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On the Magic of Law

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Abstract

This essay focuses on a forgotten and ill-reputed category, long used by anthropologists and historians to describe the origins of law: the category of “magic.” At the end of the 19th century, many scholars found in the idea of “magic” something that could explain why some sort of a necessity could be attached to certain actions, paroles or rituals from which concrete, practical effects were expected in “primitive” societies. “Magic” was a concept embodying a complete theory of performance, and of the necessity of the consequences produced by this performance, that seemed to some of those scholars capable of explaining why necessity and performance were also legal features. Yet, after World War II, the positivist school of legal historians chose to discard this explanation, and to forget all about the possible links between law and magic. By re-reading the work of Paul Huvelin, a forgotten French legal historian close to the circles of Emile Durkheim, I would like to claim that this gesture was rather a form of foreclosure – foreclosure of the fact that law might very well be the last form of magic in a world that refuses to admit its existence. Of course, the whole question is: Which magic? How magic? Why magic? These are the questions that the essay tries to answer.

On The Magic of Law

Laurent de Sutter*

1. From Lyon to Beirut

Who remembers Paul Huvelin? Despite having been one of the few lawyers in the small crowd of scholars gathering around Émile Durkheim, he seems to have vanished from memory – his sole legacy apparently being a street named after him in the Achrafieh neighbourhood of Beirut. This street received some kind of notoriety when, in 2011, Mounir Maasri released a movie by the name Rue Huvelin which tells the story of a group of students fighting against Syrian occupation in Lebanon – all of them living in said street. However, no direct reference to the person or the work of Huvelin was made in the film, even though the French professor had earned some local celebrity, in 1913, for being instrumental in setting up the law school of Saint-Joseph University, in the centre of the city. At the time, Huvelin had distanced himself slightly from scholarly work, and had started to participate in the various attempts made by the French government in trying to ensure the persistence of its influence in the Middle East – hence the creation of the law school. It was something quite unexpected from him, since what had made him famous, as a professor at the university of Lyon, was his profound and original expertise in the field of Roman law, especially in its most archaic forms. From the moment of his inception at the university, in 1899, Huvelin had published a bunch of powerful and compelling articles dedicated

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to various questions of Roman commercial law, gathered into one volume by Henri Lévy-Bruhl after the death of their author (Huvelin 1929). He also had been recruited to serve in the editorial board of *L'Année sociologique*, the journal created by Durkheim in 1898, thanks to a friend already introduced to the sociologist, Emmanuel Lévy – a lawyer now considered a precursor of legal socialism (Audren and Karsenti 2004). But nothing could have predicted that Huvelin would suddenly accept missions from the French state, and work as a defender of French interests in the Middle East, where he not only helped in founding the law school of Saint-Joseph, but also conducted research in Syria and other countries. It will most probably never be possible to clearly determine the reasons behind this shift in Huvelin's career – a shift parallel to a definite slowing down of his academic production, and his growing involvement in the local political life of Lyon. The only hypothesis that one could make is that Huvelin would never have been content with the mere internal observation of law; to him, there always had been more to law than what the growing positivism of the time was ready to accept (Audren 2001).

2. Meeting Marcel Mauss

The attraction professed by Huvelin concerning the *outside* of law was probably also what led him to develop what would become a long relationship with someone whose work had an enormous impact on his own researches: Marcel Mauss. Before entering the University of Lyon, Huvelin had been in charge of the important duty to introduce students to Roman law at the University of Aix-en-Provence – where he was assistant professor during the academic year 1898-1899. Telling his friend Lévy that he was looking for case-study materials concerning the study of rituals intended to cure diseases, the latter advised him to write to Marcel Mauss, with whom he was acquainted, and ask him for ideas. At that time, Mauss, who was 27 (Huvelin was 28), had only published a couple of articles, among which a long *Essai sur la nature et la fonction de sacrifice* co-signed with Henri Hubert, and published in the journal edited by his uncle, who was no one but Durkheim himself

(Hubert and Mauss 1899). Huvelin had read this article, and had been impressed by the deep anthropological knowledge manifested by Mauss – as he acknowledged openly in his first letter to the latter, written on the 9th of June, 1899, so initiating a friendship lasting until his own death, in 1924 (Audren 2001: 124). It is, therefore, not a surprise that his discussions with Mauss left some traces in his own work, starting with his article on *Les tablettes magiques et le droit romain* published in 1901 in the *Annales internationales d'histoire* (Huvelin 1901). In this piece, Huvelin was trying to understand the curious link existing, in Ancient Rome, between law and what the Romans called *tabulae defixionum* – a device through which a curse could be enforced upon another person, so that he or she would obey the cursor. Curses, or *defixiones*, were of many types, and the tablets within which they were engraved quite common, not only in Rome, but in the whole antique world, especially in Athens (at least, if one was to believe Plato, who mentioned them in the *Republic* and in the *Laws*) (Graf 2004). Among the various types of *tabullae*, there was one that interested Huvelin more than others: the ones concerning *defixiones iudicariae*, namely curses formulated in order to put the adversary into trouble in the framework of a judicial procedure. For Huvelin, the rites and rituals attached to the practice of cursing pointed towards a mystery with which he would keep himself busy during the next decade or so – and which would cause a long quarrel with Mauss, who had other views on the question: the mystery of the efficient power of law.

3. The Age of Magic

What makes law into something different than a mere set of words whose only power would lie in the force of those strong enough to make sure that one could not escape the consequences of one's actions – what makes law something else than brute strength? This was the question that started to slowly percolate through Huvelin's mind, although, of course, he did not formulate it in such terms – despite his own attraction for abstract questioning (something that he would eventually be criticized for) (Audren 2001: 118). Even though he

kept his questioning quite understated, he nevertheless suggested an answer that that was both curious and timely: what if, he more or less wrote, there was yet something to investigate apropos the relationship between law and magic? At the end of the nineteenth century, magic had indeed become a fashionable anthropological category, thanks to the combined work of people such as Henry Codrington (who published *The Melanesians* in 1891) or James Frazer (the first volume of *The Golden Bough* appeared in 1890) (Codrington 1891; Frazer 1890). Yet, even though both Frazer and Codrington pointed out the legal or normative dimensions of magic, understood as an abstract force, or *mana*, in certain non-Western civilizations, there was an important difference between their findings and Huvelin's hypothesis. For Frazer, magic was what provided an explanation for the interaction existing between things or beings without any physical contact whatsoever; it was the 'sympathetic' force that allowed for the distant influence of one being upon another – and that was basically it. Codrington views were a little bit more sophisticated, but his description of the *mana* cherished by the Melanesians did not bear any fruitful consequence for the general understanding of law: *mana* was simply some kind of an impersonal super-power with whom one had to deal, period. According to the Melanesians, argued Codrington, every difference of power, be it physical or institutional, should be understood as the result of a manifestation of *mana* – and behind it, of the way someone succeeded (or failed) at negotiating a favour from it. Of course, that was not what Huvelin had in mind; rather than in supernatural forces, or in the sympathetic action of a distant thing upon another, it was in the practical functioning of concrete institutions that he was interested, even if this functioning would require the performing of rites. To put it into more technical terms, what Huvelin was looking for was an explanation for the *obligatory* effect of obligations – since the efficiency of law could not be detached from this Roman invention.

4. Birth of a Quarrel

This is precisely where the quarrel with Mauss emerged: one year

after the publication of Huvelin's article, the anthropologist, with his old accomplice Hubert, published *Esquisse d'une théorie générale de la magie* again in *L'Année sociologique* (Hubert and Mauss 1902). In this voluminous text, now an absolute classic of human sciences, Hubert and Mauss were trying to define what was missing in the work of their predecessors, that is the very essence of a magical effect, whatever its context or operations. This might have been of a great interest for Huvelin, except that Hubert and Mauss decided to open their essay with a distinction leaving aside every possibility to connect law, be it in its very archaic form, and magic: the distinction between magical and obligatory effect (ibid.: 11). Even though they did not directly quote Huvelin, the two authors of the *Esquisse* must have had his piece on *tabullae defixionum* in mind when they wrote that, according to them, 'some' defended views leading to the confusion of what should be carefully distinguished (ibid.). For Hubert and Mauss, legal or judicial rites, rituals or formulas, could not be considered as magic per se, since they were not producing any direct effect; if they did, it was because they were magical or religious besides the juridical context of their performance or utterance. For a gesture or a parole to be considered as magic, there must be some actual creation, some *production* at work, beyond what Hubert and Mauss called the mere establishment of 'contractual relationships', as is the case with obligations in the field of law (ibid.). This was the reason why they allowed themselves not to consider any legal dispositive in the rest of the article, preferring to devote themselves to the careful description of the 'elements' of magic, leading to a general theory of magic as illusion and belief (ibid.: 17). Of course, this was quite paradoxical – since the efficiency of magic ultimately was, for Hubert and Mauss, the mere set of social conventions through which a community would illusion itself, so fulfilling some collective needs that could not be fulfilled otherwise. Yet, they stayed true to their position; magic, they said, only designates the efficiency of shared beliefs, responding to some social requirements; as such, it belonged to the realm of representations, and not to the realm of reality or of practices (ibid.: 84; Keck 2002). The slap in the face was direct; in his piece on curse tablets, Huvelin had

precisely advocated that there was something practical to the very idea of magic, and that law could illustrate what a magical practice could be; but Hubert and Mauss would not listen.

5. Huvelin Strikes Back

It took several years to Huvelin to offer a reply to Hubert and Mauss' *Esquisse* – years during which he was very much involved in the preparation of his classes in Roman law, and in the history of commercial law, his two domains of expertise. When he finally published *Magie et droit individuel* in 1905, he had made one major step: he had been appointed to the editorial board of *L'Année sociologique* – where he eventually published his cryptic answer to his friend's views on law and magic (Huvelin 1905). Between Mauss and Huvelin, the quarrel had never been opened; it was more of an erudite conversation between persons of good manners, so that there never was a bitter comment, or even an open disapproval, formulated on one side or the other. *Magie et droit individuel* was not different on that respect; it even opened with an overt praise for Hubert et Mauss' piece, presented as a 'decisive step' in the history of the scientific study of magic, and the benchmark for any future research on the topic (ibid.: 1). Obviously, some sort of a disagreement was to be expected – but it only appeared after a couple of pages of compliments, when Huvelin started to wonder about the normativity at stake with the social order from which magic seems to stem. If Hubert and Mauss were right in saying that, on the one hand, magic was of a social nature, and, on the other, that there was something mysterious to it, bringing it to the verge of the prohibited, then some reason must be advanced for the contradiction to be functional. How a social feature could be social, if it is at the same time prohibited by the very society that it should help functioning, asked Huvelin; are we not obliged to slightly revise our understanding of what a society is, or of what magic is? Or else, he added, would it not be interesting to go back to the facts, in order to try and see how some kind of conciliation could be possible between the two – a conciliation developing from the careful examination of the 'practical applications' of magic? (ibid.:

3) When asking these questions, there was no doubt that Huvelin was thinking about law; and if there still was a doubt, it would soon vanish, since he added a correlate to what was said before – and a correlate taken from Durkheim himself. Since, as the sociologist had written in his *De la division du travail social*, in 1893, ‘law constitutes the visible symbol of social solidarity’, and so the very incarnation of social normativity, it was in the law that the theory of magic would find its true grounding (ibid.: 4). Of course, it all depended on which kind of law one was talking about.

6. Formalism Unlimited

At first sight, though, Huvelin was much more modest; rather than criticizing Hubert and Mauss’ distinction, he started by emphasizing it, stating that, indeed the realm of the juridical and the one of the magical should be kept separate. Yet, in a footnote where all of his controversy with Mauss was summarized in a few polite sentences, he deemed to question not the distinction itself, or the understanding of the concept of magic defended in *Esquisse*, but the concept of law used there (ibid. n. 4). For Hubert and Mauss, Huvelin wrote, law must be kept separated from magic on the ground that whereas the latter is based on rituals, the former, on the contrary, lies upon convention – upon the exchange of will expressed by two parties. Being an expert in the most ancient forms of Roman law, he could not let such a characterization of law go unnoticed, and reminded Hubert and Mauss of the fact that the link between law and convention was nothing but problematic – to say the least. The Roman legal system of the first years of the Kingdom was indeed not based on conventions, but on forms, namely ‘the forms themselves that create or extinguish rights, independently from any condition of will’, Huvelin argued in his footnote. ‘Will without form produces no effect’, in such a system – whose antiquity should not induce us to think that it constituted some past curiosity, devoid of any relationship with law as it was to be grasped in a more general way (ibid.). On the contrary, formalism was a key feature of the Roman legal system up to the time of the Justinian codification,

and a constant of law up to the present time, as was illustrated by the doctrinal theory of the 'declaration of will', later studied by Raymond Saleilles (1901). Even though Huvelin did not go that far, one could easily have deduced from his demonstration that the exchange of will through which a convention could be formed was precisely this: the form of the convention – formalism still permeating under the veil of conventionalism. For on reading Huvelin's development closely, it should have been clear that the French professor did not believe that the distinction made by Hubert and Mauss should be kept intact – contrarily to what he himself explicitly declared a few sentences before. Because, was not the most striking trait of rituals precisely that of heir formalism? Was not ritualism formalism merely put into gestures, actions and formulas? And then, was not law, understood as the practice of formalism, the very place where something could be understood about magic, too?

7. Durkheim against Durkheim

What Huvelin was interested in was the efficiency of the form; this was precisely why he could not accept the quick dismissal found in the *Esquisse* of the role of law in an inquiry of what 'efficiency' means; but this also is why he could not accept Durkheim's views either. Indeed, choosing to quote Durkheim in order to contradict Hubert and Mauss was a bold, as well as paradoxical, operation – since its final outcome took the form of a theory of law that was alien to both Durkheim's and Hubert and Mauss' views at the same time. In their *Esquisse*, the latter deliberately applied the main lessons of the former, in their choosing of the *explanandum* of the success of magic in societies still functioning with other rules and principles as, say, the European ones. For them, magic was mainly a social affair – and so it was the structure of said societies that could explain why their members were to believe in the efficiency of what had so obviously none (outside of the consequences of the belief themselves). The rest only belonging to anthropological idiosyncrasies, whose description was of a great importance for the comparative study of human forms of social life, but not for the general

understanding of what a society is – so that it could be left aside. Huvelin had another take on this point; for him, the details of the rituals were precisely what mattered, because, being a lawyer, he knew that if anything happens in the world, it is because of details being carefully envisaged; take out the details, and the big picture crumbles. *Society never entails any effect*; what entails an effect always is one singular detail, one specific gesture or given set of words, inserted into a broader context that only provides the ecology for this detail to lead to the results being expected from it to produce. This was the reason why *Magie et droit individuel* so much resembled an anthology of disparate cases and examples from which no overarching story seemed to unfold, and about which no explanation seemed completely satisfactory. In the course of his listing of cases, Huvelin would only offer glimpses at a possible general view, through short sentences resounding like hard-to-decipher oracles, left suspended in the air, waiting for someone to interpret them in one way or another. Yet, there was a moment when the type of efficiency looked for by Huvelin as far as law and magic were concerned somehow crystallized: the moment when he started to answer the question of the obligatory effect of convention – the question of what, in conventions, exceeded conventions.

8. *Nexum*, what else?

During a long period of time, said Huvelin, contracting and executing contracts was possible on the sole grounds of magic; it was magic that made it so that contracts could have any effect, and that this effect could somehow be binding for the parties. To put it differently, what made magic effective in contracts was the necessity of the obligation at the core of any contract, from the very inception of the notion of obligation in the Law of the Twelve Tables, to its canonical formulation in Justinian's *Digest*. The first example given by Huvelin is the one of *nexum* – about which he had just provided a personal interpretation in an article featured in the monumental *Dictionnaire des antiquités grecques et romaines* edited by Edmond Saglio and Edmond Pottier (Huvelin 1907; Benthien 2011). The *nexum* was a very curious

institution of early Roman law providing some sort of guarantee for the creditor of a debt to see the due sum being paid by the debtor, when the latter did not have such a sum in his possession, and should be left free to try and collect it. In order to ensure this freedom did not metamorphose into a pure and simple escape, a hostage would usually be provided to the debtor, preferably someone so close to the debtor that he would not even consider not coming back (Girard 2003; Noailles 1940). Of course, there were cases when there was no such hostage at hand, and another trick was needed; this trick, according to Huvelin's interpretation of the *nexum*, was the personal involvement of the debtor, making himself the hostage, *while remaining free of his moves* (Huvelin 1905). But then again, how to guarantee that, once the *nexum* duly formed, the debtor would not simply run away, laughing at the fool who was stupid enough to be satisfied with the mere promise that he would come back as a hostage if he could not find the money? The answer, wrote Huvelin, was magic; more specifically, it was the magic of some ritual cursing, implying that the person who would not fulfil his duties would be subjected to the worst fate, a threat apparently sufficient to make people do what they had to do (ibid.). This is how conventions started to take place: as the personal engagement of a debtor, accepting to submit himself to a ritual leading to his potential cursing if he were not to perform his part of what was not yet a contract – but almost. The most important fact, though, was not so much that magic could be linked to the guaranteeing of contracts, but that it revealed, contrarily to what Hubert and Mauss had assumed, that contracts were not the result of a mere exchange of will; contracts first implied an individual involvement (ibid.: 27).

9. In Praise of the Individual

Hubert and Mauss never really replied to Huvelin's critique; but one could imagine that, at this stage, they would have simply sniffed and argued that such a description of the origins of legal obligations did not change a thing with respect to what they wrote, since, in the end, it was still about society. For someone to submit oneself to a ritual,

and act accordingly, there must have been some social belief leading to the internalization of the supposed normative power attached to it; as such, it was not the cursing that produced effects, but the belief itself. Huvelin would not completely disagree; as he pointed out later in *Magie et droit individuel* the social dimension of conventions should not be overlooked; there must be some 'social adherence' (as he put it) to them; but it should not be overstated, too. There was, he claimed, a specific 'force' of magic – and what happened with early forms of conventions, such as *nexum*, was the transference of this force to what he called 'individual activity', making so that the individual's involvement in a legal relationship could become stronger (ibid.: 42). What mattered was not so much the social dimension of magic, or the fact that it eventually was grounded on shared beliefs, but the fact that there was an effective change in the force of the subject accepting to participate to its own cursing as debtor. The magic was the magic of this sudden possibility – of making so that a given individual was provided, whatever the reality of it, a power exceeding the one at his disposal as a common body, as a person more or less free to come and go in the world. The magical dimension of a convention was that: the fact that it did effectively change something in the debtor – the fact that it gave him the power to grant his acceptance to submit himself to a ritual making him able to participate in an obligatory relationship. Indeed, this was hard to explain in terms of social normativity; it was rather the functional necessity of a given dispositive that was at stake with the phenomenon described by Huvelin – its internal necessity, rather than the external necessity of the social context in which it took place. Whereas Huber and Mauss, closer to the sociological orthodoxy of Durkheim, focused on the social dimension of magic, and so expelled law from its realm (being another social phenomenon), Huvelin wanted to outline the importance of the individual. Even more so, he wanted to stress that the individual could not be considered separately from the institutions granting it a given place in society, and the power to eventually change it – hence the link between law and magic.

10. Goodbye, Sociology

Despite his blow to the Durkheimian orthodoxy, Huvelin stayed in the editorial board of *L'Année sociologique* until the end of its first series, in 1913 – even though he did not publish any new article, satisfying himself with book reviews here and there. Law was too exotic a topic to really lead to any controversy within the sociological entourage of Durkheim; the fact is that Huvelin was the only one, with Lévy, to possess the full range of technical knowledge of the discipline; the others were only remotely interested (Cotterrell 2005). This might explain why, at the time, no one seemed to notice Huvelin's claims – or, to put it in more direct terms, his radical critique of sociology, and of the elementary conception of normativity defended by his friends and colleagues. For the latter, normativity was an overarching phenomenon, of which law was only a mere illustration, emerging at a certain moment of history, in a certain context, in order to answer certain social needs – even though this illustration was deemed capital. For the former, normativity, so conceived, could not explain the specific force manifested by law, nor the singularity of the functioning of its dispositives; it would only make law the accessory of something else, more general and more important. Of course, at the end of *Magie et droit individuel*, Huvelin conceded that, if law and magic had something in common, it was because they shared some sort of belonging to the realm of religion and the sacred – both stemmed, in a twisted way, from religious beliefs. Yet, as he put it, 'in the field of law, magical rites only are religious rites diverted from their regular social goal, and used in order to achieve an individual will of belief [...] The magical rite is religious in its external appearance; it is antireligious only in its ends'. (Huvelin 1905: 46) It was a clever way to state that, on the one hand, the antinomy defended by Hubert and Mauss was not sustainable; and that, on the other hand, the most crucial aspects of Durkheim's sociology could be maintained untouched – somehow. For a careful reader, however, the gap separating the attempt at grounding the efficiency of magic and of law in different areas of the social, from the desire to understand this efficiency as an integral part of a dispositive

centred upon individuals, was abyssal. Hubert and Mauss, like their master Durkheim, wanted society to provide the alpha and omega of normativity, whereas Huvelin was persuaded that there was no such thing as normativity, but only tiny legal mechanisms requiring *per se* analysis.

11. A Criticism by Georges Gurvitch

A few years after Huvelin's death, though, an attempt was made by Georges Gurvitch, in a study titled *La magie et le droit*, published in his book *Essais de sociologie*, to prove the latter wrong, and, conversely, to prove Durkheim, and then Hubert and Mauss, right (Gurvitch 1938). According to Gurvitch, Huvelin committed a very important mistake: his demonstration was based on some sort of circular reasoning, leaving aside the fact that it had to presuppose the existence of an individual right in order to open the floor for magic (ibid.: 40). Indeed, one could question the importance of magic in the definition of a right, if this right was already recognized by the one trying to assert it *without its intervention*; in Huvelin's argument, magic was simply playing the role of indifferent decorum. For Gurvitch, on the contrary, magic was something *big*; first of all, it had to be spelled with a major 'M', something that neither Huvelin, nor even Hubert and Mauss, dared to do, as if it was a kind of major instance, to whom a very special type of respect was due. And indeed, it was the case: as Gurvitch stated it, the concept of magic was a way to investigate what he called the 'spirit' of law, even though one had to be careful in avoiding to make it the 'cause' of law, and to describe it only in its 'influences'. (ibid.: 39, 41) Of course, in the end, things came back from where they started, and Gurvitch was forced to admit that magic, as he saw it, was again a set of beliefs of the same kind as, say, religious beliefs – which amounted to the very radical conclusion that beliefs might influence law. In reality, the purpose of Gurvitch's criticism was to try and demonstrate that Huvelin should have made one further step, and include in his analysis what he called 'social law', namely the set of rules and mechanisms exceeding the limits of individual conventions (ibid.: 71). Even though

his own arguments were a little bit shabby, his purpose was rightful: Huvelin's view could have been more powerful if he had accepted that individual rights were not the place of ultimate realization of magic in law – or, at least, not only. If one were to get rid of the abstraction of social normativity, one should have to take into consideration the inner efficiency of the whole set of mechanisms through which something other than individual bonds can be legally produced. Was it not possible to imagine that magic could permeate through law in a more general way than the one stated by Huvelin, that is, allowing for the conclusion of a *nexum* in order to guarantee a debt – or the judicial cursing at stake with *tabullae defixionum*? Gurvitch's criticism was not that bad, after all.

12. Towards Magical Legal Realism

Despite its limitations and the lack of echo that it received from both sociologists and lawyers, Huvelin's hypothesis benefitted from a life of its own, somehow finding its way through the underground of legal scholarship, up to the present day. If the French school of legal history appearing after World War Two openly excommunicated any views that might have even a remote relationship with the idea of religion and of magic, the more recent era seems to become more favourable to their re-examination (Gaudemet 2000). Huvelin's work was mentioned in both the *Dictionnaire encyclopédique de théorie et de sociologie du droit*, edited in 1991 by André-Jean Arnaud, and the *Dictionnaire historique des juristes français*, edited in 2007 by Patrick Arabeyre, Jean-Louis Halpérin and Jacques Krynen (Arnaud 1997; Arabeyre, Halpérin and Krynen 2007). In the interval between these two publications, some of Huvelin's letters to Marcel Mauss had finally been edited, with an introduction, by Frédéric Audren, and the general context of his work, in particular its Durkheimian dimension, has been outlined by Roger Cotterrell (Audren 2001; Cotterrell 2005). Other works followed, testifying to a renewal of curiosity in the generation of lawyers represented by Huvelin and Lévy, especially from the point of view of their relationship to ideas customarily seen as far

removed from contemporary lawyers' preoccupations, such as socialism (Audren and Karsenti 2004). Yet most of these different endeavours, while finally recognizing the historical importance of Huvelin, have remained remarkably discrete about his attempts at grounding the necessary force of obligations in magic – as if this still represented an embarrassment. Outside France (and the United Kingdom), however, there were attempts at engaging with it, most notably Kaius Tuori in Finland, who decided to follow the path opened by another important lawyer having considered magic with a favourable eye: Axel Hägerström. In his treatise on the roman concept of obligation, 1927, Hägerström indeed discussed the idea that obligations, in Roman law, originated in rites being performed, from which obligations received their own power – quoting Huvelin himself (Hägerström 1927). For him, too, the very idea of necessity at the core of any obligation required an explanation that could not have been found in the mere social context within which such an obligation would take place, or in the beliefs of the participants to the rite. A few years later, in 1940, in his famous book *On Law and the State*, Karl Olivecrona quoted Hägerström's theory, adding that, contrary to what one might think, magical thinking was still a part of the functioning of law, if one was to see it realistically (Olivecrona 2011).

13. Meanwhile, in the United States

The place of Hägerström and Olivecrona in the history of legal theory is well known; both are considered as the fathers, and most prominent figures, of what has been called Scandinavian Legal Realism, a school of thought still highly considered today. Their main claim was that law should not be considered metaphysically, as according to them was the case then, but realistically, that is, without the philosophical apparatus, and the call to transcendence that were the feature of the legal theory of their time. Legal realism, according to Olivecrona, was the realism that refused to consider law from the point of view of 'mysticism', and instead chose to consider it from the point of view of 'science' – refusing to provide grounding for law, and choosing instead to describe it (ibid.:

45). Yet, for Olivecrona, it seemed that ‘magical thinking’ should be put in the context of ‘science’ rather than of ‘mysticism’, as far as law was to be considered, since magical rituals provided a more accurate description of its obligatory force than other explanations (ibid.). *Magic was an inherent feature of realism* – it was the acceptance of how certain early forms of law needed magic in order to work, that defined the type of ‘science’ that the tenets of Scandinavian Legal Realism advanced. And the fact was that Hägerström and Olivecrona were right in claiming so, since they were not the only type of realists calling for magic as a central category of legal scholarship; before them, the most important American Legal Realist of all times did the same. In his celebrated address to the students of Boston University, in 1896, *The Path of the Law*, Oliver Wendell Holmes Jr. also suggested that true realism had something to do with magical rites, under the form of what he called ‘prophesy’, a curious word for such a rationalist (de Sutter 2014). If, seen from the present days, this seems to be quite paradoxical, it was not for the time – a time when some of the greatest thinkers, such as Holmes’ friend William James and his French colleague Henri Bergson, were both proud to chair the newly formed Society for Psychical Research. It was a part of the rationalism of the time, even of the *pragmatism* of the time, to interest oneself, in a constructive way, in all the phenomena apparently evading human rationality, to try to expand rationalism’s ambit to new realms, beyond the limitations imposed by any theoretical tradition (Menand 2002). When Holmes addressed his students, Codrington and Frazer were the hottest read one could hope for – and the lawyer was perfectly aware of their discussion of the entanglement between law, magic and power.

14. The Psychology of Formalism

The end of the nineteenth century, and beginning of the twentieth, was a moment when magic was everywhere, especially in societies and civilizations foreign from the Western ones, so that they could provide a useful contrast to either criticize or praise them. Huvelin’s work provides a perfect example of the type of questioning that such an omnipresence of the category of law could lead to, even though

there was more to this than a mere historical remnant, as Tuori has understood better than others. Recalling the Scandinavian tradition of magical legal realism, the Finnish scholar dedicated some time and effort in trying to weigh the interest of Huvelin's reading of *nexum* and the origins of the Roman concept of *obligatio* from the point of view of contemporary science. In a much celebrated piece on *The Magic of Mancipatio*, Tuori tried to reconsider the traditional accounts given of the very specific procedure that *mancipatio* is, in its connexion to earlier forms of what were not yet contracts, such as the one of *nexum* (Tuori 2008). He cautiously concluded that here was no definite evidence, in one direction or the other, to assess the magical dimension of *mancipatio*, even if this procedure indeed involved some sort of ritual – or, at least, as he called it, some sort of 'formalism' (ibid.: 481). This, already, was a nod towards Huvelin's views, since the first criticism that the latter opposed to Hubert and Mauss was precisely the fact that they overlooked the formalistic dimension of the archaic manifestations of law, and then of law in general. But Tuori went even further; he stated that even if there were no obvious connection to the supernatural involved in *mancipatio*, this did not mean that magic was not a part of the forms involved at the time; it simply implied that these forms were not religious. The weakest point of Huvelin's argumentation, justifying Gurvitch's regret, namely his attempt at justifying the social role of magic through religion, and then forgetting social law itself, was redeemed by a more clear-cut distinction. As Tuori wrote, '[t]he fact that this legal ritual did not refer to the supernatural realm does not mean that its psychological effect would not have resembled that of magic' (ibid.), meaning that the performance of a ritual could produce such an effect in itself. Of course, the distinction was immediately undermined by the fact that, according to Tuori, the question was 'psychological' more than anything else; the functional dimension of magic within the ritual was not something that he was ready to consider, despite his insistence upon its 'performative' character (ibid.)

15. The Inner Necessity of Law

Maybe this was the last word on the question of magic: ‘performative’ – a word that has been introduced into the legal vocabulary due to the success of (the examples of) the linguistic theory of the speech-act developed in the late 1950s by John Austin (Austin 1970). Yet, compared to what has now become an evergreen of legal theory, Huvelin’s ideas about the magic of law rested upon a very different ground, since Austin’s speech-act was an act only insofar as there was an institutional context justifying the power of the one acting. Despite its apparent formalism, the speech-act theory was again some sort of sociologism, albeit under linguistic disguise, whereas Huvelin was only interested in the inner functioning of the legal act, and the way magic could provide for the necessity of its consequences. What Huvelin wanted was a theory of the legal act that was not dependent upon the person who would utter the word (or make the gestures), but on the words (or the gestures) themselves – and not because of their meaning, but because of their, say, ‘genre’. There must be a certain type of words or actions that can be called ‘magic’, and whose use within a legal context produces necessary consequences, whatever the social context is – and even, if one is to follow Tuori, whatever the religious context is. *There must be an inner necessity of law*, or else it is only void – that is, pure force, pure application of the relationship of power within a certain group of human beings, pure legitimization of something that would have happened anyway. Of course, this might very well be possible, but then why do people insist so much upon law? Is it because it would only be the ideological veil with which the darn truth was covered, so that ‘people’ behaved? The reality is that, as weak and as ideological as it might be, law still has an existence in itself – and this existence cannot be denied by even the most ferocious critique of law or the most encompassing sociological theory of the norm. If there is something like law, then there must be something, in it that could evade any attempt at providing an external justification or explanation of its existence and functioning; this is precisely what Huvelin was looking for and that he found, thanks to the concept of magic. What he found was the inner necessity of the form, understood not in the

sense of respect due to some formalities, but in the most specific sense of *forming* – the giving of shape to what had none before, for instance giving the shape of a debtor to someone who, before, was simply owing money to somebody else.

Endnotes

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