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Meditations on the Role and Rule of Law

FRIEDRICH KRATOCHWIL

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For
Petra Hoelscher
uxori carissimae,
“o et praesidium et dulce decus meum”

ἐὰν μὴ ἔλπηται ἀνέλπιστον οὐκ
ἐξευρήσει, ἀνεξερεύνητον ἐὸν καὶ ἄπορον.
If you do not expect the unexpected, you will not find it;
For it is hard to be sought out and difficult

Heraclitus, frag. 18

_ _ μάχεσθαι χρὴ τὸν δῆμον ὑπὲρ τοῦ
νόμου ὅκωσπερ τείχεος.
The people must fight for its law as for its walls.

Heraclitus, frag.44

CONTENTS

PREFACE

This book is the result of several explorations that are here brought together in a substantially revised form. Thus Meditations 1 through 6 were first delivered as series of lectures at a "winter course" of international law at CEDIN in Belo Horizonte, Brazil in July of 2011. Meditations 7 and 8 were my contribution to the Summer Academy of the European Inter-University Center for Human Rights and Democratization in Venice in the summer of 2012. Meditation 6 was written under the auspices of Kyung Hee University in Seoul, where I was an "International Scholar" in the fall of 2011. The Introduction and Meditation 9 were written while teaching as Visiting Professor at the Central European University at Budapest in 2012.

From its genesis it is clear that this project could not have come to fruition without the great personal and institutional support that I enjoyed while working on this manuscript. My wife put up with me even though I was often grumpier than usual (if people who know me can believe this)! She let me focus on the book while taking care of all the burdens of dealing with workers and authorities that result from running a big house in the Tuscan hills. The European University Institute, my former university, where I taught until April 2011 and where my last seminar on international law provided the first outline of the project, provided me with access to the library during the summer of 2012 when I finished the first draft. At a very decisive point, right at the beginning, Carol Bohmer generously shared some of her research resources when I was suddenly cut off from a research library after my retirement from the Institute, and before I had a new institutional affiliation.

Equally important have been the long conversations and comments I received from Nick Onuf, Oliver Kessler, and Jens Bartelson, who read the manuscript in its entirety and provided me with detailed criticisms. Similarly, Hannes Peltonen and Gulherme Vasconcelos, who had been my untiring research assistants, were also the first critical readers of the initial drafts, providing me with valuable suggestions concerning both content and form of the argument. In addition, I benefited from the comments on different chapters made by Dennis Patterson, Jan Klabbers, Nikolas Rajkovic, Mary Ellen O'Connell, Jean Cohen, Albena Azmanova, Xymena Kurowska, and, above all, from the international research group "Constitutionalism Unbound," assembled by Antje

Wiener in Hamburg. It organized a gruelling day-long workshop in Hamburg, in which both lawyers and social scientists examined each Meditation and gave me valuable feedback. My sincerest thanks to Sigrid Boysen, Julia Fronenberg, Maj Garsten, Hannes Hansen-Magusson, Sarah Imani, Joern Axel Kaemmerer (who also was kind enough to read a further draft), Alexandra Kemmerer, Christine Landfried, Anthony Lang, Philip Liste, Sven Opitz, Almut Schilling-Vacaflor, Joerg Philipp Terhechte, Andreas von Arnault, Antje Vetterlein, and Antje Wiener. Finally, special thanks also to Manuel Mireanu who got the last version of the manuscript in shape. Finally, I owe a great debt of gratitude to Cambridge University Press (John Haslam and Chris Reus-Smit who took an interest in this project) and to Fleur Jones and Rob Wilkinson who saw this manuscript through the editing and production process.

With so much advice and the extensive "canard hunt" by the commentators, the remaining errors of fact or judgment remain, of course, entirely my responsibility. This also concerns the form in which, after careful reflection, I present the material. Some readers remarked (with good reason) that they found the presentation at times confusing, as frequently not a single storyline dominates the discussion, but rather different strands of arguments appear and then "drop" out, only to be taken up again in a different context. They also wondered for which audience this text is written, as the Meditation resembles more an interior monologue than an explicit argument. To that extent I, as the author, seem to engage in a seemingly autistic activity, taking up themes and leaving them after a while unattended, where readers would perhaps have expected other turns.

The latter observation might of course be true, especially when judged against the standard contemporary debates in political science, which are usually as predictable as they are tedious. This is perhaps best exemplified by the mode of exposition in which allegedly "three approaches" frame most dissertations in international relations and explaining the "variance" then takes pride of place. Nevertheless, the above objection deserves some further comments. Actually, contrary to what one would at first suspect, only "demonstrations" are monologic, since universality and necessity unite author and audience and thus, as in the ideal theory of the early Rawls, it makes no difference whether a single person speaks, or a group discusses and discovers the principles of justice. Ultimately the results are justified by universal reason and emerge from what Kant would call "determinative" judgments. But, as we know, even outside of ethics, such as in the sciences, this might be a misleading picture. Normally controversies abound and "debates" rather than demonstrations dominate the different fields. Thus the notion of ideal reason or a universal audience might be a phenomenon that has seen its day, as has the genre of a linear narrative in literature, where an all-knowing author is writing. Actual "thinking," even if done by a single person in the "ivory tower," is, in contrast, hardly ever a monologue, but always consists of an internal dialogue in which (imagined) interlocutors

and their arguments – established or controversial – which have become part of the understandings, are scrutinized. Here the various "fields" and traditions constitute the bounds of sense within which we move and within which we locate a problem and perhaps even try to "redraw" the bounds of sense.

Thus engaging in this questioning and participating in the debates and conversations seems particularly appropriate when we deliberate about the practical choices we face, since we are always in the middle of things and cannot withdraw to an absolute point beyond time and the particular situation we are in. Instead, we have to reflect upon the options, largely framed by the institutions within which they are embedded, and the context in which a problem arises, when we try to determine what to do, "all things considered." This means that we have to understand how our choices are linked via the norms and rules to certain practices, but also how our decisions arise from a particular judgment by which we appraise and justify our chosen alternative – or get criticized, perhaps even sanctioned, by others for having selected it – since we usually are not at liberty to follow our idiosyncrasies (*de gustibus est disputandum!*). In addition, in this choice we cannot rely on the criteria of necessity and universality, as the latter might be hollow (and compatible with a variety of choices, even contradictory ones), and different competing necessities (duties) might be at issue. Here the standard modes of presentation quickly run out, as no ultimate foundation offers itself from which we can rigorously derive our conclusions, or show their justifiability by invoking generalizations, as we do in "determinative judgments." Instead, something like a "reflective judgment," as developed by Kant in his *Third Critique*, becomes necessary. Thus, "going back and forth" between facts and norms, falling back on analogies, utilizing metaphors and counter-factuals, and thus "weaving together" different strands of thought, are then the modes in which we try to resolve the issue(s) at hand. Finally, having found a solution, we hope we thereby can "woo" (again a Kantian term) the bystanders to agree with us, instead of apodictically demanding their assent or, in the case of their refusal, of eliminating them from the discourse as they must have violated "universal reason."

To that extent the two fragments of Heraclitus I chose as the *avant propos* capture the two main purposes of this "second journey" (*deuteros plous*) on which I am going to embark, for which the openness for "surprises" and getting rid of preconceived ideas is as important as realizing that law is not a brooding omnipresence in the normative sky or the ethereal sphere of values but an eminently social phenomenon. It is a means for contestation as well as for accommodation, but also of *dominium*, which we all use in order to pursue our personal and political projects. But as such, law has to be cared for and fought for as it will not disclose itself in its "truth" (like Heidegger's *aletheia*) but has to be "made," shaping and being shaped by social forces.

While this latter point has usually been acknowledged even by "non-realist" exponents of jurisprudence – here the topos was that law always pointed

"beyond" itself as it is not mere speculation but a social practice – the second notion that knowledge appropriate for practical issues has also had a long tradition, but its reliance on "prudence" has been much contested in modernity. Here, true "knowledge" had to measure up to field independent epistemic standards, as otherwise we would fall into the abyss of errors and relativism. The (implausible) Cartesian doubt could only be assuaged by an equally implausible conception of knowledge exorcizing all doubts by being characterized by clarity, universality, and necessity.

Thus, to let go of the ultimate props of an a-historical universality and necessity might then make for some tough reading and writing, as it is not the familiar canonical form in which we are trained to present our arguments. But it might also provide some new insights that lie outside the tradition of subjecting praxis to a "theoretical" gaze, and even outside the various disciplinary myopias based on such a "prejudice" for "theory." Obviously the proof of the pudding is in the eating. But then again we should also remember that "wisdom" (*spientia*) and "to taste" (*sapere*) spring from the same root, so that there might be perhaps more to it when we say: "*sapere aude*," that is "dare to taste/know," a topos that has inspired our reflections from Horace to Augustine, to Kant, and Foucault.