further specification of the meaning of constitutional liberty, equality, and privacy for women. The only way that the judge could completely avoid the moral issues would be if the constitution systematically dealt with them by treating abortion explicitly and by providing legal standards for resolving differences among the contending camps. This would set an extremely high threshold that would be nearly impossible to achieve for both internal and external reasons. Internally, constitutional norms are unlikely to ever become fully exhaustive and, externally, given the contentiousness of the issue, it would seem impossible to muster the requisite level of support for exhaustive ex-ante agreement on all facets of the issue.
46 413 U.S. 113 (1973).
The argument in support of the assertion that incorporation of philosophy in law originating at a supranational level is likely to lead to more legal legitimacy objections than a counterpart set in motion at the national level is analogous to that above comparing philosophy to morals and politics. The supranational is more distant and seems much less amenable to control or influence from the standpoint of an affected national citizenry. Because of that, all other things being equal, a contested norm imposed from outside one’s own polity would seem subject to greater objections on legal legitimacy grounds. Up to a point, legal legitimacy can be established based on an argument from democracy. As long as a polity as a whole has a solid basis for cohesion and lacks sources of profound existential cleavages, it stands to reason that some contested issues would be settled democratically and that those whose views had not prevailed would accept the legitimacy of the result on largely procedural grounds. Thus, the combination of lesser identification with supranational proponents of contested norms and less democratic input into supranational policy making and norm production appears to make all legal norms and, above all, philosophy in law norms coming from abroad more vulnerable to legal legitimacy attacks.

As indicated above, an analytic breakdown such as the one just sketched is likely to be misleading absent a corresponding synthetic account that factors in the dynamics of the complex pluralistic legal regime prevalent in the typical contemporary polity. Indeed, in the abstract a foreign norm looms as more contestable than a domestic one, but that need not be the case. In an ethnically or nationally divided polity, for example, transnational norms may well sometimes become less contested than national ones. It is not hard to imagine that a dispute relating to applicable legal norms between Cataluña and Spain or Scotland and the UK may benefit from recourse to the EU. Or, to refer to another example, in theory there would seem to be much greater opportunity for contested philosophy in law instances at the level of constitutional law than at that of ordinary parliamentary law. Increasingly, however, these two levels become more intertwined, and in some countries like Germany, constitutional norms and principles have been made applicable to purely private legal transactions.

As these two examples illustrate, the analytic categories detailed above provide useful guideposts, but the dynamics of legal relationships in the multi-ethnic, multi-national, multi-religious contemporary polity seem bound to belie neat separations. An important consequence of this for present purposes is that significant contestability of legal validity and legitimacy will often extend all the way down to the level of infra-constitutional majoritarian law making. Conversely, contestability need not automatically increase as one progresses from the local to the global, and on occasion consensus may project all the way up.

In the end, philosophy in law, though interstitial, is ubiquitous as it can become incorporated directly or indirectly at all levels of the complex pluralistic contemporary legal order. Moreover, at least in significant part, philosophy in law triggers or increases contestability regarding legal validity and legal legitimacy. In short, philosophy in law is inevitable and it makes all claims to legal validity and legal legitimacy non-trivially contestable. In some cases, particularly where there is great convergence within the relevant polity, contestations will be easily met, but, under conditions of great divergence, serious damage to the entire legal order’s claim to legitimacy may naturally ensue.

48 Consider in this connection the claim that the European Union suffers from a “democratic deficit”. See David Marquand, Parliament for Europe 64 (1979).
49 Pursuant to the German Basic’s law “third party effect” or “Drittwirkung” “fundamental rights protections extend to private party transactions. See Norman Dorsen et al., Comparative Constitutionalism: Cases and Materials 896 (2d. Ed., 2010).
Contestability associated with philosophy in law cannot be eliminated, but its scope and intensity may be markedly reduced through commitment to a particular philosophical perspective, namely that carved out by normative pluralism. Normative pluralism strives to accommodate as many competing conceptions of the good as possible based on the belief that fostering plurality is a worthy and desirable end.\(^5\) Consistent with that, normative pluralism may be used to achieve inclusion of as many competing perspectives as possible thus minimizing irreconcilable conflicts among them, and accordingly reducing—without ever being able to eliminate—reasonably available grounds for contestation of legal validity and legitimacy. If an instance of philosophy in law could at once accommodate both libertarian and egalitarian liberals, then neither of the two would be prone to contesting the validity of the resulting legal norm (though non-liberals would still be excluded and thus likely to contest). Furthermore, whereas detailing how normative pluralism would operate in this context remains beyond the scope of the present undertaking\(^5\), as a general rule it would seem best to combine a greater stress on diversity at the national level with more emphasis on unity at the transnational level. Hopefully, that would lessen contestation by prompting greater acceptance of difference among one’s fellow citizens while at the same time searching for common values and points of convergence across borders.

**Conclusion**

The preceding analysis reveals that philosophy in law is inevitable in the context of complex modern legal systems. This means that law as a normative system must remain normatively open contrary to Luhmann’s autopoietic theory which posits law as cognitively open but normatively closed. Moreover, philosophy in law must be distinguished from law under (moral or political) philosophy as understood by Dworkin. For Dworkin, law lacks coherent meaning unless interpreted in terms of a particular moral or political philosophy. Instances of philosophy in law, in contrast, are internally incorporated within law, are interstitial, and are unlikely to be amenable to being collectively harmonized into a single comprehensive normative theory within the language game of philosophy. As a consequence philosophy in law opens the range of opportunities for contestation of legal validity and legal legitimacy in any setting marked by significant disagreements regarding ideology, morals, politics and law. Finally, I have suggested that recourse to normative pluralism may help reduce the areas and intensity of contestation. That may be achieved through a recasting of poles of unity and of poles of difference within the relevant socio-political and legal space. However, any further inquiry into how exactly that might be accomplished so as to bolster law’s legitimacy under current circumstances will have to be put off till another day.

\(^5\) See Michel Rosenfeld, *Just Interpretations*, supra, at 199-234 (for an extended argument in favor of normative pluralism).

\(^5\) For a more detailed discussion, see Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, supra note 11.