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Bjarne MELKEVIK, *Philosophie du droit*, t. 1, Québec, Les Presses de l'Université Laval, 2010, 649 p., ISBN 978-2-7637-8952-1.

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processus d'intégration économique et politique et du couple droit-économie habilement illustrée par Régis Debray en ces termes : « Le rêve communautaire surgit au carrefour d'un ékonomisme et d'un juridisme, vieux couple d'inséparables. Un homme de loi rencontre un professeur d'économie. Que font-ils ? Le traité de Rome¹⁴. » Au travers de la fonction symbolique qui lui est attachée, le droit européen en matière de transparence des sociétés cotées devrait oser une voie nouvelle et offrir une représentation innovante de l'entreprise dépassant les stricts intérêts financiers... Mais voilà les propos du professeur Konstantinos Sergakis dépassés et déjà de nouvelles recherches à mener.

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Bjarne MELKEVIK, *Philosophie du droit*, t. 1, Québec, Les Presses de l'Université Laval, 2010, 649 p., ISBN 978-2-7637-8952-1.

In *Philosophie du droit*, published in 2010 by Les Presses de l'Université Laval, Professor Bjarne Melkevik brings together the most important contributions that he has made in the recent years to various themes of legal philosophy. The author does not focus on any particular theoretical problem of law in this work : rather, he is concerned with the overall state of "intellectual sanity" in contemporary jurisprudence. From this perspective Professor Melkevik analyses not only the state of affairs in the Western legal tradition, but also some pivotal theoretical problems arising in relation to traditional and non-Western legal cultures. The central task of this book is to reveal the key elements of juridical modernity (*modernité juridique*) which characterize the classical (Western) style of legal thinking and which are nowadays under relentless attack from postmodernism.

In the first part of the book, Professor Melkevik examines the philosophical aspects

of self-determination of peoples, multiculturalism, solidarity, and the right to life, to a healthy environment, democracy, etc., offering the reader his considerations on these controversial issues of jurisprudence. Along with these articles, the volume includes several texts where Professor Melkevik analyzes the ideas of two authors who have had a key influence over his conception of law : Eugeny Pashukanis and Jürgen Habermas (compared with the conception of John Rawls).

The volume begins by reflecting on the central tasks of legal philosophy, which is not surprising given the overall theme of the book. The first two articles "Thinking of law in a philosophical manner" (our translation, p. 9-21) and "The concept of law and contemporary philosophical reflection" (our translation, p. 23-32) focus on different philosophical approaches to law. From the positivist standpoint, legal philosophy can be considered as a useless set of metaphysical abstractions ; on the other hand, from a natural law perspective this discipline gains overwhelming importance, to the point where law as a social regulator risks being replaced by philosophical reflections concerning the principles of its regulation. Following Habermas, the author suggests that there can be an alternative perspective – that of philosophy of action where law is conceived as an emerging compact of collective and individual acts and opinions (p. 20). Here law is closely linked to choices between values, the verification of hypotheses and other mental acts through which human beings participate in the project of juridical modernity ; i.e. to create for themselves a system of coordinates to place the different models of behaviour along the axis law/non-law. A careful examination of the key conceptions of law allows a restatement of the structure of this system as it exists in every human society. Professor Melkevik does not make an apology for the analytical philosophy of law, but calls for a more subtle study of the existential axis around which human beings arrange their discussions about law. Instead of focusing exclusively on legal concepts, he

14. Régis DEBRAY, *La puissance et les rêves*, Paris, Gallimard, 1984, p. 171.

wants to include various aspects of human culture into his inquiry (religion, metaphysics, ecology, politics...) and show how they can be important for the philosophy of law. In the author's opinion, these disciplines have a particular place among the other legal disciplines because of the wide scope of their research domain. Are there any fixed landmarks to differentiate philosophy of law from other disciplines of law? Professor Melkevik is convinced that everything that human beings can glean for carrying out the project of juridical modernity will ultimately be important for the philosophers who study law.

But is usefulness the only criterion? The author elaborates this subject in the two following articles "Is nature a subject of law? A philosophical and critical interrogation" (our translation, p. 35-52), "Utilitarianism and law. Jeremy Bentham and John Stuart Mill" (our translation, p. 53-71). Professor Melkevik demonstrates the rampant sterility of the traditional utilitarian account of law while arguing that subjectivity will always remain at its core. Subjectivity does not necessarily mean individuality. The idea of abandoning subjectivity in law paradoxically results from methodological individualism, which sets aside the collectivity and its communicative acts, thus cutting the individual off from the social environment and socialization (p. 71).

An interesting example of a collision between the utilitarian and communicative perspectives of the philosophy of law can be found in the issue of euthanasia. The article "Responsibility before death. Sue Rodriguez before the Supreme Court of Canada" (our translation, p. 73-86) deals with the case of an individual asking the court to allow immunity against prosecution for a third person providing assistance to commit suicide. This case revealed the deep philosophical implications connected with the right to life, and also with the extent to which an individual can exercise his or her rights. Professor Melkevik disagrees with the position taken by the minority of judges who considered

the right to life as a kind of personal benefit that can be used at the discretion of the right-holder. This position discards the communicative nature of law. The author upholds the position of the majority of justices who dismissed the appeal because the right to life has not only a personal dimension but also a collective and social one. In the collision of these two dimensions, priority must be given to the latter: in other words the intention of exterminating a human being as an object (whether by euthanasia or the death penalty) must be classified on the side of "non-law" on the existential axis of law (p. 84-86).

The following articles "Communicative model in jurisprudence: Habermas and law" (our translation, p. 89-102), "Transformations in law from the point of view of the communicative model" (our translation, p. 103-128) and "Habermas and rule of law. The communicative model of law and the reflexive reconstruction of the contemporary rule of law" (our translation, p. 129-146) are united under the title "The communicative model and law" (our translation, p. 87). In discussing the methodological issues of scientific research in law, Professor Melkevik insists that this research must be conducted on the base of intersubjectivism, collective choice and democratic discourse. The real changes in law do not take place in the normative dimension, but in the living world of human beings who constantly reconstruct, reinterpret, and justify the models which regulate their behaviour. That is why these models are developed in discussions, where the formal changes in law are accepted (or not) by the legal subjects and therefore acquire (or not) binding force (p. 116-120). In other words, legal changes are produced in many dimensions of the living world and affect various social communications: "any change in law must be carried out through the forms of communication which are capable of mobilizing the cultural forces standing in the background of the living world" (our translation, p. 128). Considered in the light of the communicational model, such institutions as democracy, the separation of powers or human rights acquire a discursive dimension. This dimension reveals

the social significance of these institutions for maintaining the communicative discourse and rule of law in society.

Two other papers are dedicated to the theoretical problems in the postmodernist philosophy of law ("The new quarrel between the modernists and postmodernists in the domain of law" (our translation, p. 149-154), "Postmodernism, law and 'farewell to reason'. A critique of the postmodernist conception of law" (our translation, p. 155-171)). In these articles Professor Melkevik draws attention to the discrepancy between the postmodernist thesis about the death of the subject and the thesis of relativity which is opposed to the alleged objectivism of modern thought and which in the last resort is based on subjectivism and methodological individualism. The postmodernist account of law is erroneous as it leads to nihilism and destroys the communicative discourse, providing an apology for arbitrariness and the identification of law with coercion (p. 171).

The next chapter deals with the comparative analysis of three legal traditions: Chinese, Muslim, and the Amerindian ("A look at the Chinese legal culture: [...] (our translation, p. 175-199), "The crime of Salman Rushdie. Reflections about the Satanic Verses" (our translation, p. 201-216), "Juridical acculturation: philosophy of law and law of the Amerindians" (our translation, p. 217-227)). The author juxtaposes the foundations of these legal cultures and mostly finds differences between them and the Western style of legal thinking. The Muslim and Chinese cultures, in the author's opinion, do not enter into the Western project of juridical modernity, though this opinion is mostly motivated by considerations of legal philosophy. Regarding the Amerindian legal-customary culture, Professor Melkevik's conclusion is milder: to illustrate the coexistence of the Western and Amerindian cultures, he draws the example of three canoes descending a river: the aboriginal culture of tribal customary-law, the European culture of liberalism, and the sphere where they overlap. These three boats (cultures) are separate but nevertheless

intertwined and travel in the same direction (p. 225-227).

The article which ends the first part of the book deals with Marxist legal philosophy: "Pashukanis: a Marxist lecture of Maurice Hauriou" (our translation, p. 231-237), in which the author analyses Soviet legal scholar's criticism of the conception of French legal theorist Maurice Hauriou. This critique discloses the weak points of the conception of Pashukanis himself, whose socio-communicational model of law remains purely procedural and demonstrates a suspicious affinity with theological concepts of law.

In the second part of the volume Professor Melkevik examines solidarity and cultural identity in law. He starts with the question "Why study philosophy of law?" (our translation, p. 247-256) to persuade the reader that many applied problems in law cannot be solved without recourse to philosophical debates. The article "Solidarity, philosophy and our presence" (our translation, p. 257-273) deals with the question of the normativity of solidarity in society and in law. Classical liberalism rightly considers law as an expression of the people's will, but erroneously supposes that it must be the will of a majority or a parliament. In the perspective of the communicative model of law, the people's will should rather be seen as an outcome of the discourses emerging in society. If these discourses acquire an institutionalized form, they can be reduced to a set of formal norms and translated in the form of public legislation. When institutionalizing their discourse, human beings show solidarity on various points and they place different models and phenomena at various points on the "law/non-law" axis.

In the following articles "Identity and law, affirmation and self-determination at the crossroad: the First Nations and Quebec" (our translation, p. 277-300), "The question of identity, law and the legal philosophy of liberalism: reflection on the bases of Canadian Aboriginal law" (our translation, p. 301-318) and "The autochthon legal

cultures: the question of legal philosophy” (our translation, p. 319-327) Professor Melkevik demonstrates the pointlessness of attempts to merge the “legal projects” of Western and Canadian aboriginal cultures, and as a result contests the strategy of multiculturalism. The author is confident that different peoples cannot be merged into one melting pot of cultures without losing their national identity. The policy of acculturation leads to dominance of one legal culture over another. As an alternative to this policy, he looks at the communicational model of law, which allows for the coexistence of different cultures that nevertheless remain distinct and independent from each other.

The chapter “Metaphysics and law” (our translation, p. 329) starts with the article “Metaphysics and law: a philosophical assessment” (our translation, p. 331-338), in which Professor Melkevik examines the possible status of metaphysics in the project of juridical modernity. On the one hand, the author is certain that “nowadays it is impossible to justify rights only with reference to the discourses of metaphysics and of rationalism” (our translation, p. 338). On the other hand, legal philosophy inevitably leads to the basic issues of human existence, and thereby to the problems traditionally referred to as metaphysical. As an example of such a metaphysical approach, Professor Melkevik cites the works of Michel Villey: “Villey and legal philosophy: Reading *Les Carnets*” (our translation, p. 339-363), “Influence of Villey in Quebec and French-speaking Canada” (our translation, p. 365-370). The author scrutinizes the autobiographical sketches of Villey, in which the French thinker inquires into the religious roots of human culture, even if Professor Melkevik cannot accept the scepticism of the French philosopher towards “corrupted” human nature. In the author’s opinion, religious beliefs do not form the basis of Western legal culture, which has become strictly secular. Religious belief always requires compulsory subordination of persons to the accepted views of the religious community, contrary to true democracy which does not enforce any values before

these values are justified in the communicative discourse (p. 362 and 363).

Next, the author deals with the problems of legal ideology, taking as paradigmatic examples the conceptions of two philosophers whose ideological stances are rather controversial – von Hayek and Marx (“The epistemology of Hayek and the question of law: analysis and critique” (our translation, p. 373-391), “Marx and his legal conception: intersubjectivity, materiality and normativity” (our translation, p. 393-410)), adding to his analysis the Marxist legal philosophy of Pashukanis (“Pashukanis, philosophy and law” (our translation, p. 411-414)). Professor Melkevik shows that Hayek implicitly puts a strong emphasis on the existing legal order, this order being based on the unity of the legislative materials. Hayek argues that social anarchy is incapable of creating a new legal order and he builds an imaginary self-regulating spontaneous legal order on the presupposed ability of human individuals to rationally reshape their cultural and spiritual environment. This ability is questionable and cannot be taken for granted. The “true-law” (*vrai droit*) defended by Hayek ontologically and axiologically turns out to be the same objectivist projection as the normativism criticized by this philosopher. The main weakness of his legal conception resides in its antidemocratic character: for Hayek, law is a given, *a priori*, and so legal regulation does not depend on democratic (or undemocratic) procedures for making or finding law in a given society (p. 391). A spontaneous legal order can easily become a danger for human liberty. The State, on the contrary, can defend this liberty against society – a fact repeatedly observed in history, but which is neglected by Hayek.

In the legal philosophy of Marx the author finds a similar ideological flaw, i.e. the presupposed class nature of law. Trying to save Marx from Marxism, Professor Melkevik displays the role praxiology plays in the writings of the younger Marx. These writings show Marx as a “forerunner of the new juridical modernity” (p. 408) and as an

"ideologist of intersubjectivity" (p. 407). The Marxist-Leninist philosophy diverges at some essential points from the philosophy of Marx himself, as the former philosophy is mostly composed of the ideas of Engels and Lenin who decried law as a means of class subordination. This attitude towards the law does not coincide with the projects of Marx to emancipate human beings and introduce solidarity. Such projects required reforming the social structures through collective action – such emancipation is quite congruent with the juridical modernity examined in the volume of Professor Melkevik. One of the interesting developments of the legal ideas of Marx can be found in Pashukanis' conception, which stresses the socio-communicative role of law as a special medium of social cohesion based on the equality and the autonomy of subjects.

In the chapter on "Culture and positivism" (our translation, p. 415), Professor Melkevik focuses on Quebec's legal culture and on the role legal philosophy plays in this culture. In the articles "Philosophy of law in Quebec: recent developments" (our translation, p. 417-432) and "Quebec law between culture and positivism: some critical remarks" (our translation, p. 433-448), the author reflects on the evolution of legal philosophies in his country. According to Professor Melkevik, legal theory in Quebec was traditionally under the influence of normativism, sociology and utilitarianism, but things are changing for the better nowadays. As sign of this development, Professor Melkevik cites the growing interest of legal theorists for the problems of legal modernity and intersubjectivity (p. 447 and 448).

The third part of the volume is centered on the critical examination of the legal conceptions of Habermas and Rawls. The author evidently leans towards the former's conception, which is "better adapted to the juridical project" (p. 455), but he also attentively studies Rawlsian moral philosophy with regard to law. This moral philosophy is to a considerable extent formed as a counterweight to the intersubjectivist communicative

theory of Habermas (p. 475). After sketching the "Philosophical and political profiles" (our translation, p. 459-476) of both philosophers, the author analyzes the public controversy dating back to 1995 about the nature of rights. Two articles, ("From contract to communication: Habermas criticizes Rawls" (our translation, p. 479-496) and "Morals or democracy: back to the debates between Rawls and Habermas" (our translation, p. 497-520)), are dedicated to criticism of the interrelation of political and moral autonomy of individuals in the Rawls' conception. The American thinker builds his theory on a simplistic vision of the subject taken as a rational agent acting pragmatically and capable of recognizing intuitively the principles associated with the modern project of law. This vision leads to the postulated independence of an individual who does not need to communicate with others to be in possession of his rights. Individuals are portrayed by Rawls as rational egoists bargaining about principles with other individuals under a veil of ignorance. Here Professor Melkevik joins the critic of Habermas against the idealization of the values of Western liberalism. The theory of democratic self-governance and communicative sovereignty elaborated by Habermas is preferable, for the purposes of the juridical modernity project, to Rawls' position based, in the last resort, on vague moral intuitions.

Possible conflicts between moral values and democracy are examined in the two following articles "Social contract or democracy: a philosophical question" (our translation, p. 523-544) and "Habermas and the democratic conception of law" (our translation, p. 545-557). The author expresses his certitude that democracy is incompatible with any theoretical versions of the social contract (p. 523 and 524), because this theory undermines the idea of popular sovereignty. In such theories, the people become a metaphysical entity whose will can be loosely interpreted to frame any particular political interests. Developing the theory of social contract, Rawls underpins this theory by the outdated principles of natural law: methodological individualism, intuitivism and

apriorism. As Professor Melkevik argues, any political system can be justified with the help of these principles and there is no necessary connection between natural law and democracy. The true foundation of democracy can nevertheless be found in the procedural democracy of Habermas. Only this conception allows for the communicative model of law where a collective agency (*le nous juridique*) emerges as a subject of communication: "Habermas connects the notions of legitimacy and legality, which are symbolized by the paradigms of democracy and autonomous legislation, with the democratic process which is the foundation of the contemporary state" (our translation, p. 556). This conclusion is easily explicable insofar as the author defines democracy as the participation of legal subjects in the juridical project (p. 557).

Discussing the issue of "cosmopolitan law" (our translation, p. 559), Professor Melkevik analyses the Rawls-Habermas controversy in the light of international law. In the articles "Law of peoples or cosmopolitan law" (our translation, p. 561-591) and "The cosmopolitan law: a reformulation by Habermas" (our translation, p. 593-610), the author reassesses the conceptions of these two thinkers on the nature of international law. Professor Melkevik stresses the cardinal shift in the legal ideas of Rawls, which took place between his works *A Theory of Justice*¹ and *The Law of Peoples*². In this latter work, the position taken by Rawls can be described as highly conservative, since it disclaims the idea that ordinary physical persons or legal entities can become subjects of international law. This inevitably leads to the conclusion that only states can create and grant rights to human beings and to collectivities, thereby authoritatively circumscribing the limits of these rights. From this standpoint, international law is viewed simply as a part of the state law, depending solely on the discretion

of countries' political leaders. This construction, along with the hierarchy of nations built by Rawls on the base of the alleged criterion of the strength of the feeling for justice in different peoples, repudiates the very idea of law. Professor Melkevik finds that the ideas of Habermas are much closer to the idea of law. The German philosopher considers international law as a platform for democratic discussions at the planetary level; in his view, not only states but also particular persons and their organizations can take part in these discussions. This means that international law can become "a legal shield" for these persons against the omnipotent lawmaking of the states (p. 610). This communicative approach to international law opens the possibility of fulfilling the Kantian idea of a "cosmopolitan state" with a new content (p. 594).

The last article in the book under review, "Rawls, utilitarianism, and two concepts of rules" (our translation, p. 613-633), brings to a close the author's reflections on the methodological basis of the juridical project of modernity. Professor Melkevik criticizes one of Rawls' earlier works, *Two Concepts of Rules*³, and argues that utilitarian description cannot yield any positive results for the deontological analysis of legal prescriptions. Rawls rejects the deductive model of normativity, which considers rules as regularities of social practices, as "bundles of conventions to be regularly observed and applied" (our translation, p. 616). In his opinion, it is moral intuition that supports such regularities and allows everyone to discover the "rules of game". This intuitivism leads, in Professor Melkevik's opinion, to an arbitrary conception of law where the status of legal rule can be acquired by any regularity needed to continue the "social game", i.e. to maintain order and stability in society. It turns out that such utilitarian rules do not prevent an innocent person from being found guilty, insofar as it is not justice and individual conse-

1. John RAWLS, *A Theory of Justice*, Cambridge, Harvard University Press, 1971.

2. John RAWLS, «The Law of Peoples», *Critical Inquiry*, vol. 20, n° 1, 1993, p. 36.

3. John RAWLS, «Two Concepts of Rules», *The Philosophical Review*, vol. 64, n° 1, 1955, p. 3.

quences which matter in this conception, but the overall social stability resulting from the regular reapplication of rules (p. 626-631). Even if Rawls later on rejects the analogy between legal rules and the rules of a game, he still pays tribute to moral intuitivism and to utilitarianism.

Professor Melkevik concludes by summing up the principal critics against the Rawlsian conception of law, and stresses the importance of a Habermasian deliberative conception of democratic law for the juridical project of modernity (p. 635-642). The author argues that any moralization of law unavoidably leads to hypostatization of law in the flawed idea of a “correct law”. Conceiving of law as morally good also means conceiving of the power which upholds the legal order as morally appraisable. Political power is then believed to be empowered to grant or repudiate particular rights at its entire discretion. Consequently, it is only judicial discretion which becomes the “matter of principle”, whether it is morally bound or not. But Professor Melkevik is sceptical as to any determinism in the justification of moral values: he argues that there is no pre-established correct morality and no organ (the courts, etc.) absolutely competent to find and fix values, as values can only be found and justified in the democratic discourse and law cannot be isolated from the processes of lawmaking in society. Thus, it is not the moral content of law which really matters, but the procedure of its creation.

Professor Melkevik’s book offers a broad range of themes that are examined with a well-established set of philosophical views. These views are sometimes expressed categorically, and the author clearly demarcates his stands on many controversial problems of legal philosophy. The reader will enjoy the arguments deployed in favour of the ideas cherished by Professor Melkevik and the diversity of examples on which these ideas are tested and justified. Those who support different philosophical and methodological positions will not find any reconciling synthesis in this volume, and the creation of

such an “integrative” synthesis is clearly not the task the author set himself. His detailed analysis leaves the reader with an excellent impression of the debate, both for those who accept the author’s views and for those who prefer to adhere to the positions criticized in the book.

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Lisa M. FAIRFAX, **Shareholder Democracy. A Primer on Shareholder Activism and Participation**, Durham, Carolina Academic Press, 2011, 191 p., ISBN 978-1-59460-919-0.

Quod erat demonstrandum pourrait être la formule résumant l’ouvrage publié en 2011 que nous propose Lisa M. Fairfax, professeure à la Faculté de droit de The George Washington University. L’auteur s’attèle à présenter dans des termes juridiques – et ce n’était pas le moindre de ses défis – un serpent de mer qui parcourt l’océan Atlantique depuis quasiment une décennie : la « démocratie actionnariale ». Si cet ouvrage a été publié il y a deux ans, force est de constater que ce thème n’a pas perdu de sa pertinence, bien au contraire. Au Canada, les prises de position¹ et les

1. À titre d’illustration, cf. Carol HANSELL et autres, *The Quality of the Shareholder Vote in Canada*, Davies Ward Phillips & Vineberg LLP, 2010, [En ligne], [www.dwpv.com/Sites/shareholdervoting/media/The-Quality-of-the-Sharerholder-Vote-in-Canada.pdf] (14 septembre 2013); Yvan ALLAIRE, *Droits de vote et citoyen-neté dans l’entreprise ouverte : une proposition*, Institut sur la gouvernance des organisations publiques et privées (IGOPP), 2006, [En ligne], [www.igopp.org/IMG/pdf/Allaire-Politique_2_Version_francaise_4_decembre_2006-2.pdf] (14 septembre 2013); Yvan ALLAIRE, *Les actions multivotantes : quelques modestes propositions*, IGOPP, 2006, [En ligne], [www.igopp.org/IMG/pdf/30_2006-11-16_Allaire-Politique1_-VF.pdf] (14 septembre 2013).