Deleuze´s ontological pragmatism and Legal Decision: some remarks on Pragmatism, Social Change and Democracy

In most classical and even contemporary legal theories, notions such as creativity and application are almost presuppositions in approaching legal decision. Those theories usually conceives both of them as separated from each other. it´s quite common in Legal Theory and Legal Philosophy to assume that a valid decision is the one where the judge simply applies the legal rule to a case at hand, whether this means producing a holistic interpretation of the legal system, or simple declaring that the case matches with the description of the legal rule. In both examples, creativity is taken as accidental, a feature that would be only present in legal decision in exceptional situations that calls for more accentuated discretionary solutions, such as hard cases and in all other circumstances where legal rules and precedents won´t be enough to resolve a dispute. From this discussion, one can infer that creativity is normally associated with the past: when we do have a legal decision that is creative, it is usually confined either to the Court´s institutional history or to the past legal rules. Legal pragmatism, however, conceives the link between creativity and application from a perspective that differs significantly from that one. Instead of approaching creativity and application as a dualism, Legal Pragmatism integrates them in order to rethink legal decision within the cultural and political spheres of society. Although Law as a social system has an autonomous dimension, especially regarding its social function, concepts and institutional rituals, this autonomy is always relative and directly connected to its social and political environments. From a pragmatic approach, this makes a legal problem also an interdisciplinary one. This is due to pragmatists, notably the classic ones, regarding every problem, no matter how technical and complex, as problems that transcend specific disciplines: it´s only when we do begin to investigate them theoretically that the problems are approached as being part of specific disciplines. This is necessary in order to develop a more specialized and deep investigation of the object. The main objective of this presentation is to show how Deleuze´s ontological pragmatism can be relevant to three different but occasionally related concerns: 1. to bring philosophical pragmatism closer to contemporary French philosophy, notably post-structuralism; 2. to reflect upon the role of legal decisions regarding significant social changes within contemporary democratic societies, putting more emphasis on the future rather than on the past; 3. to let us move beyond a rational normativist perspective much concerned with developing universal norms in order to criticize specific decisions and political practices. Habermas´s ideal speech situation and John Rawl´s Veil of Ignorance are two famous examples. First, I´m going to make clearer what I intend by a ontological pragmatism within Deleuze´s work despite of him never really employing this expression to describe his metaphysics. As the relationship between Deleuze and pragmatism becomes clearer in the first section, I´m going to approach legal decision through the ontological pragmatism angle in order to show how legal decision is always inherently creative. This is quite pertinent for forging a deeper connection between the dynamics of the legal system, much concerned with stability, rationality, order, the past, and the one of democracy, here representing the site of dispute, destabilization, change and the future. I argue that recognizing the inherently creative dimension of legal decision would help us develop a complex interplay between law and democracy not confined to our actual liberal institutions and substantial metaphysical claims about the nature of justice and democracy. I have two main reasons to assert this. First, Modern democracies, we are told by Claude Lefort, begins and is sustained by the dissolution of the markers of certainty: it does not have any definitive and substantial fundament which could be evoked in order to ultimately settle discussions on values and political principles. Every value, theory, principle that we have can be rethought or revised. Second, by taking this conception of democracy seriously, one can think of legal decisions also as answers to social and political demands. We can treat the legal system as a sort of laboratory where arguing and disputing on those matters can lead to the creation of new concepts and ways of posing questions. A concept is not an abstraction or a tool, it is a condition for us to think of something, which also poses limits to our reflection. According to Deleuze´s ontological pragmatism, concepts are always answers to previous problems: in order to think of problems and questions, these must be previously with concepts. Concepts not only describe a reality or an event: they are constitutive of it. If we take for grant that a key component of the concept of life is sacredness and so life should be always protected by the State, or that immigrants always hurts the economy and our most cherished cultural values, there is no point in reflecting upon euthanasia and immigration: they must be avoid, period. However, when we press forward the limits of our concepts by deepening our investigation on those matters, we can come out with new ways of conceiving community, life, assisted suicide and immigration, for example. This “pressing forward” can happen when unusual legal cases, such as the ones of Terri Schiavo and Chantal Sébire, produces discussions through society, which definitely includes the legal system and different political institutions. The creation of those concepts is neither limited to the judiciary nor excludes it, but calls for a more integrate view of order, one that is open to the destabilizing and potential revolutionary effects of democracy. Bring together Deleuze and pragmatism, the classics but also the ones from the legal field, can prove to be an important theoretical move for proposing a different look on legal decision and its importance to democracy and social change.