A Treatise of Legal Philosophy and General Jurisprudence

Volume 9

A History of the Philosophy of Law in the Civil Law World, 1600–1900

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A History of the Philosophy of Law in the Civil Law World, 1600–1900

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GENERAL EDITOR'S PREFACE TO VOLUMES 9 AND 10 OF THE TREATISE

I am happy to present here the third batch of volumes for the *Treatise* project: This is the batch consisting of Volumes 9 and 10, namely, *A History of the Philosophy of Law in the Civil Law World, 1600–1900*, edited by Damiano Canale, Paolo Grossi, and Hasso Hofmann, and *The Philosophers' Philosophy of Law from the Seventeenth Century to Our Days*, by Patrick Riley. Three volumes will follow: Two are devoted to the philosophy of law in the 20th century, and the third one will be the index for the entire *Treatise*, which will therefore ultimately comprise thirteen volumes.[1]

This Volume 9 runs parallel to Volume 8, *A History of the Philosophy of Law in the Common Law World, 1600–1900*, by Michael Lobban, published in 2007.

Volume 10, for its part, takes up where Volume 6 left off: which appeared under the title *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* (edited by Fred Miller Jr. in association with Carrie-Ann Biondi, likewise published in 2007), and which is mainly a history of the philosophers' philosophy of law (let us refer to this philosophy as A).

In this Volume 9, the reader will find some chapters (Chapters 2 and 6, for example) mainly devoted to the jurists' philosophy of law (let us refer to this philosophy as B), and some chapters (Chapters 1 and 3, for example) mainly devoted to the legal philosophers' philosophy of law (let us refer to this latter philosophy as C). Volume 10 is expressly devoted, in the title itself, to philosophy A.

Of course, these rubrics—A, B, and C—only express broad categories with respect to all historical volumes, and carry a good number of simplifications. But the volume editors, in their respective prefaces, have specified how and where their volumes each relate to these rubrics.

For the reader's convenience, and by way of clarifying what was just briefly mentioned, I should recall here a few observations already premissed to Volumes 1 and 6. Thus, among the distinctions that from the outset served as guiding principles in planning out the *Treatise* project was the distinction between philosophy A and B. However, we thought it appropriate to introduce as well C, which may be considered the philosophy of law par excellence. Prior to the modern era there was no distinct discipline that could be called

[1] The first batch consists of the first five volumes of the *Treatise* (2005), and together they make up a theoretical treatment of the philosophy of law. The second batch consists of the first three historical volumes of the *Treatise* (Volumes 6, 7, and 8). On the *Treatise*'s overall framework, see the General Editor's prefaces in Volume 1, xix–xxx, and Volume 6, xv–xviii.

"philosophy of law," and it was only in the modern age that scholars began to view themselves as philosophers of law.

The philosophy of law of the modern rationalistic natural-law school was the first classic instance of C. Now, there are of course theoretical differences that distinguish the legal philosophers in the natural-law school from one another, but then they all laid at the foundation of their doctrines a series of speculative questions from which they derived systems of ethics *ordine geometrico demonstrata* (Benedict de Spinoza, 1632–1677) or systems of natural law *methodo scientifica pertractatum* (Christian Wolff, 1670–1754). In other words, citing the title of a work by Wilhelm Leibniz (1646–1716), one of the fundamental aspects characterising the rationalistic natural-law school is a *nova methodus discendae docendaeque jurisprudentiae*, a new method for learning and teaching legal science, a method that leads to a systematic construction or reconstruction of law.[2] The rationalistic natural-law school—traditionally made to begin with Grotius (1583–1645)—developed in the 17th century, and in 18th it received its typical Enlightenment form.

The second classic instance of philosophy C in the history of legal thinking was German legal positivism, which at the end of the 19th century proclaimed the end of C as embodied in the rationalistic natural-law conceptions and replaced it, ironically, with the *Allgemeine Rechtslehre*, that is, with the general doctrine, or theory, of law.

Hence, from the 17th to the 19th century, philosophy C developed two rival orientations, and took two different names, natural-law school and legal positivism, but did so, however, following a formalistic path and taking as well a strong systematic approach. German formalistic and systematic legal positivism reached its most refined version in the 20th century, with Hans Kelsen (1881–1973), who gave us a very sophisticated representation of the legal system—a glorious and fragile representation of *das Recht* ("what is right") *als Rechtsordnung* ("as a system of what is right") that had the strengths and the weaknesses of a daring cathedral of crystal.[3]

[2] "The *Nova methodus* is aimed at reducing law to systematic unity, this by giving legal material an order that ascends to simple principles from which to obtain exceptionless rules. This material is, again, Roman law [it is so in Leibniz's *Nova methodus*, but not with any of the other exponents of the new natural-law theory], the law which at that time [when Leibniz was writing] was in force in Germany as the *ius commune*, but a *ius commune* reordered on the basis of a new method, a method using which the law can be rationalized and hence endowed with the unity which in the Justinianian system it lacked. The system Leibniz envisioned and put forward must be such that, as a complete whole, it provides a solution for each question, and must do so through precise arguments expressed in a rigorous language, on the model of logical-mathematical procedure" (Fassò 2001, 189; my translation; cf. also ibid., 186).

[3] On these questions, see Volume 1 of this *Treatise*. In the second half of the 20th century, Kelsen's formalistic legal positivism spread not only in civil-law countries (even outside of Europe: in Latin America, for example), but also, in some measure, in common-law countries, this on account of the influence that Kelsen's work and thought had beginning from the time of

By way of a summary, Volumes 6 and 7 bring out the twofold distinction between philosophies A and B. The two volumes are thus roughly parallel as to their chronology and complementary as to their subject matter.

In the two volumes being presented here (Volumes 9 and 10), as well as in Volume 8—covering among them the period from the 17th to the 20th century—the underlying distinction is instead the threefold distinction introduced above between A, B, and C. These three philosophies of law are treated in different ways and with different emphases in these volumes, albeit not always in explicit distinction from one another, the reason being that the distinction was meant to be a principle for each volume editor to interpret freely, according to his understanding of the purposes and contents of his volume.[4]

I am grateful to and pleased to thank the many people who, in different roles, have had a part in bringing out Volumes 9 and 10. Of course, the credit for the specific content, as well as a warm thanks, goes in the first place to the authors and volume editors: Damiano Canale, Paolo Grossi, Hasso Hofmann, and the various contributors to Volume 9; and Patrick Riley, for Volume 10.

Further, I should thank Gerald Postema, who as a member of *Treatise*'s advisory board played a fundamental role by contributing with ideas, advice, and oversight; and also Nino Rotolo, assistant editor of the entire *Treatise*, for coordinating the work that made these two volumes possible: Had it not been for his generous and passionate commitment, the two volumes would not have come to light. And I should finally thank Corrado Roversi, who helped me manage relations with authors, editors, and the publisher, and who has had an active part, along with Nino Rotolo, in the academic discussions devoted to improving the way in which to organize the subjects treated.

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his emigration to the United States. Of course, as is well known, there is a native and very important empiricist legal positivism in Anglophone countries that traces back at least to Hobbes and was then developed in the so-called analytical jurisprudence, whose fathers are Jeremy Bentham (1748–1832) and John Austin (1790–1859).

[4] Thus, Volume 8 is a history of the philosophy of law in common-law countries from the 17th to the 19th century and, as is observed by its author, Michael Lobban, it is "primarily concerned with jurists' and legal philosophers' understandings of law, rather than with those of philosophers." Volume 9, as has already been observed, is mainly a history of the jurists' and the legal philosophers' philosophy of law from the 17th to the 19th century in civil-law countries. And Volume 10, even though it is in the first instance an ideal continuation of Volume 6, and hence a history of the *philosophers*' philosophy of law from the 17th to the 20th century, also discusses, for reasons rightly pointed out by Patrick Riley, some thinkers, such as Grotius and Pufendorf, whose philosophy of law might properly be described as a *legal* philosopher's philosophy of law.

PREFACE TO VOLUME 9

This volume is devoted to the understandings of law developed from the mid-17th century to the end of the 19th century by jurists and legal philosophers working in the *civil-law* tradition.[1] This makes the volume complementary to Michael Lobban's Volume 8 of this *Treatise*, where the same subject matter and the same period are covered, but from a *common-law* perspective instead.

This peculiar combination of subject matter and period has made it necessary for us as volume editors to make certain choices in treating the civil-law tradition: These choices concern the volume's overall design as well as the framing of its single chapters.

Which is to say that the thinkers and schools of thought covered are not arranged along a strictly chronological line of development, nor is there an attempt to show how different thinkers and schools of thought have offered different solutions to the same basic questions, concerning the nature, the distinctive traits, and the function of law, since that would not have made it possible to bring out how complex the development was that legal thought went through during the arc of time in question: Such a development cannot be reduced to a linear sequence of theories and ideas, for it is instead broken up by significant discontinuities. One need only recall here, by way of example, how an understanding of law still tied to the late-medieval world eclipsed during this period, making it possible for modern legal science to progressively take hold; or how the institutions of the Ancien Régime fell apart and the modern state became fully established politically as well as administratively; or how legal pluralism survived in Europe until the end of the 18th century, when legal monism came into being with the 19th-century codifications. This makes it necessary—as we take into view the jurists' and legal philosophers' understandings of law in the historical period in question—to speak of different *epochs* of development rather than of different stages within the same epoch.

Add to this that the discontinuities just mentioned were marked by different characteristics, came to pass at different times, and had entirely different consequences depending on which levels legal discourse, which areas of cultural influence, and which parts of the legal system we are considering.

Let us take a few examples to briefly consider, in the first place, what this means with respect to the different levels of legal discourse. There was the discourse of the practical jurists on the one hand and that of the theoretical ones on the other. And it can be observed in this regard that, while the jurists'

[1] On the distinction between the jurists' and legal philosophers' philosophy of law, see the general editor's prefaces to this volume and to Volumes 1 and 6 of this *Treatise*.

practical discourse offered an important basis of continuity for Europe's legal culture—so much so as to make it look for a long time as though this culture was immune from the social and political upheavals the Continent went through in the 18th and 19th centuries—those among the *theoretical* jurists who were sensitive to the calls for change and emancipation that marked this historical period played a prominent role in the effort to set on a new foundation the science of law and the government of society. These theoretical jurists not only left an indelible mark in the history of European legal thought but also helped modify the institutional context in which the practical jurists worked, and in this way the theoretical discourse undertaken by some jurists acted to indirectly influence the practical activity of the others.

And let us consider, in the second place, how the different branches of the law, in their historical development, came under the influence of the principles of natural law: These principles were in the first place received and assimilated into doctrines of public and criminal law as well as into administrative science over the course of the 17th and 18th centuries, apparently not encroaching upon the basic concepts of civil law, or of business law, admiralty, and so on; but at the same time, this assimilation changed the structure and function of the legal system as a whole, and did so as well with respect to the different branches and areas of the law. The 19th-century bourgeois person (the person recognized by law as a subject of rights and duties) developed in this sense out of a series of transformations affecting the way all the areas of the law in the period in question were understood overall. These very transformations, however, eventually brought on the crisis of legal science itself, which in the following century would take some radical and unexpected turns.

It was thus by reasoning on multiple levels of discourse, as well as on different normative planes and in different areas of practical interest, that the jurists and the legal philosophers of the modern age came at their understandings of the law—and it is in order to reflect this multiplicity that we have seen fit to organize this volume on the basis of a thematic criterion. What is offered here is not a history of legal philosophers or of legal theories but a history of the basic legal concepts and of the disciplines that systematized them in a set form in the legal thought of Continental Europe.

With this method that we have chosen come at least three cautions for the reader:

(1) The authors treated and their works will be considered not only for the original ways in which they offer to solve traditional problems in the philosophy of law but also, and in the first place, for their contribution in framing these very problems, in understanding the social phenomena out of which they originated, and in founding the disciplines that made it possible to impart an organic unity to such an understanding. The same goes for the phi-

losophers properly so called, such as Leibniz, Pufendorf, Kant, and Hegel: It is in other volumes of this *Treatise* that their thought is presented, and so in this volume they will be taken up mainly for the influence they exerted on the science and practice of law.

(2) The volume's different chapters may have some historical overlap in their discussion of different themes and topics. The historical development of European constitutionalism, for example, stretches across the entire time span covered by this volume, and for this reason it crosses paths with the topics treated in the other chapters, and yet it carries a conceptual identity of its own that warrants a discussion apart in a dedicated chapter. And so it is that each chapter in the volume rounds out the discussion undertaken in the others before it as well as in the ones that follow.

(3) Each topic and issue will primarily be addressed by reference to the geographic area out of which it originated, with only a cursory treatment of the way in which the related concepts and ideas spread across other territories. Then too, reference is made in some chapters to the common-law tradition, since it proved necessary to point out its ongoing cultural exchange with the civil-law tradition in the historical period in question. (The reader is referred to Volume 8 of the *Treatise* for an exhaustive discussion of these cross-connections.)

Having said that, here is a run-through of the themes and topics treated in this volume. The first two chapters discuss the way the scientific method elaborated and firmed up by modern natural-law theory was received into European legal science in the period leading to the French Revolution, with Chapter 1 focusing on the Germanic area, where the universities acted as the main conduit for this reception, and Chapter 2 focusing instead on the French area, where a decisive role was played by the legal practitioners.

Chapter 3 is devoted to that fervent crucible of conceptual production that was the European legal Enlightenment, and to the reverberations this movement had on the culture as well as on the politics of law.

Chapter 4 discusses the codification of law, describing in what ways and in what degree codification shaped the structure of Europe's legal systems and the organization of its society through law.

Chapter 5 traces out the development of German legal science through the crisis of modern natural-law theory and the birth of the great European codes, considering in particular the birth of the Historical School of law and its later development with Puchta.

Chapter 6 reconstructs the birth and evolution of the modern science of administration, which played a central role in helping the institutions of the modern state become woven into the social and economic fabric.

Chapter 7 is dedicated to the history of European constitutionalism, as previously mentioned.

Chapter 8 discusses the crisis of conceptual jurisprudence, the voluntarist and vitalistic conceptions this crisis led to, and the birth of neo-idealist movements in the late 19th and early 20th centuries. The discussion turns in conclusion to the judgment the young Gustav Radbruch had of the jurists' and the legal philosophers' understandings of law in the period covered in this volume: It is a judgment that offers in retrospect great insight on this historical period, at the same time as it sets up some central issues the philosophy of law would be taken up with in the 20th century.

It must be recognized, by way of a conclusion to these introductory remarks, that this entire volume is the outcome of a unitary project, the outcome of a discussion that has engaged, in addition to the volume's editors and authors, Enrico Pattaro, Gerald J. Postema, Patrick Riley, Antonino Rotolo, and Corrado Roversi: A special word of thanks goes to them for contributing ideas and insights that have been essential in writing this volume, as has the effort they have expended in coordinating the entire work. Also, as much as the volume may be cast in the mould of a unitary plan, the contributors have each investigated their subjects on their own, each bringing to bear their own historiographical sensibility and each working in a distinctive style of research and presentation. We believe these many voices afford in combination a broad and rich perspective on a historical period that crucially shaped the course of European history, in an equal degree as it presented a multitude of facets evincing a complexity much deeper than we might otherwise be able to appreciate.

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Chapter 1

SCIENTIA IURIS AND *IUS NATURAE*: THE JURISPRUDENCE OF THE HOLY ROMAN EMPIRE IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES

by Merio Scattola

1.1. Introductory Remarks

A history of legal philosophy in the territories of the Holy Roman Empire in the seventeenth and eighteenth centuries can begin with three general statements.

"Natural law was the first modern philosophy of law." The idea that the whole complex of the laws in a country should derive from one principle, that it should build a coherent system, that it should be organized into a deductive connection, that we can go from a superior point to an inferior one by means of a single uninterrupted inference—this had all been a main concern of natural law since the late seventeenth century. Of course, principles of law and system were not new, but the idea that law should adopt the structure of a theory was a product of the late seventeenth century and could be developed only on the basis of a Cartesian methodology.

"The first philosophy of law could only be modern." Natural law was a philosophy of law because it reduced the whole complex of rules directing outward human behaviour under a systematic structure. Natural law was therefore a concept, or a conceptualized law, and had a theoretical essence. It was a rule that was made of thought and derived its validity, its ability to oblige people to act in a certain way, from the fact that it was consistent with itself and with its premises. Thenceforth, natural law had to be "essentially" systematic, since law can be a logical construct only within a strictly deductive framework.

"Modern philosophy of law requires a particular form of human knowledge." Natural law is based on a systematic concept of rights and jurisprudence, this in contrast to previous ideas of justice, which proceeded on a different notion of human understanding. We can therefore identify two different epochs in the history of legal thought. While the modern idea of law insists on the deductive consistency of premises and conclusions, medieval and early modern doctrines (or theories) used the method of dialectics to merge different arguments and points of view into a single argumentation. Ancient doctrine of law was based on a variety of principles and materials, was arranged into a collection of commonplaces, and put forward its arguments using dialectics as its method. By contrast, modern legal philosophy assumes the

existence of a single principle, organizes its rules into a deductive system, and applies the methods of logic.

These introductory remarks warrant two general conclusions about philosophy of law in the Holy Roman Empire during the seventeenth and eighteenth centuries. Firstly, modern legal philosophy describes law and the doctrine of law as an independent part of human knowledge and finds the basis for this independence in the doctrine's formal qualities. For the first time in the Western tradition, law has been defined not substantively, that is, by reference to justice, but only formally, through the way the content of justice is elaborated. But if a single law can be described as such through its formal qualities alone, then the same can be done for the whole of jurisprudence, and we then have a criterion for identifying jurisprudence as a branch of human knowledge and separating it from all other disciplines.

Secondly, if natural law could define law formally for the first time, if it could clearly distinguish jurisprudence from other branches of practical knowledge, if for the first time it proposed a real philosophy of law, it marked a major difference in the history of legal and political ideas, introducing an entirely new paradigm. Compared with this main feature, all other differences within the modern tradition appear relative and secondary. All schools of natural law share the same theoretical core and agree on a basic conception of deductive rationality—a conception of system and logical constraint—and on the need to have a single first principle. These elements build a methodological set that identifies a peculiar experience of law and knowledge and differs fundamentally from previous legal conceptions. All the differences between the modern schools are therefore variations or varieties within a common basic conception, as in the case of the classical distinction between voluntaristic and intellectualistic positions.

The introductory remarks just made will serve as a basis for the reconstruction that follows. A history of German legal doctrine in early modern times will accordingly be outlined here around four main subjects: the general features of legal doctrine in the early seventeenth century, the history and structure of this tradition, the history of modern natural law in late seventeenth and eighteenth centuries, and the systematic features of this new legal philosophy.

1.2. Main Characteristics of Legal and Political Thought in the Early Seventeenth Century

1.2.1. An Academic Discipline

German doctrines of law show two main characteristics in the early seventeenth century. Firstly, jurisprudence was very close to politics, so close that their margins were uncertain and could be merged or confused. In fact, both

were expressions or consequences of the same order of justice. Secondly, both politics and jurisprudence were first of all academic disciplines and expressed themselves in the genres and codes of academic life. This relation to the universities was so pregnant that it can be seen as a typical element of legal and political thought in Germany in early modern times.

The history of legal philosophy in the Holy Roman Empire of the seventeenth and eighteenth centuries can be described from different points of view. If we observe the contents handed down by way of legal works, like commentaries, dissertations, and treatises, in early modern times, Germany too will be seen to shift along the show a traditional pattern, from the *mos Italicus* to the *mos Gallicus*; then to the Ramistic method; and finally to a positive, historical, and practically oriented method, called *usus modernus Pandectarum* (Stryk 1690), which can be regarded as the real foundation of a German "science of jurisprudence" (Stintzing 1884, 1–31; Wieacker 1967, 203–5). In tracing out this history we ask about the "What" of legal philosophy, but we can also ask about the "How," considering first of all three main questions, about the "Who," the "Where," and the "Why" of legal philosophy (Scattola 2003b, 5–8; Scattola 2006, 35–41). More to the point, we can investigate "Who" elaborated legal and political knowledge: Professional jurists, gentlemen and politicians, secretaries, academicians and professors? Secondly, we can ask in what places and institutions legal knowledge was produced. And finally, we should clarify why or for whom legal literature was written.

These three questions can be used to describe legal and political discourse in the late sixteenth and early seventeenth centuries. This will make it possible to see that different ways of arguing competed in a larger common space, and that around each of these ways there developed a particular learned community with its own rules, its actors, its designated places, and its addressees—a community with its Who, its Where, and its Why. These groups in European learned discussion can be described as closed communities, each of which used a particular code and roughly stretched over a national territory. In fact, each of these communities can also be depicted as a "quotation society," formed by members who would quote one another as literary sources and would recognize one another as authorities in scholarly discussion.

So viewed as a community with peculiar codes and institutions, the Holy Roman Empire reveals a characteristic outline. If we ask who developed political and legal doctrines in early modern times, as well as where and why such doctrines were developed, we will easily see that the German authors were all public professors, that they taught at the universities, and that their teachings were developed not only *in* but also *for* academe (Gundling 1736: 5990–6033). During the great conflict of the Thirty Years' War, for instance, the constitutional alternatives at the centre of the political and religious struggle were shaped in the context of academic debate. In this way, the conflicts on the battlefield corresponded to similar struggles in the universities be-

tween different legal models, which interpreted the constitution of the Holy Roman Empire as a monarchy (Gryphiander 1612; Arumaeus 1615, 7; Reinkingk 1659, 59), or a mixed constitution (Lampadius 1620; Clapmar 1644, 281–3; Limnaeus 1645, S1r–V1r), or an oligarchy (Paurmeister 1608, 322–4), or an aristocracy (Bodin 1951, 188b–189a; Chemnitz 1640, 241–7).

In the same period, during the first decades of the seventeenth century, German universities even introduced specific academic curricula for the education of the statesman and exerted a deep influence on the organisation of knowledge. It was now possible to think of an independent teaching of statecraft and politics, and in fact chairs in politics were introduced in many German secondary schools in the two first decades of the seventeenth century (Denzer 1972, 300–7; Maier 1985, 40–50). The institutionalization of the teaching of politics was then followed by a huge production of corresponding writings in the form of the academic genres: practice disputations, disputations for attaining a degree, dissertations, treatises, textbooks, handbooks, and encyclopaedias (Dreitzel 1970, 412–4; Stolleis 1988, 104–12; Weber 1992, 9–89; Scattola 2003b, 59–165). New literary genres were developed and flourished in the first half of the century, beginning with introductions to the study of jurisprudence and politics (Caselius 1631a, 1631b, 1631c; Bornitz 1602; Clapmar 1611; Grotius 1636; Scattola 2003a, 35–40). Finally, the introduction of politics at the faculty of philosophy came along with a number of similar changes at the faculty of law, and most important among these was the institution of German public law. Two parallel innovations thus took place contemporaneously within the universities and contributed to shaping legal and political discussion in the Holy Roman Empire before and during the religious conflict of the Thirty Years' War (Stintzing 1884, 32–54; Stolleis 1988, 141–6).

Early evidence of the new discipline is the *Disputatio de iure publico*, by Arnold Clapmar in 1602, which tried to derive the contents and arguments of public law from the lesson of history, and above all from Cornelius Tacitus and the neo-Stoic tradition (Clapmar 1602; Gentili 1598). The need for a new discipline expressed itself at first in the publication of vast collections of public laws, contracts, and manifestos, as well of old treatises and dissertations about the prerogatives of the Roman emperor, of the pope, and the Christian kings (Freher 1600–1611; Goldast 1607, 1609, 1611; Schardius 1609; Hortleder 1645a, 1645b). From 1610 to 1620 the study of German public law developed into a true academic subject and was introduced at many German universities. At first, much interest was devoted to the question of jurisdiction, which established the competence of the emperor and the powers of the princes and the inferior magistrates (Obrecht 1589; Gentili 1601; Paurmeister 1608; Bocerus 1609; Besold 1616a; Hunnius 1616; Lampadius 1620). The materials discussed in disputations and treatises was then gathered into collections, like those of Dominicus Arumeus (1615), and was summarized and ordered systematically in textbooks, like those written by Daniel Otto, Iohannes

Limnaeus, and Christoph Besold (Otto 1617; Limnaeus 1645; Besold 1646; Hoke 1968). In this way, during the Thirty Years' War, the new discipline of imperial public law shaped the discussion on the constitutional form of the Holy Roman Empire.

1.2.2. Jurisprudence and Politics

The academic teaching of public law and politics alike claimed to offer an adequate knowledge of the same subjects, and it was therefore inevitable for them to enter into an academic conflict, each trying to prevail on the other. The conflict was acutely felt in both faculties and affected the organisation of the academy (Scattola 2003a, 13–20).

Some authors, such as Iohannes Althusius and Christoph Besold, cultivated both disciplines but kept them separate, without merging their arguments into a third, new, intermediate form of knowledge, a kind of legal philosophy. An initial attempt to merge politics and jurisprudence into a comprehensive doctrine can perhaps be seen in the *Iuris Romani libri duo*, the first textbook of civil law by the young Iohannes Althusius, which begins with a brief account of public law and with a pure Bodinian doctrine of state sovereignty (Althusius 1586, 18–20; Scattola 2002b, 234–42). Yet this early attempt would later be strongly rejected by Althusius himself, who in the preface to his major work, the *Politica methodice digesta*, of 1603, declared what the true boundaries of both disciplines should be: "Where ethics ends, there begins theology, and where ends physics, there begins medicine, and where ends the politician, there starts the lawyer" (Althusius 1603, a3v). More accurately, the goal of politics "is to establish and preserve the political association or the human society and the social life for the sake of our own good with all the means that are suitable, useful, and necessary to this purpose" (ibid., a4r). Anything that may stand in contradiction to this goal or is alien to it must be excluded from politics. The goal of jurisprudence, by contrast, "is to deduce deliberately the right from the fact and to judge in this way about the right and the relevance of the fact in human life" (ibid., a4r). But facts, which give the premises for the lawyer's deductions, do not belong to jurisprudence itself: They instead come from other disciplines, and especially from politics (ibid., a4r–v). Politics is thus superior to jurisprudence. Althusius discussed the same question in his great legal work *Dicaeologica*, in which he applied the same distinction between fact and right but came to quite a different conclusion, placing the science of justice at the top rung of human knowledge and deducing from it both jurisprudence and politics (Althusius 1967, 1a).

Similar fluctuations between politics and jurisprudence can be found as well in other authors of the early seventeenth century. Christoph Besold made a comparison between politics and physics in his introductory dissertations (Besold 1614; Besold 1625, 82–3) in a quite stringent way, concluding that ju-

risprudence applies to a commonwealth the general conclusions of politics and is therefore dependent on and subordinate to politics, as medicine is with respect to physics (Besold 1625, 83; Goclenius 1601, 122–3; Horneius 1625, 575–6; Heidmann 1638, 6–7; Witzendorf 1642, 76; Scattola 2003a, 312–3): Politics "is supposed to be princess and mistress of all other faculties and sciences," and Aristotle expressed a correct opinion when he called it "the most architectonic one" (Besold 1625, 82; Keckermann 1608, 4; Timpler 1611, a2r–3r; Matthiae 1611, 4). Besold then reiterated the same argument in his 1612 *Templum iustitiae*: This time, however, he was referring not to politics but to jurisprudence, which he presented as "the most architectonic" discipline, superior to politics (Besold 1616b, 20).

In the history of universities the political curriculum prevailed from 1600 to 1610, when politics imposed itself as the first academic study of the commonwealth. In the following decade it secured its primacy, but at the same time public law gained the status of an independent doctrine and emerged as a plausible alternative, until the passage from politics to jurisprudence was completed during the Thirty Years' War (Scattola 2003a, 13–20; Weber 1997, 98–102; Weber 2004, 366–9; Friedeburg 2006, 209–15).

Two explanations can be offered for the dominance of jurisprudence over politics in the middle of seventeenth century: The first explanation is the "juridification" of the political debate (Stolleis 1988, 127–30) and the second the transformations introduced by natural law. Jurisprudence triumphed as the main study in the education of public servants because the Thirty Years' War ended with a constitutional compromise that implied a hefty use of legal means. In fact the Holy Roman Empire was for the most part a juridical construction that assumed a permanent legal negotiation. This solution had been put forward in learned discussion by Jakob Lampadius (1620), a leading figure among the Protestants during the peace conference in Westphalia, who actually expunged the problem of sovereignty from the debate over the empire and transformed it into a technical question about the Empire's jurisdiction and its true subjects in the German territories.

The second reason for the ascendancy of jurisprudence can be found in a general transformation of practical knowledge, a transformation involving both politics and jurisprudence. In fact, the Aristotelian tradition of a single discipline was substituted by a distinction between theoretical reflection and practical application, and in this new context the leading role was attributed to natural law, the new "architectonic" discipline, which reduced other disciplines to a subordinate function.

1.3. Legal Doctrine in the Early Seventeenth Century

1.3.1. Dialectics and Law: The System of Academic Teaching

The closeness to the university had important consequences for both the form and the content of German legal philosophy. An academic discipline was a system not only of doctrines—of knowledge gathered through the centuries—but also of forms that classified and distributed the contents inherited from tradition. A discipline was of course in the first instance a collection of answers, that is, of arguments approved by authorities and selected during over the long period, but it was also at the same time a collection of questions, of all possible problems in a particular field of knowledge. And such knowledge was to be gained in a given order, or in the right "disposition" (*dispositio disciplinae*), which was also called a method.

Speaking of method, the authors of the early seventeenth century explain to us that every discipline had to be conceived as a closed and finite number of arguments inherited from the past (Althusius 1603, a2r; Keckerman 1613c, 1700a–b; Scattola 2005, 21–8). Indeed, humans have been developing all manner of knowledge since creation, and it is therefore plausible that in so long a period they have gathered all true arguments and identified all false conclusions: Human knowledge is in this sense complete and closed, embracing a finite number of true arguments. But at the same time, the arguments available to us can all be put together and arranged in an infinite number of ways. Premodern knowledge is therefore finite in its arguments and infinite in its combinations, or finite in materials and infinite in forms (Scattola 2006, 76–86).

Clearly, in this case legal authors would argue by dialectical means and conceived their task as a continuing effort to work on traditional notions so as to find the best fit among all the elements of knowledge. Indeed, if the same materials can be arranged in different ways, they will yield a certain number of concurrent orders varying by the amount of arguments they can hold together. The greater the number of arguments an arrangement can freely combine, the better it will be. And the best arrangement of a discipline, like jurisprudence, will be the one that takes in all the positions inherited from the relevant tradition. Innovation was in no way an advantage—in fact it was denounced as *novitas* (Morhof 1688, vol. 2: 50–256; Pasch 1700)—and early-seventeenth-century authors pointing out the merits of their work would emphasize the originality not of their ideas, which were ancient, but of their presentation. Iohannes Thomas Freigius (1543–1583) summarized the duty of a legal author in a very effective way saying that: "Nor you can praise here any personal invention of the author (actually all contents are taken from the writings of the ancient lawyers), but only the disposition and the light of method and the explanation of the proposed arguments" (Freigius 1581, A3v; Vulte 1586, 2–3; Althusius 1967, a2r–v).

Dialectics was therefore the leading science in the sixteenth and early seventeenth centuries, and it determined the method and structure of all parts of practical philosophy, including jurisprudence. It exerted its influence not only by setting up a characteristic mode of argument but also by changing at the core the structure of knowledge itself. In the classical tradition, from Aristotle to Cicero and Boethius, commonplaces were in fact a general scheme for treating a discourse. But at the same time, a method gave the manner of proceeding from unknown ideas to known ones and in this sense was different from order, which arranged and conveyed ideas already known (Zabarella 1578, 93; Capivaccio 1603, 1023 B). Still, arguments would constantly be confused with commonplaces, and order with method, and for this reason it was usually opined that the task of jurisprudence was to find the best possible commonplaces, those forming its proper method. A discipline therefore consisted in the list of its commonplaces or in its method, which Rudolf Goclenius and Bartholomaeus Keckermann also called "arrangement of the whole discipline" (Zwinger 1566, 18; Günther 1586, 25r; Keckermann 1600, 591 = Keckermann 1613a, 309; Keckermann 1601, 146; Keckermann 1613b, 962a; Goclenius 1613, 684; Scattola 2002a, 278–87; Scattola 2003b, 5–39).

That is how jurisprudence mainly conceived itself at the beginning of the seventeenth century: as a topology of arguments, which could also be called a "system" (a system of legal arguments, topics, and commonplaces). Two collections of the early seventeenth century attempted to gather all possible knowledge in the legal tradition and present it systematically, that is, alphabetically: The first of these was Sebastian Naeve's 1608 *System of Legal Questions* and the second Iohannes Steckius's 1619 *System of Feudal Jurisprudence*. Naeve argued that lawyers faced with a huge and growing number of legal writings needed a guide or an inventory to find their way (Naeve 1608, a2r–v). Satisfying this urgent need for a legal directory made it necessary to use the order of the commonplaces, but jurisprudence already had a proper distribution for all its subjects: It was all worked out in the titles and rubrics of the *Corpus iuris civilis*, which really sets out a true system of legal topics, or topoi. Under its guide, all possible opinions and sentences of all legal authors in ancient and modern times can be put in a proper order showing the internal frame of jurisprudence (ibid., a2v–3r). A system of jurisprudence is in this sense a comprehensive card catalogue, in which all the components of all legal writings since the birth of jurisprudence are sorted out, placed under the appropriate rubrics, and arranged in the best order—that is what at the time was meant by such expressions as *Oeconomia iuris*, *Bibliotheca iuris*, and *Dicaeologica*.

The lists of commonplaces built the internal frame of jurisprudence and organized its materials for academic teaching. Its exterior reflection was a corresponding system of literary genres. The collections of commonplaces set up a proper scheme of question and answer, identified special problems, and used particular sets of arguments. The commonplaces could therefore be

treated in separate chapters, disputations, dissertations, or treatises. The writings in each such grouping all had a similar internal structure and made up their own independent genre within the discipline, fitting neatly into the wider topological system of arguments and commonplaces (Scattola 2003b, 17–20; Scattola 2003c, 185–9). Most of the arguments and topics that can be classified as legal philosophy were treated, for instance, in disputations, dissertations, and treatises *De iustitia et iure*, introducing students to the study of jurisprudence and presenting its characteristic epistemological issues (Obrecht 1584; Goeddaeus 1596; Godefroy 1596; Stephani 1604; Hunnius 1609; Hoen 1614; Scattola 1999, 156–61).

1.3.2. A Topological Philosophy of Law

The foregoing discussion leads to two conclusions about the general character of legal theory in the sixteenth and seventeenth centuries: Firstly, jurisprudence and politics were mixed up to some extent and, secondly, they shared with all other branches of practical philosophy a strong dialectical structure and were organized into a classification of commonplaces and into a system of literary genres. Given these conditions, there was only one way in which philosophy of law could be conceived in the sixteenth and early seventeenth centuries, namely, as legal topology or dialectics; and its main interest could only be in the correct disposition of inherited materials, a problem that in the scholarly language of the time was understood as one of method. Philosophy of law—that is, a conscious reflection on the essence of law, as well as on its terms, foundations, sources, and divisions—was concerned not with the question "What *is* law?" but with the question "What is law *like*?" ("What is the *shape* of law?") And while the former question necessarily led to the question "*Is* there any law?" the latter question proceeded, in answer, on the assumption that "there *is* law."

Philosophy of law in early modern times, if there was one at all, had no interest in the foundation of rights, duties, and rules because the whole discussion started from the assumption that law existed and operated in the human world. Modern philosophy of law, on the contrary, is concerned in the first place with the question of the law's origin and foundation. It therefore concentrates on the principle of law: on the principle, or source, that should then generate the entire system of legal rules. Once philosophy has found a suitable beginning, the rest will be only secondary and will flow into the tasks of a theory of law that takes the principle for granted and applies it to all the lower levels of theory. But if the point of origin is already given, a general theory of law (a general doctrine) can only be concerned with the division, distribution, and disposition of legal materials, as well as with their hierarchy and consistency or inconsistency. In this sense, a general doctrine of law in early modern times could only be conceived as a methodology of law. But we